NO CERTIFICATE OF INDEPENDENT REVIEW?

CAN YOU MEET THE CLEAR & CONVINCING EVIDENCE STANDARD TO SAVE THE GIFT?

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A. OVERVIEW OF STATUTES AND CASE LAW

1. **Governing Statute-** ***Probate Code*** **(*"PC"*) §§ 21360-21392**

   a. Applies to instruments irrevocable on or after 1/1/11

   b. Instruments that became irrevocable before 1/1/11 being governed by former law.

   c. Overhaul brought about by *Bernard v Foley* (2006) 39 C4th 794, 47 Cal.Rptr.3rd 248.

      (1) Major holding: Neither a person with a pre-existing friendship with the donor nor a nonprofessional who provided health or social services to a dependent adult falls outside of the statutory definition of care custodian even if the services were provided with no expectation of compensation.

      (2) Certificate of Independent Review: Recognizing the harsh result, the court also ruled that a certificate of independent review is a ready mechanism for making donative transfers to care custodians.

2. **Presumption of Fraud or Undue Influence and Transactions Involved**

   a. *PC* § 21380(a) set forth the presumption of fraud or undue influence:

      "(a) A provision of an instrument making a donative transfer to any of the following persons is presumed to be the product of fraud or undue influence:…"

   b. "Donative Transfer" must be involved – no definition in *PC*.

      (1) Applicable case: *Jenkins v. Teegarden* (2014) 203 Cal.App.4th 1128 - a transfer is a donative transfer if it is for inadequate consideration; the mere fact that the recipient gave good consideration, sufficient to support a contract, does not prevent the transfer from being donative. *Id*. at 1131

      (2) Fair and reasonable consideration will be defined by circumstances. The court analyzed and applied the principles of contract law (*Civil Code* §3391(1)) to determine this question

(3) Care custodian/drafter/transcriber and their affiliates—presumed to be product of fraud or undue influence

3. **Prohibited Transferees**

a. PC §21380(a)(1)-(7) sets forth seven categories of persons to whom "donative transfers" are presumptively the product of fraud upon certain individuals:

(1) The person who drafted the instrument (PC §21380(a)(1)).

(2) A person who transcribed the instrument or caused it to be transcribed and who was in a fiduciary relationship with the transferor when the instrument was transcribed (PC §21380(a)(2)).

(3) A care custodian of a transferor who is a dependent adult, but only if the instrument was executed during the period in which the care custodian provided services to the transferor, or within 90 days before or after that period (PC §21380(a)(3)).

(4) A care custodian who commenced a marriage, cohabitation, or domestic partnership with a transferor who is a dependent adult while providing services to that dependent adult, or within 90 days after those services were last provided to the dependent adult, if the donative transfer occurred, or the instrument was executed, less than six months after the marriage, cohabitation, or domestic partnership commenced (PC §21380(a)(4)).

(5) A person who is related by blood or affinity, within the third degree, to any person described in paragraphs (1) to (3), inclusive (PC §21380(a)(5)).

(6) A cohabitant or employee of any person described in paragraphs (1) to (3), inclusive (PC §21380(a)(6)).

(7) A partner, shareholder, or employee of a law firm in which a person described in paragraphs (1) or (2) has an ownership interest (PC §21380(a)(7)).

4. **Care Custodian**

a. *PC* § 21362(a) defines "care custodian" as follows:

(1) Person who provides health or social services to a "dependent adult"

(2) Does not include a person who provided services without "remuneration" if the person had a personal relationship with the dependent adult:

(a) At least 90 days before providing those services,

(b) At least six months before the dependent adult's death; AND

(c) Before the dependent adult was admitted to hospice care, if the dependent adult was admitted to hospice care.

NOTE: "remuneration" does not include the donative transfer at issue under this chapter or the reimbursement of expenses.

(3) ***Requirement of Remuneration*** –

(a) "Remuneration" does not include:

1) Donative transfer at issue

2) Reimbursement of expenses

(b) But – Others paid for "caregiver" services on a regular and substantial basis?

(c) Effect of forgiveness of a debt

b. See *Estate of Odian* (2006) 145 CA 4th 152—Live-in caregiver who provided in-home care including basic household tasks was considered care custodian under former statute - same effect under new statute

c. See *Estate of Shinkle* (2002) 97 CA 4th 990—Individual with pre-existing genuine personal relationship can provide health and social services without being care custodian under former statute if services naturally flow from relationship. Under current statute, result may be different depending on whether donee is being compensated and/or services are being provided because of donor's dependent condition or personal relationship

d. Marriage, cohabitation or domestic partnership with or to the dependent adult will not recategorize the prohibited transferee as an exempt person under PC §21382(a) if the donative transfer occurred or instrument executed less than six months AFTER the marriage, cohabitation or domestic partnership commenced and the marriage, cohabitation or domestic partnership began during or within 90 days before or after the last services were provided by prohibited transferee to the dependent adult. (PC §21380(a)(4).)

(1) Statutory amendment designed to reverse outcome in *Estate of Pryor* (2009) 177 Cal.App.4th 375 where former caregiver who married decedent qualified as spouse and thus the exception to care custodian in PC §21382(a) applied.

5. **Health and Social Services** –

a. *PC* § 21362(b) defines "health and social services" as follows:

(1) Services provided to a dependent adult

(2) Services provided because of the person's dependent condition

(3) Nonexclusive list of samples of "health and social services" include:

- Administration of medicine
- Medical testing
- Wound care
- Assistance with hygiene
- Companionship
- Housekeeping
- Shopping
- Cooking
- Driving
- Assistance with finances

b. Factors to show:

(1) Timing of relationship
(2) Nature of relationship
(3) Was there payment involved
(4) Nature of the services provided
(5) Services must be related to a dependent NEED of the transferor not just "helpful" assistance

c. Findings under the former statute (may have different result under current statute as specific examples are now included in health and social services):

(1) See *Conservatorship of Davidson* (2003) 113 CA 4th 1035—found that cooking, gardening, driving the transferor to the doctor, running errands, grocery shopping, purchasing clothing or medication, and assisting the trustor with banking did not qualify as health or social services under the *former* statute

(2) See *Estate of Austin* (2010) 188 CA 4th 512—driving the transferor to the doctors' appointments and meal preparation were not substantial ongoing health or social services qualifying the donee as a care custodian under the *former* statute.

/ / /

6. **Dependent Adult**

a. *PC* § 21366 defines "dependent adult" as: *At the time the instrument was executed*, the person was EITHER:

(1) 65 years of age or older AND satisfied one or both of the following criteria:

(a) Unable to provide properly for his or her physical needs for physical health, food, clothing, or shelter

(b) Due to one or more deficits in mental function as set forth in § 811(a)(1)-(4) inclusive, has difficulty managing his or her own financial resources or resisting fraud or undue influence

– OR –

(2) 18 years of age or older AND satisfied one or both of the following criteria:

(a) Unable to provide properly for own physical needs for physical health, food, clothing, or shelter

(b) Due to one or more deficits in mental function as set forth in *PC* § 811(a)(1)-(4) inclusive, has substantial difficulty in managing his or her own financial resources or resisting fraud or undue influence

b. *PC* § 811(a)(1)-(4) sets forth the factors for determining "unsound mind or lack of capacity to make a decision or do a certain act" as follows:

• Alertness and attention including but not limited to:

• Level or arousal or consciousness
• Orientation to time, place, person, and situation
• Ability to attend and concentrate

• Information processing including but not limited to:

• Short and long term memory including immediate recall
• Ability to understand or communicate with others either verbally or otherwise
• Recognition of familiar objects and familiar persons
• Ability to understand and appreciate quantities
• Ability to reason using abstract concepts
• Ability to plan, organize, and carry out actions in one's own rational self-interest
• Ability to reason logically

- Thought processes deficits in which may be demonstrated by the presence of the following:

    - Severely disorganized thinking
    - Hallucinations
    - Delusions
    - Uncontrollable, repetitive or intrusive thoughts

- Ability to modulate mood or affect deficits of which may be demonstrated by pervasive and persistent or recurrent state of:

    - Euphoria
    - Anger
    - Anxiety
    - Fear
    - Panic
    - Depression
    - Hopelessness or despair
    - Helplessness
    - Apathy or indifference

    That is inappropriate in degree to the individual's circumstances!

B. CERTIFICATE OF INDEPENDENT REVIEW REQUIREMENTS

1. **Probate Code §21384 Exempts Donative Transfers from the Prohibitions of PC §21380 that meet the following requirements:**

    a. The instrument is reviewed by an independent attorney;

    b. Who counsels the transferor (out of the presence of any heir or beneficiary);

    c. About the nature and consequences of the intended transfer (including effect of intended transfer on transferor's heirs an any beneficiary of a prior donative instrument;

    d. Attempts to determine if the intended transfer is the result of fraud or undue influence; AND

    e. Signs and delivers to the transferor an original certificate "substantially in the form" prescribed by statute

2. **Review by Independent Attorney**

a. Requires attorney to review both prior donative gifts AND nature and consequences of intended transfer upon the heirs and beneficiaries of those prior donative instruments

(1) How many prior instruments? No statutory or case law answer
(2) What if all prior instruments are not available or known?

b. Requires attorney to determine if intended transfer is result of fraud or undue influence

(1) To what degree must attorney determine influence?
(2) This is huge weak spot for litigators to attack – it's not the liability of the attorney. Rather it's the ultimate effectiveness of the COIR

c. Drafting attorney can also review and certify donative transfer BUT only as to gift to care custodian

3. **Independence of Attorney – *Estate of Winans***

a. PC §21370 defines "independent attorney" as one who has no legal, business, financial, professional or personal relationship with beneficiary or donative transfer at issue AND who is not appointed as fiduciary or receives any pecuniary benefits as a result of the operation of the instrument containing the donative transfer at issue

b. If attorney has a written agreement signed by the transferor (required for any agreement for more than $1,000 of compensation) which is expressly limited solely to compliance with PC §21384 (COIR), not considered to otherwise represent transferor as client

c. *Estate of Winans* (2006) 183 Cal.App.4th 102

(1) Attorney who signed certificate of independent review was named executor in document – found to be NOT independent
(2) An attorney who has any kind of business connection to donor – MAY not be independent. What about referral source? Amount of referrals?
(3) An attorney assisting the donor with other legal matters – MAY not be independent
(4) Is best practice to ask complete stranger (as to transferor)? What about 3 or more referrals? Certified specialists?

4. **Contents of Certificate**

a. See statute for contents of form

"CERTIFICATE OF INDEPENDENT REVIEW
I, , have reviewed
(attorney's name)
and have counseled the transferor,
(name of instrument)
, on the nature and consequences of any
(name of transferor)
transfers of property to
(name of person described in Section 21380 of the Probate Code)
that would be made by the instrument.
I am an "independent attorney" as defined in Section 21370 of the Probate Code and am in a position to advise the transferor independently, impartially, and confidentially as to the consequences of the transfer.
On the basis of this counsel, I conclude that the transfers to
that would
(name of person described in Section 21380 of the Probate Code)
be made by the instrument are not the product of fraud or undue influence.

	"
(Name of Attorney)	(Date)

b. Discussion – is more information than "substantially in the form" better? Worse?

5. **Potential Liability of Attorney Who Fails to Advise Regarding CIR**

a. *Osornio v. Weingarten* (2004) 124 Cal.App.4th 304 (Decision under former statutes)

b. Potential malpractice liability of attorney to beneficiary for failing to advise re: potential failure of gift due to disqualified donee statute and/or failure to refer transferor to independent attorney for certificate of independent review

(1) Liability to testator
(2) Liability to care custodian
(a) For failure of gift, or
(b) Attorney's fees necessary to establish exception if fees would have been less had there been a certificate of independent review

c. Care custodian cannot sue drafting attorney for failing to provide certificate of independent review as part of engagement because there is no duty to do so

C. SETTING ASIDE OR DEFENDING THE PROHIBITED TRANSFER

As the party attacking the "donative transfer" as being the product of undue influence, there are several evidentiary hurdles you must overcome before you can shift the burden of proof to the proponent of the document (aka ne'er do well) that the donative transfer was the product of undue influence.

1. Underlying Elements to Prove in Attacking the Gift

a. **Burden upon contestant to show by preponderance of evidence**

(1) **"Donative Transfer" involved** – no definition in *PC.*

(a) Applicable case: *Jenkins v. Teegarden* (2014) 203 Cal.App.4th 1128 - a transfer is a donative transfer if it is for inadequate consideration; the mere fact that the recipient gave good consideration, sufficient to support a contract, does not prevent the transfer from being donative. Id at 1131

(2) ***PC* § 21362(a) – Definition of Care Custodian** "'Care custodian' means a person who provides health or social services to a dependent adult, except that "care custodian" does not include a person who provided services without remuneration if the person had a personal relationship with the dependent adult (1) at least 90

days before providing those services, (2) at least six months before the dependent adult's death, and (3) before the dependant (*sic*) adult was admitted to hospice care, if the dependent adult was admitted to hospice care. As used in this subdivision, 'remuneration' does not include the donative transfer at issue under this chapter or the reimbursement of expenses."

(a) ***Requirement of Remuneration*** –

1) "Remuneration" does not include:
   a) Donative transfer at issue
   b) Reimbursement of expenses
2) Others paid for "caregiver" services on a regular and substantial basis?
3) Effect of forgiveness of a debt

(3) ***PC* § 21362(b) – Definition of Health and Social Services** "'Health and social services' means services provided to a dependent adult because of the person's dependent condition, including, but not limited to, the administration of medicine, medical testing, wound care, assistance with hygiene, companionship, housekeeping, shopping, cooking, and assistance with finances."

(a) **Factors to show:**

1) Timing of relationship
2) Nature of relationship
3) Was there payment involved
4) Nature of the services provided
5) Services must be related to a dependent NEED of the transferor not just "helpful" assistance

(b) **Applicable Cases re finding or non-finding of "Care custodian":**

1) *Estate of Austin* (2010) 188 Cal.App.4th 512 – Under former statute, daughter of former wife found not to be "care custodian" due to nature of services provided (driving to doctor, preparing some meals, and unspecified "helping out"); query: because former statute had no friend exception and new statute requires compensation, outcome would likely be the same BUT services provided would likely be health & social services under statute.
2) *Hernandez v. Kieferle* (2011) 200 Cal.App.4th 419 – stepdaughter qualified as "heir" to avoid designation as care custodian; no clear & convincing evidence required

3) *Estate of Pryor* (2009) 177 Cal.App.4th 375 – former caregiver who married decedent qualified as spouse and exception to care custodian finding
4) *Estate of Barrow* (Not Reported in Cal.Rptr. 3rd 2015) – Care custodian and friends for 13 years, but CIR prepared
5) *In re Estate of Wisner* (Not Reported in Cal.Rptr.3rd 2010) – respondent not found to be care custodian due to familial exception
6) *Halverson v. Vallone* (Not Reported in Cal.Rptr. 3rd 2009) – no finding of care custodian
7) *Silicon Valley Community Foundation v. Beltran* (Not Reported in Cal.Rprt.3rd 2008) – No care custodian finding – focused on whether respondent "transcribed" instrument
8) *Bernard v. Foley* (2006) 39 Cal.4th 794 – under prior law, no long-term friend exception to care custodian definition; changed with new law in 2010

(4) **PC §21366(a) – Definition of Dependent Adult** "Dependent adult" means a person who, at the time of executing the instrument at issue under this part, was a person described in either of the following:

(a) The person was 65 years of age or older and satisfied one or both of the following criteria:

1) The person was unable to provide properly for his or her personal needs for physical health, food, clothing, or shelter.

2) Due to one or more deficits in the mental functions listed in paragraphs (1) to (4), inclusive, of subdivision (a) of Section 811, the person had difficulty managing his or her own financial resources or resisting fraud or undue influence."

(b) **Factors to show:**

1) Need for medical records to show:

a) deficit(s) relating to "difficulty in managing financial resources or resisting fraud/UI" OR

b) inability to provide for personal needs for health, food, clothing or shelter

2) Need for witnesses with observational information at

time of execution

3) Family situation

4) Prior behavior of the transferor is just as important as the state the transferor was in when they made the donative transfer. Was the person always stubborn, and then suddenly docile? Was the person always depressed and anxious, as they were at the time they made the transfer?

5) Effect of *voluntary* conservatorship—no finding of "lack of capacity" or "inability to care for personal needs or manage own finances"

6) When looking at thought processing deficits - Are these deficits isolated and temporary incidents? For example, UTI in the elderly causes a number of temporary cognitive issues which can be resolved. Was delirium caused by a medication or brief illness, from which the transferor recovered?

(c) **Applicable Cases:**

1) *Stover v. Padayao* (Not Reported in Cal.Rptr.3rd 2016) – friends were not care custodians because decedent not shown to be dependent adult

D. REBUTTING "CLEAR AND CONVINCING EVIDENCE" WHEN ATTACKING THE GIFT

1. Use definition of Undue Influence to your benefit

a. *PC* §21380(b) provides with respect to "validating" the gift: "The presumption created by this section is a presumption affecting the burden of proof. The presumption may be rebutted ***by proving, by clear and convincing evidence, that the donative transfer was not the product of fraud or undue influence***." (Emphasis added.)

b. *PC* §86: "Undue influence" has the same meaning as defined in Section 15610.70 of the Welfare and Institutions Code ("*WIC*"). It is the intent of the Legislature that this section supplement the common law meaning of undue influence without superseding or interfering with the operation of that law.

c. *WIC* §15610.70:

"(a) 'Undue influence' means excessive persuasion that causes another person to act or refrain from acting by overcoming that person's free will and results in inequity. In determining whether a result was produced by undue influence, **all of the following shall be considered**:

"(1) The vulnerability of the victim. Evidence of vulnerability may include, but is not limited to, incapacity, illness, disability, injury, age, education, impaired cognitive function, emotional distress, isolation, or dependency, and whether the influencer knew or should have known of the alleged victim's vulnerability.

"(2) The influencer's apparent authority. Evidence of apparent authority may include, but is not limited to, status as a fiduciary, family member, care provider, health care professional, legal professional, spiritual adviser, expert, or other qualification.

"(3) The actions or tactics used by the influencer. Evidence of actions or tactics used may include, but is not limited to, all of the following:

"(A) Controlling necessaries of life, medication, the victim's interactions with others, access to information, or sleep.

"(B) Use of affection, intimidation, or coercion.

"(C) Initiation of changes in personal or property rights, use of haste or secrecy in effecting those changes, effecting changes at inappropriate times and places, and claims of expertise in effecting changes.

"(4) The equity of the result. Evidence of the equity of the result may include, but is not limited to, the economic consequences to the victim, any divergence from the victim's prior intent or course of conduct or dealing, the relationship of the value conveyed to the value of any services or consideration received, or the appropriateness of the change in light of the length and nature of the relationship.

"(b) Evidence of an inequitable result, without more, is not sufficient to prove undue influence." (Emphasis added.)

2. **Clear and Convincing Evidence Standard** – see *Sheehan v. Sullivan* (1899) 126 Cal. 189, 193 "'clear and convincing evidence' is evidence 'so clear as to leave no substantial doubt' and 'sufficiently strong to command the unhesitating assent of every reasonable mind.'" *Sheehan* was a trust case where the proponent had to prove by clear and convincing evidence the terms of a purported oral trust.

a. But compare BAJI No. 2.62 – "Clear and convincing" evidence means evidence of such convincing force that it demonstrates, in contrast to the opposing evidence, a high probability of the truth of the fact[s] for which it

is offered as proof. Such evidence requires a higher standard of proof than proof by a preponderance of the evidence.

b. See also, *Mattco Forge, Inc. v. Arthur Young & Co.* (1997) 52 Cal.App.4th 820, 847-850, adopting BAJI No. 2.62 as the standard rather than that in *Sheehan*, although the dissent took exception to ignoring the Supreme Court.

(1) NOTE: Applicability of very old decisional authority – "Although the California Supreme Court is free to overrule its own prior decisions, the doctrine of stare decisis compels lower court tribunals to follow the Supreme Court whatever reason the intermediate tribunals might have for not wishing to do so. [Citations.] There is no exception for Supreme Court cases of ancient vintage." (*Mehr v. Superior Court* (1983) 139 Cal.App.3d 1044, 1049.)

3. Applicable cases re clear & convincing evidence standard:

a. *Estate of Odian* (2006) 145 Cal.App.4th 152 – paid caregiver did not meet clear & convincing threshold against charities unknown to decedent

b. *Estate of Savic* (Not Reported in Cal.Rptr.3rd 2018) –friend who provided "social services" including visiting daily, controlling finances and taking care of other daily needs found to be care custodian under former statute & didn't meet clear & convincing threshold; son who lived out of country and hadn't seen decedent in years prevailed under Will executed 13 years earlier

c. *Estate of Schmitt* (Not Reported in Cal.Rptr.3rd 2012) – claimant who worked for 17 years, five days a week found to be care custodian & didn't meet clear & convincing threshold despite evidence from longtime financial adviser that decedent executed the beneficiary designation without claimant around or even aware of the gift; instead account went to estranged half-brother of decedent. NOTE: it likely didn't help that claimant tried to get a handwritten letter allegedly signed by decedent that left her the house admitted, but the signature to the document failed in a separate sub-trial as likely a forgery and not that of decedent.

4. **Appellate Court Review of Clear and Convincing Evidence Standard**

Even if a care custodian manages to convince the trial court by clear and convincing evidence that the transfers were NOT the product of undue influence, if the decision is appealed, two 2020 appellate cases have clarified that a higher standard of proof awaits the care custodian again.

a. *Conservatorship of O.B.* (July 2020) 9 Cal.5th 989 – Proposed limited conservatee with autism challenged the finding that the need for a limited

conservatorship had been shown by clear and convincing evidence. Resolving a split among the districts and disapproving lower court decisions where a finding is reviewed only for sufficiency of evidence, instead the Court held that, when reviewing a finding that a fact has been proved by clear and convincing evidence, the question before the appellate court is whether the record as a whole contains substantial evidence from which ***a reasonable factfinder could have found it highly probable*** that the fact was true.

b. *In re V.L.* (September 2020) 54 Cal.App.5th 147 (2nd District, Division 2) – followed *Conservatorship of O.B.*; in making finding whether the record as a whole contains substantial evidence from which ***a reasonable factfinder could have found it highly probable*** that the fact was true, appellate court must view the record in light most favorable to the prevailing party below and give due deference to how the trier of fact may have evaluated the credibility of witnesses, resolved conflicts in the evidence, and drawn reasonable inferences from the evidence.

c. But see, *Wilkin v. Nelson* (February 2020) 45 Cal.App.5th 805 (2nd District, Division 6) – in action for reformation of pour-over Will consistent with *Estate of Duke* (2015) 61 Cal.4th 871, clear and convincing evidence of testator's intent at trial reviewed for merely substantial evidence on appeal, relying on *Crail v. Blakely* (1973) 8 Cal.3d 744, 750 (which was specifically disapproved of in *Conservatorship of O.B., id* at 1010)

5. **Failure to Rebut the Presumption**

a. If the beneficiary of a donative transfer is unable to rebut the presumption, the beneficiary will bear all costs of the proceeding including reasonable attorneys' fees. However, the beneficiary who does successfully establish the validity of donative transfer is <u>not</u> entitled to fee award from the challenging party.

b. See *Butler v. LeBouef* (2016) 248 CA 4th 198, 203—Heirs-at-law brought action to invalidate decedent's purported will and living trust naming attorney as beneficiary of decedent's $5 million estate, heirs-at-law awarded attorneys' fees because proponent of gift failed to negate or rebut the presumption of undue influence

c. Where beneficiary of donative transfer fails to rebut presumption, instrument operates as if beneficiary had predeceased transferor without spouse, domestic partner or issue

(1) NOTE: Instrument is NOT invalidated in whole

(2) If no alternative or residual beneficiary provided for, invalid transfer will pass to donor's intestate successors or beneficiaries under prior instrument

(3) See *Estate of Anderson* (1997) 56 Cal.App.4th 235 – Under doctrine of dependent relative revocation, a Will that is revoked by a later Will in the belief that the later one will become effective remains in effect to the extent that the later Will is invalid

E. OTHER "DEFENSES" TO SAVE THE DONATIVE TRANSFER THAT MUST BE ADDRESSED – AKA CHECK YOUR FACTS!

1. **Statute of Limitations for Challenging the Transfer** –One possibility of saving a "gift" that was otherwise invalid was raised in *In re Estate of Hastie* (2010) 186 Cal.App.4th 1285, that the challenge of the lifetime gift of the donor by the administrator after decedent's death was barred by the statute of limitations. The Court of Appeal held that the statute of limitations began to run as against the estate "only after the administrator became apprised of the material facts [regarding the transfer]." Otherwise it would be inconsistent with the purposes of the statute to protect the transferor who was unable or unwilling to file suit against the recipient of the transfer.

2. **Transferor Not a Resident of CA at Time of Transfer** – PC §§21360 *et seq.* apply only to an instrument executed within California by a transferor who was a resident of California at the time when the instrument was executed. PC §21382(f). Thus, in a decision decided under the old statute, *In re Estate of Clementi* (2008) 166 Cal.App.4th 375, the friend of decedent who had drafted the will for decedent, but was also a personal beneficiary as well as his charitable foundation that he ran, was NOT a prohibited transferee because the Will was executed by decedent when he resided out of state and was not signed within California's boundaries.

3. **Adequacy of Legal Advice** – In *In re Estate of Winans* (2010) 183 Cal.App.4th 102 involved a Will, prepared less than one month prior to decedent's death, where the drafting attorney designated his colleague as executor and excluded nieces and nephews provided for in prior Wills in favor of the owner of the residential facility where the testator was living at the time. The terms of the Will were "independently" reviewed by the attorney who was nominated as the executor of the new Will. The Court of Appeal focused on whether or not the "independent" attorney actually discussed the effect of excluding decedent's nieces and nephews, whether the counseling was conducted in a "confidential manner", and whether the "independent" attorney was actually "independent". The *Winans* Court remanded the matters of testamentary capacity and undue influence to the probate court which had granted summary judgment in favor of the gifts. Apparently, neither the

attorney preparing the Will nor the attorney preparing the CIR ever knew of the prior gifts to the nieces and nephews.

4. **Inapplicability of *PC* §21380 to specified instruments or transfers -** *PC* §21382 provides that *PC* § 21380 does not apply to any of the following instruments or transfers:

a. Person related by blood or affinity within the fourth degree

(1) Refer to table of consanguinity

(2) Spouse or domestic partner of specified person

(3) See *Estate of Pryor (2009)* 177 CA 4th 1466 re spousal exception—Even if a person previously served as care custodian, a subsequent marriage to the donor will take any gifts to them outside the scope of the care custodian rules. (Result would likely be reversed by new PC §21380(a)(4).)

(4) See *Estate of Lira* (2012) 212 CA 4th 1368—The exception applies if the requisite relationship exists at the time the instrument is executed even if the relationship no longer exists at the date of death (former stepson gets gift in documents drafted by donor's step-grandson before dissolution)

b. Person who is cohabitant of transferor

(1) *Penal Code* § 13700(b) defines "cohabitant" as follows:

(a) Two (1) unrelated adult persons living together for a substantial period of time, resulting in some permanency of relationship.

(b) Factors that may determine whether persons are cohabiting include, but are not limited to:

1) Sexual relations between the parties while sharing the same living quarters

2) Sharing of income or expenses

3) Joint use or ownership of property

4) Whether the parties hold themselves out as spouses

5) Continuity of the relationship, and

6) Length of the relationship.

c. Instrument drafted or transcribed by person related by blood or affinity within fourth degree to transferor or is cohabitant of transferor

(1) See *Rice v. Clark* (2002) 28 C4th 89—the term "causes [the instrument] to be transcribed" has been interpreted to refer only to the person who directs, oversees, or otherwise participates directly in the instrument's transcription. The term does not refer to a person who merely procures the attorney who drafts the instrument or who facilitates the drafting of the instrument without being directly involved in its transcription.

d. Transfer of property valued at $5,000.00 or less if total value of transferor's estate equals or exceeds PC§ 13100 amount –originally $150,000.00, now $166,250

E. CONCLUSION

There is no published or unpublished case where a person who has been found to be a care custodian has met the "clear and convincing evidence" burden of proof that the gift/transfer to that person was NOT the product of presumed undue influence, without the support of a certificate of independent review.

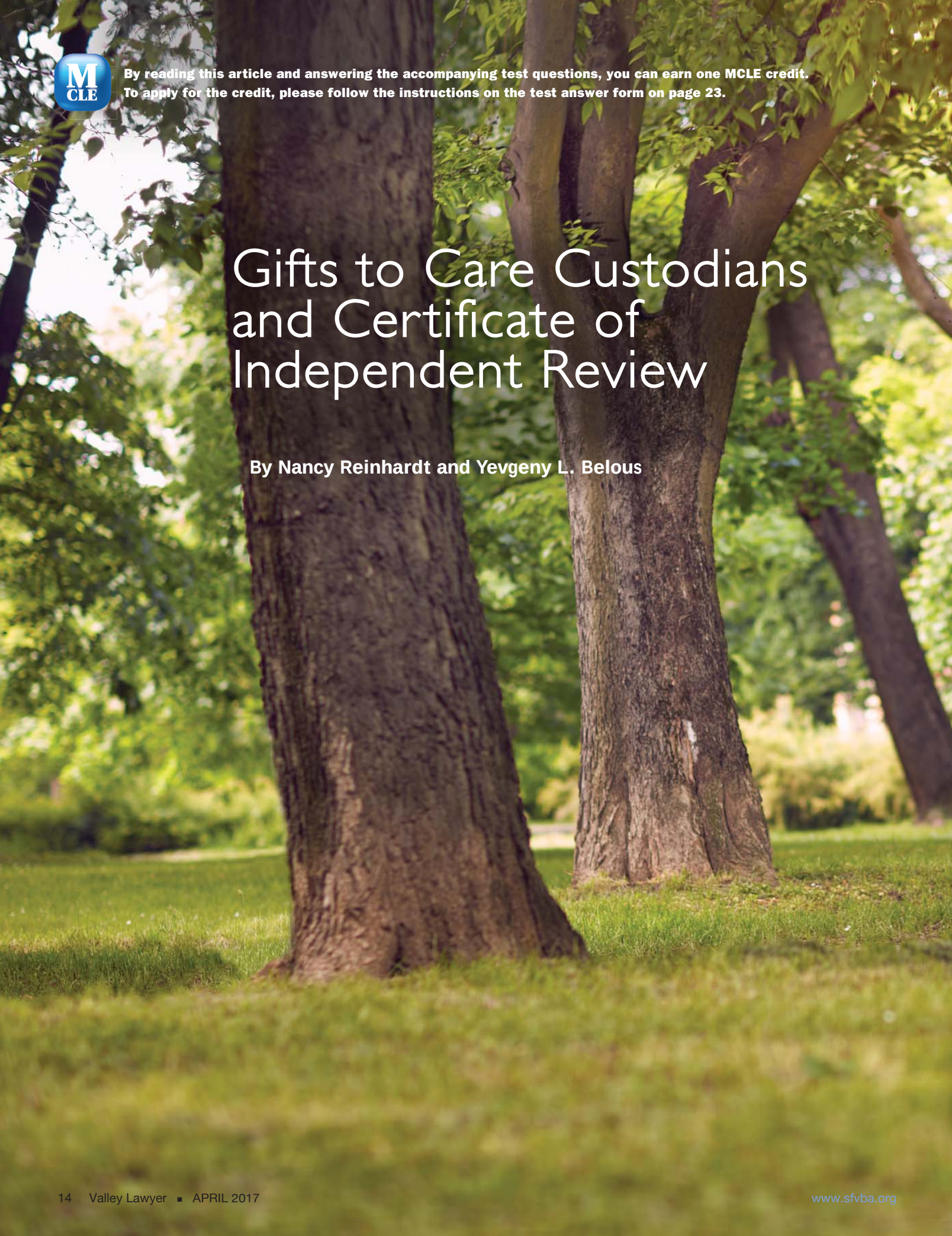
In *Estate of Odian* (2006) 145 Cal.App.4th 152, the only published case, a paid caregiver who had become essentially the only family decedent knew could not show by clear and convincing evidence that her designation as primary beneficiary (instead of charities decedent had never met and to which she had never made a lifetime gift) was not the product of presumptive undue influence.

In *Estate of Barrow*, an unpublished case, the parties stipulated that the primary beneficiary was a care custodian, but, in addition to having a certificate of independent review, there was a multi-decade history of intended gifts to the care custodian prior to becoming a care custodian instead of distant blood relatives and the same attorney was involved in all estate plans.

In all other similar cases, most of which are unpublished decisions (*In re Estate of Pryor*, *Estate of Winans, Estate of Clementi, Stover v. Padayao, Estate of Savic, Estate of Schmitt, Hernandez v Kieferle*, *In re Estate of Wisner*, *Halverson v. Vallone*, and *Silicon Valley Community Foundation v. Beltran*), the appellate court has been unable to find that the proponent of the "donative transfer" proved that the gift was "not the product of undue influence" on that prong alone; instead they have found either that decedent was not a "dependent adult," that the nature of the services did not make the beneficiary a "care custodian" or that some other exception applied. The takeaway from all of these cases is that there has never been a set of facts where a care custodian beneficiary can overcome the presumption of undue influence on this prong of analysis alone because proving a negative is essentially impossible.

Therefore, unless you can show that your client is not a "care custodian," that the donor was not a "dependent adult" or that some other exception applies, it is HIGHLY unlikely that you will prevail in protecting the donative transfer.

APPENDIX A



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Gifts to Care Custodians and Certificate of Independent Review

By Nancy Reinhardt and Yevgeny L. Belous

The legal standing of care custodians—those who provide health and social services to dependent adults—is a potentially thorny area where, sadly, the exertion of undue influence on dependents and malpractice claims sometimes come to the fore. As the authors point out, "Strict adherence to the statute and case law will help ensure that a client's testamentary wishes are carried out and that the attorney's risk of discipline and malpractice are minimized."

THE CALIFORNIA COURTS AND LEGISLATURE recognize there are individuals in our society who are particularly vulnerable to undue influence. These vulnerable members of our society are protected by a diverse set of laws designed to prevent unscrupulous individuals from taking advantage of this susceptibility. One area where the exertion of undue influence is common is estate planning.

The California Probate Code lists seven categories of persons who cannot validly receive donative transfers, including, inter alia, a care custodian of a dependent adult.[1] Here, our focus is on those care custodians.

California Probate Code §21350 and *Bernard v. Foley*

California Probate Code §21350 is the predecessor to the current statute identifying the categories of individuals who cannot validly receive donative transfers. It is still the effective statutory framework for instruments which became irrevocable between September 1, 1993 and January 1, 2011.[2] Today, most cases related to this issue will be analyzed under the current statute.

However, there are still situations requiring analysis under §21350. The instrument shall be deemed irrevocable if the testator, by reason of incapacity, was unable to change the disposition of his or her property and did not regain capacity before the date of his or her death.[3] Hence, if a person became incapacitated on or before January 1, 2011, but died this year and never regained capacity, donative transfers made in his or her estate plan would be analyzed under §21350.

Under Probate Code §21350(a)(6), no provision, or provisions, of any instrument shall be valid to make any donative transfer to a care custodian of a dependent adult who is the transferor. One of the landmark cases in the area of prohibited transfers to care custodians is *Bernard v. Foley*. This 2006 California Supreme Court decision not only explains how §21350 relates to the common law doctrine establishing a presumption of undue influence these types of transfers, but is also the reason the California legislature overhauled §21350.

In *Bernard v. Foley*, the California Supreme Court recognized that California Probate Code §21350 was designed to supplement the common law doctrine establishing a rebuttable presumption of undue influence where the person who is alleged to have exerted such influence (1) has a confidential relationship with the testator; (2) actively participated in procuring the instrument; and (3) would benefit unduly by the instrument.[4]

One such "confidential relationship" addressed in §21350 is the relationship between a dependent adult and their care custodian. In *Bernard*, James Foley and his girlfriend, Ann Erman, were longtime personal friends of Carmel L. Bosco. For two months before Carmel L. Bosco's death, she resided at the Riverside home shared by James Foley and Ann Erman, who jointly cared for her during her final illness. The court was asked to determine whether close personal friends of a dependent elder adult who at the end of her life provided her with personal care are care custodians for the purposes of §21350. The court concluded that:

> "When an unrelated person renders substantial, ongoing health services to a dependent adult, that person may be a care custodian for purposes of the statutory scheme at issue, notwithstanding that the service relationship between the individuals arose out of a preexisting personal friendship rather than a professional or occupational connection."[5]

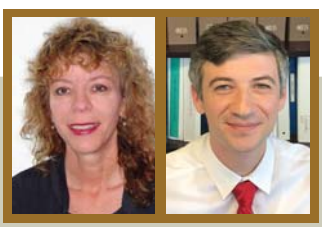
The court recognized that a substantial personal friendship existed between the testator and the disqualified individual. Despite this relationship, the court concluded that the statutory directive was clear—under California Probate Code §21350, there is no exception for preexisting social relationships. The court also concluded it was immaterial if the personal care services were provided with no expectation of compensation. Despite recognizing the harsh effect this statute may have in certain situations, the court explained that Probate Code §21351 provides a simple mechanism for avoiding the application of §21350. This mechanism is called the Certificate of Independent Review.[6]

At the conclusion of the *Bernard* decision, the court invited the Legislature to "correct our error" if they believed the court's interpretation of the §21350 went beyond the intended application.[7] The legislature did exactly that, creating the new statutory framework for potentially invalidating gifts to those defined as "care custodians." This new statutory framework is contained in California Probate Code §§21360 to 21392.

Current Statutory Framework for Donative Transfers

Under California Probate Code §21380(a)(3), a donative transfer to the care custodian of a dependent adult is presumed to be the product of fraud or undue influence if the instrument containing the transfer was executed during the period in which the care custodian provided services to the transferor or within 90 days before or after that period.

Once applicable, this presumption can be rebutted if the beneficiary can prove, by clear and convincing evidence, that



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the donative transfer was not the product of undue influence or fraud.[8] If a beneficiary is unsuccessful in their attempt to rebut this presumption, they shall bare all costs of those proceedings, including reasonable attorney fees.[9]

In order to determine whether a gift to a particular situation triggers the applications of California Probate Code §21380, it is important to understand the definitions and case law analyses of several key terms.

"Care custodians" are persons who provide health or social services to dependent adults, except for those individuals who provided such services without remuneration if the persons had a personal relationship with the dependent adult: (1) at least 90 days before provide those services; (2) at least 6 months before the dependent adult's death; and (3) before the dependent adult was admitted to hospice care, if the dependent adult was admitted to hospice care.[10]

"Health or social services" are services provided to a dependent adult because of the person's dependent condition, including, but not limited to, the administration of medicine, medical testing, wound care, assistance with hygiene, companionship, housekeeping, shopping, cooking, and assistance with finances.[11] Probate Code §21362(b) clearly expands on the California Supreme Court's previous analysis of which services can properly be considered "health or social services."

In *Conservatorship of Davidson*, a case decided before the enactment of California Probate Code §§21360 to 21392, the court concluded that cooking, gardening, driving the transferor to the doctor, running errands, grocery shopping, purchasing clothing or medication, and assisting the transferor with banking did not qualify as health and social services.[12]

"Dependent adult" is a person who, at the time of the execution of the instrument, is either: (1) 65 years of age or older and is unable to provide properly for his or her personal needs for physical health, food, clothing or shelter, or due to one or more deficits in the mental functions listed in paragraphs (1) to (4), inclusive, of subdivision (a) of Probate Code §811, the person has difficulty managing his or her own financial resources or resisting fraud or undue influence; or (2) is 18 years of age or older and is unable to provide for his or her personal needs for physical health, food, clothing, or shelter, or due to one or more deficits in the mental functions listed in paragraphs (1) to (4), inclusive, of subdivision (a) of Probate Code §811, the person has substantial difficulty managing his or her own financial resources or resisting fraud or undue influence.[13]

It is important to note that the rather expansive list of activities included in the definition of "health or social services" must be provided to the dependent adult because of the person's dependent condition. In *Estate of Shinkle*, a case decided prior to the enacting of the California Probate Code §§21360 to 21392, the California Supreme Court determined that a person with a pre-existing, genuine, personal relationship with the donor can provide health and social services without being a care custodian if the services naturally flow from the relationship.[14] It seems clear that the courts and the Legislature want to avoid disqualifying transferees rewarded by a transferor who received the genuine benefits of a personal relationship.

Instruments and Transfers

California Probate Code §21382 excludes the application of the care custodian rules to the following transfers and instruments: (1) transfers to person related by blood or affinity within the fourth degree or who is a cohabitant of the transferor; (2) instruments drafted or transcribed by a person related by blood or affinity within the fourth degree to transferor or is a cohabitant of the transferor; (3) a transfer of property valued at $5,000 or less, if the total value of the transferor's estate equals or exceeds the sum listed in California Probate Code §13100 (currently $150,000); or (4) the instrument is executed outside of California by a transferor who was not a California resident at the time of execution.[15]

Table of Consanguinity

While many of the terms in California Probate Code §21382 require no further explanation, certain terms require outside guidance. Determining whether an individual is related to the transferor within the fourth degree can be tricky in large families. One very useful guide used by practitioners to make this determination is the Table of Consanguinity.

The meaning of "cohabitant" is defined by California Penal Code §13700. The term "affinity" relates to a relationship created because of marriage (i.e., in-laws). For the purposes of §21382, this marriage can be entered into after the transferee previously served as a care custodian.[16] Further, if the requisite relationship by affinity exists at the time the instrument is executed, the exemption still applies, even if the relationship is no longer present at the time of death of the transferor.[17]

Certificate of Independent Review

There are a number of ways to render this section of the Probate Code inapplicable or to rebut the presumption that the transfer was the product of fraud or undue influence.

A review by an independent attorney that results in the execution of a Certificate of Independent Review is the primary methodology to help ensure that a gift to a care custodian does not fail as a result of the application of the statutory provisions discussed above.

Probate Code §21384 sets out the statutory requirements. First, the instrument containing the gift must be reviewed by an independent attorney. Second, the independent attorney must counsel the transferor. This counsel must address the nature and consequences of the intended transfer, including the effect of the intended transfer on the transferor's heirs and on any beneficiary of a prior donative instrument. Third, this

counsel must be outside of the presence of any heir or proposed beneficiary. Fourth, the independent attorney must attempt to determine if the intended transfer is the result of fraud or undue influence. Fifth, an original Certificate of Independent Review in substantially the form set out in this section must be signed and delivered to the transferor with a copy provided to the drafting attorney.[18]

The term "independent attorney" is defined in Probate Code §21370. It means an attorney who has no legal, business, financial, professional, or personal relationship with the beneficiary of a donative transfer at issue. This term also excludes an attorney who would be appointed as a fiduciary or receive any pecuniary benefit as a result of the operation of the instrument containing the donative transfer at issue.[19]

It is interesting to note that there is at least one appellate court decision which contains a much more expansive definition of who is or might not be independent for purposes of the review and execution of a Certificate. In *Estate of Eugene Winans*, the court focused its discussion as to independence on the reviewing attorney's relationship with the donor. By reviewing the legislative history, the *Winans* court concluded that the word "independent" "would entail, at a minimum, 'an attorney not related to, or associated with, the drafter or the beneficiary of the transfer.'"[20]

Although *Winans* was decided under the prior statutory framework, there are some insightful comments in the opinion for consideration. While the prior statute did not discuss a minimum, adequate level of counseling and only contained "the barest description of the necessary counseling," the court declined to require that the reviewing attorney discuss the existence of the statute, its purpose and operation, and the concept of "disqualified persons."[21]

The term "nature and consequences" must be construed in light of the purpose of the statue, that is to ensure that the testator makes the bequest to a disqualified person both voluntarily and fully aware of the scope of the action. "Nature" extends to both the type and amount of the property being transferred.

The term "consequences" extended to those individuals who will not only receive the property but those who will not receive the property. The court found that proper counseling required the attorney to ensure that a testator understood that a disqualified person would receive the property and that the natural objects of the testator's bounty would not.[22]

The *Winans* court went on to require that the testator voluntarily intended this result and that he or she did not "believe himself or herself to be under any compulsion, whether legal, financial or otherwise, to make the bequest." This may extend to documenting advice to the testator and confirming his or her understanding that the disqualified person has already been fully compensated for services provided to the testator or otherwise has no legal claim on the testator's bounty.[23]

While the statute does not specifically require the counseling to be confidential, the Certificate provided for in §21384 stipulates that the reviewing attorney certify that he or she has advised the

transferor "independently, impartially, and confidentially." Thus, the *Winans* court agreed the statute required the counseling to occur confidentially. Caution should be taken to ensure that the otherwise disqualified person is not privy to the counseling discussions (in *Winans*, she is "in and out") and that the conversations cannot be overheard by third parties.[24]

The *Winans* court noted the best practice is "to hold the counseling session in complete privacy with only the testator and certifying attorney present." But the court refused to adopt a rule strictly prohibiting the presence of a third party. The court recognized that there might be circumstances in which the presence of a third party would be necessary to effect the counseling. It concluded that, at a minimum, the disqualified person and any person associated with the disqualified person must be absent during the counseling session.

Further, any person whose presence might discourage the testator from speaking frankly with the attorney must also be absent. If any person other than the certifying attorney is present during a counseling session, the court imposed a burden on the disqualified person to demonstrate that the counseling session was confidential by showing that the presence of third parties was either necessary to accomplish the counseling session, or did not interfere with the transferor's full and honest conversations with the drafting attorney regarding the transfer to the disqualified person.[25]

With respect to "independence," the *Winans* court focused on ensuring that the attorney's personal circumstances permitted the rendering of a disinterested judgment about the validity of the request. Dissociation from the beneficiary's interests alone was insufficient to constitute independence. Relationships with the transferor and the drafting attorney were also considered in the determination.[26]

Failure to Obtain Certificate of Independent Review

In *Osornio v. Weingarten*, the drafting attorney failed to obtain a Certificate of Independent Review for a plan in which the entire estate was left to a care custodian. When the care custodian was unable to overcome the statutory presumption against the bequest, the bequest failed. The care custodian then sued the drafting attorney, contending that the failed bequest was a result of the attorney's negligence in failing to obtain a Certificate of Independent Review.

The *Osornio* court found that the drafting attorney owed a duty to advise the transferor that, absent taking certain steps, the subject transfer, if challenged, had a significant likelihood of failure because of presumptive disqualification and to recommend that the client seek independent counsel in an effort to obtain a Certificate of Independent Review. This counseling is clearly intended to occur prior to the client's decision to obtain a Certificate of Independent Review.[27]

The four elements to a legal malpractice claim are duty, breach of duty, proximate cause, and damage. The *Osornio* court found that the caregiver could have alleged that the attorney breached a duty owed to her by failing to advise the testator of the caregiver's presumptive disqualification and referring the testator to independent counsel to advise her and to provide a Certificate of Independent Review. Additionally, in the absence of a certificate, the caregiver would be required to prove by clear and convincing evidence (not including her own testimony) that the transfer was not the product of fraud, menace, duress, or undue influence, which is a high burden.[28]

In *Osornio*, the court identified six factors to be evaluated when determining the existence of an attorney's duty to a non-client. One of those factors queries whether the extension of liability to a non-client, here the care custodian, would "impose an undue burden on the profession." In extending liability, the court found that the care custodian was a third party beneficiary of the contract to provide legal services.[29] Hence, third-party liability could reasonably be imposed.

The *Osornio* court, in analyzing the duty of a drafting attorney, also found that an attorney is expected to possess a knowledge of "plain and elementary principles of law," to undertake reasonable research, and "to make an informed decision as to a course of conduct based upon an intelligent assessment of the problem."

The court went on to say that the attorney **must** (emphasis added) assist his client in making the transfer "in a manner that does not unduly expose the transfer to attack." Imposing a duty does not create a situation where the attorney would have conflicting loyalties. Imposing a duty in cases such as this would only encourage attorneys to "devote their best professional efforts on behalf of their clients." The attorney's duty was to take appropriate actions to carry out the testator's wishes that were expressed and formalized in a signed estate planning instrument.[30]

Other Methods to Render Probate Code §21380 Inapplicable

As the *Osornio* court commented, in the absence of a Certificate of Independent Review, a presumptively disqualified donee may rebut the presumption where the court determines on clear and convincing evidence, not based solely on his or her own testimony, that the transfer was not the product of fraud, menace, duress, or undue influence. This burden of proof requires the care custodian to persuade the court that it is "highly probable that the fact is true."

Framed differently, the care custodian must demonstrate that there is no substantial doubt that the transfer was not the product of fraud, menace, duress, or undue influence. If the proposed donee fails to meet this burden, he or she shall bear all costs of the proceedings, including reasonable attorney's fees. However, the converse is not true. A proposed donee who establishes the validity of the donative transfer by successfully rebutting the presumption is not entitled to an award or costs and reasonable attorney's fees.[31]

If the transferor is also a conservatee, the court may issue an order on a substituted judgment petition which seeks authority to execute an estate planning instrument containing a presumptively disqualified transfer after full disclosure of all of the relationships involved.[32]

Finally, it is worth mentioning that lifetime transfers not made on written instruments are not subject to the presumptive disqualification statute. These gifts would exclude gifts evidenced by a deed, a bank or securities account transfer, a vehicle transfer, or similar transfers. These exempt lifetime transfers are still subject to issues of fraud, duress, and undue influence.

The Gift Has Failed

If the proposed transfer is subject to the statute and none of the above approaches are either available or can be satisfied, the gift will fail. If the gift fails, the instrument operates as if the beneficiary had predeceased the transferor without a spouse, domestic partner, or issue.[33] The invalid transfer will pass to the donor's intestate successors or beneficiaries under a prior instrument if no provision has been made for an alternative or residuary beneficiary. Under the doctrine of dependent relative revocation, a will that is revoked by a later will in the belief that

the later document is effective remains in effect to the extent that the later will is invalid.[34]

In addition to the potential malpractice liability imposed under *Osornio* which is discussed above, Business and Professions Code §6103.6 makes an attorney's violation of part 3.5 commencing with Probate Code §21350 (the predecessor statute) or part 3.7 commencing with Probate Code §21360 grounds for discipline "if the attorney knew or should have known of the facts leading to the violation." This section is only applicable to violations that occur on or after January 1, 1994.[35]

Practice Pointers

In an effort to avoid the potential failure of the client's expressed proposed transfer, the potential imposition of malpractice liability and risk of discipline by the State Bar, the attorney should consider the adoption of practice pointers raised by the applicable statutes and case law.

First, the drafting attorney should revise his or her estate planning questionnaire to aid in the identification of all care custodian issues. The questionnaire should closely follow all statutory definitions so as to assist in the identification of all possible disqualified transfers. The questionnaire should be used with each and every estate planning engagement.

Second, to the extent that the drafting attorney will not prepare a Certificate of Independent Review for a gift to a care custodian (which review is specifically authorized by statute in this very limited circumstance), it is recommended that the drafting attorney specifically excludes this service in their written Agreement of Representation. There is no statutory duty imposed on the drafting attorney to perform this service.

Third, the authors recommend extreme caution in making referrals to attorneys for preparation and execution of the Certificate of Independent Review. The *Winans* court has expanded the definition of "independent attorney." Query how far a court may go in its analysis of independence and whether the landlord/officemate situation in *Winans* might also be expanded to other relationships such as friendships, referral relationships, or the like. The authors recommend the use of a lawyer referral service such as the service provided by the San Fernando Valley Bar Association in an effort to ensure as much independence as possible.

Fourth, in keeping with *Osornio* and *Winans*, the drafting attorney should document the risk that the contemplated gift will fail and that he or she recommends the client seek independent counsel to procure a Certificate of Independent Review. This letter should be sent to the client multiple times and copious notes maintained regarding discussions with the client.

Fifth, in further keeping with *Osornio* and *Winans*, the certifying attorney should prepare a Certificate of Independent Review that is both statutorily compliant and considers the *Osornio* issues such as discussed above.

Strict adherence to the statute and case law will help ensure that the client's testamentary wishes are carried out and that the attorney's risk of discipline and malpractice are minimized.

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[1] CAL. PROB. CODE §§21350(6) and 21380(a)(3).
[2] CAL. PROB. CODE §21355.
[3] CAL. PROB. CODE §21355(a).
[4] *Bernard v Foley*, 39 Cal.4th 794, 47 Cal.Rptr.3d 248 (2006).
[5] *Id.*
[6] Id.
[7] Id.
[8] CAL. PROB. CODE §21380(b).
[9] CAL. PROB. CODE §21380(d).
[10] CAL. PROB. CODE §21362(a).
[11] CAL. PROB. CODE §21362(b).
[12] *Conservatorship of Davidson*, 113 Cal.App.4th 1035 (2003).
[13] CAL. PROB. CODE §21366.
[14] *Estate of Shinkle*, 97 Cal.App.4th 990 (2002).
[15] CAL. PROB. CODE §21382.
[16] *Estate of Pryor*, 177 Cal.App.4th 1466 (2009).
[17] *Estate of Lira*, 212 Cal.App.4th 1368 (2012).
[18] CAL. PROB. CODE §21384.
[19] CAL. PROB. CODE §21370.
[20] *Estate of Eugene Winans*, 183 Cal.App.4th 102 (2006).
[21] *Id.*
[22] *Id.*
[23] *Id.*
[24] *Id.*
[25] *Id.*
[26] *Id.*
[27] *Osornio v. Weingarten*, 124 Cal.App.4th 304 (2004).
[28] *Id.*
[29] *Id.*
[30] *Id.*
[31] *Id.*
[32] CAL. PROB. CODE §§2580 and 21380.
[33] CAL. PROB. CODE §21386.
[34] *Estate of Anderson*, 56 CA 4th 235 (1997).
[35] CAL. BUS. & PROF. Code §6103.6.

Test No. 102

This self-study activity has been approved for Minimum Continuing Legal Education (MCLE) credit by the San Fernando Valley Bar Association (SFVBA) in the amount of 1 hour. SFVBA certifies that this activity conforms to the standards for approved education activities prescribed by the rules and regulations of the State Bar of California governing minimum continuing legal education.

1. Tom signed his trust containing a gift to his caregiver on December 3, 2010. Tom had a stroke on January 15, 2011, causing him to go into a coma, and died on January 15, 2016, never regaining consciousness since his stroke. In a lawsuit to invalidate the gift to Tom's caregiver, it would be appropriate to use Probate Code §21350 for the analysis.
❑ True ❑ False

2. In 2017, Tim's brother-in-law, Sam, was asked to leave his job in order to care for Tim, who was diagnosed with dementia. Tim paid Sam $50 per day to help with the administration of Tim's medication and to drive Tim to the doctor. Two weeks after Sam started providing these services, Tim contacted his attorney and changed his trust to leave Sam a substantial gift. One month later, Tim died. PC §21380 does not apply to this situation.
❑ True ❑ False

3. In Estate of *Shinkle*, the court determined that, under certain conditions, a person can provide the donor with health and social services without being considered a care custodian.
❑ True ❑ False

4. PC §21350 was designed to supplement, not replace, the common law doctrine establishing a presumption of undue influence for gifts to those who share a confidential relationship with the donor.
❑ True ❑ False

5. A properly executed Certificate of Independent Review cannot rescue a gift to care custodian made in a trust which became irrevocable on January 2, 2008.
❑ True ❑ False

6. Under *Bernard v. Foley*, a person with a pre-existing friendship with the donor falls outside of the statutory definition of a care custodian.
❑ True ❑ False

7. There is no way to overcome the presumption of undue influence once it is established under PC §21380.
❑ True ❑ False

8. In 2017, Sam establishes a friendship with John, who was receiving hospice care when they became friends. This genuine friendship lasts until John's death 11 months later. Four months into the friendship, John changes his trust to leave everything to Sam. If Sam provided John with health or social services without remuneration starting one month before John's death, Sam is not a care custodian.
❑ True ❑ False

9. A Table of Consanguinity is used to determine the degree of kinship between two related people.
❑ True ❑ False

10. PC §21384 sets out the statutory requirements for a Certificate of Independent Review. Under §21384, the independent attorney must counsel the transferor on the nature and consequences of the intended transfer.
❑ True ❑ False

11. "Care custodians" is defined as persons who provide health or social services to dependent adults, including those individuals who provide such services without remuneration under certain circumstances.
❑ True ❑ False

12. In *Estate of Eugene Winans*, the California Supreme Court adopted a rule prohibiting the presence of a third party at confidential counseling sessions.
❑ True ❑ False

13. In *Bernard v. Foley*, the California Supreme Court concluded that whether the personal care services were provided with no expectation of compensation was immaterial to the outcome of the case.
❑ True ❑ False

14. Dissociation from a beneficiary's interests alone is insufficient to constitute independence.
❑ True ❑ False

15. In certain circumstances, an "independent attorney" is permitted to have a legal, business, financial, professional, or personal relationship with the beneficiary of a donative transfer at issue.
❑ True ❑ False

16. In *Conservatorship of Davidson*, the court found that a variety of activities—including cooking, gardening, driving the transferor to the doctor, running errands, and grocery shopping—qualified as health and social services.
❑ True ❑ False

17. PC §21384 fails to set out the statutory requirements of a Certificate of Independent Review.
❑ True ❑ False

18. The best practice is for a reviewing attorney to hold a counseling session with a testator and the certifying attorney in a public venue so that witnesses can corroborate whatever counsel is given.
❑ True ❑ False

19. The three elements to a legal malpractice claim are breach of duty, proximate cause, and damage.
❑ True ❑ False

20. The relationship between a dependent adult and their care custodian is not considered a confidential relationship under the provisions of PC §21350.
❑ True ❑ False

MCLE Answer Sheet No. 102

INSTRUCTIONS:

1. **Accurately complete this form.**
2. **Study the MCLE article in this issue.**
3. **Answer the test questions by marking the appropriate boxes below.**
4. **Mail this form and the $20 testing fee for SFVBA members (or $30 for non-SFVBA members) to:**

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5. **Make a copy of this completed form for your records.**
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ANSWERS:
Mark your answers by checking the appropriate box. Each question only has one answer.

1.	❑ **True**	❑ **False**
2.	❑ **True**	❑ **False**
3.	❑ **True**	❑ **False**
4.	❑ **True**	❑ **False**
5.	❑ **True**	❑ **False**
6.	❑ **True**	❑ **False**
7.	❑ **True**	❑ **False**
8.	❑ **True**	❑ **False**
9.	❑ **True**	❑ **False**
10.	❑ **True**	❑ **False**
11.	❑ **True**	❑ **False**
12.	❑ **True**	❑ **False**
13.	❑ **True**	❑ **False**
14.	❑ **True**	❑ **False**
15.	❑ **True**	❑ **False**
16.	❑ **True**	❑ **False**
17.	❑ **True**	❑ **False**
18.	❑ **True**	❑ **False**
19.	❑ **True**	❑ **False**
20.	❑ **True**	❑ **False**

By reading this article and answering the accompanying test questions, you can earn one MCLE credit. To apply for the credit, please follow the instructions on the test answer form on page 21.

Certificate of Independent Review: A Must-Have Protection

By Nancy A. Reinhardt, Sarah S. Broomer and Mark A. Lester

A Certificate of Independent Review is strongly recommended in any instance in which a gift is intended to a non-family member who might be found to be the donor's care custodian. In addition to carefully documenting any advice given to a client in the case file, only by recommending the Certificate can the risk of discipline and/or a charge of malpractice be avoided.

THE STATUTES GOVERNING GIFTS TO A prohibited transferee in the California Probate Code (PC) apply to instruments which became irrevocable on or after January 1, 2011.[1]

For purposes of these sections, an instrument that is otherwise revocable or amendable is deemed to be irrevocable if, on or after January 1, 2011 the transferor by reason of incapacity was unable to change the dispositive provisions and did not regain capacity prior to his or her death.[2]

Instruments that became irrevocable prior to that date are governed by PC §§ 21350 *et seq*. which contains the predecessors to the current statutes. They apply to instruments which became irrevocable between September 1, 1993 and January 1, 2011.[3]

Under PC § 21350(a)(6), no provision of any instrument shall be valid to make any donative transfer to a care custodian of a dependent adult who is the transferor.

Refer to *Bernard v. Foley* which is one of the seminal opinions in the area of prohibited transfers.[4] That 2006 California Supreme Court decision found that the statutes then in effect did not have a "substantial personal relationship" or a "no compensation for services" exception to the definition of a "care custodian" as seemingly found in prior lower court decisions and therefore invited the Legislature to correct those omissions in PC §§ 21350 *et seq*., if that had in fact been intended. That invitation was clearly accepted and the omissions corrected in the current statutes.

Presumption of Fraud or Undue Influence

If the instrument containing the transfer was executed during the period in which the care custodian provided services to the transferor or within 90 days before or after that period, a donative transfer to the care custodian of a dependent adult is presumed to be the product of fraud or undue influence.

Once applicable, this presumption can be rebutted if the beneficiary can prove, by clear and convincing evidence, that the donative transfer was not the product of undue influence or fraud.[5]

Several key terms are critical to the analysis.

The first term that is important to understand is "care custodians"—the persons who provide health or social services to dependent adults. Excepted from that definition are persons who provided those services without remuneration if they had a personal relationship with the dependent adult…

- At least 90 days before providing those services;
- At least 6 months before the dependent adult's death; and,
- Before the dependent adult was admitted to hospice care, if the dependent adult was admitted to hospice care.[6]

Remuneration does not include the donative transfer at issue under this chapter or the reimbursement of expenses.[7]

In *Estate of Shinkle*, which was decided before enactment of the current statutory scheme, the Court of Appeal determined that a person with a genuine, pre-existing personal relationship with the donor can provide health and social services without being a care custodian "if the services naturally flow from the relationship."[8]

Under the current statutory scheme, the result might differ if the donee is compensated. The result might also differ if the services are provided because of the donor's dependent condition or as a result of the personal relationship.

The second important term to understand is health or social services—services provided to a dependent adult because of his or her dependent condition, which may include activities such as administration of medication, medical testing, care of wounds, help with personal hygiene, companionship, housekeeping, shopping, cooking, and assistance with finances.[9]

Several cases decided under the former statute may prove insightful, though not determinative, when considered under the current statute.

In *Conservatorship of Davidson*, for example, the Court of Appeal concluded that cooking, gardening, driving the transferor to the doctor, running errands, grocery shopping, purchasing clothing or medication, and assisting the transferor with banking, where the service providers were not being compensated, did not qualify as "health or social services."[10]

But, compare that case with the *Estate of Odian* in which a live-in, paid caregiver providing similar services was found to be providing health and social services.[11] In yet another case, *Estate of Austin*, the court concluded that driving the transferor to doctor's appointments and meal preparation were not substantial ongoing health or social services qualifying the donee as a care custodian.[12]

The third important term in the analysis is "dependent adult."

A dependent adult is a person who, at the time of execution of the instrument, is either 65 years of age or older

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and has "*difficulty* managing his or her own financial resources or resisting fraud or undue influence, and is unable to provide properly for his or her personal needs for physical health, food, clothing or shelter, or due to one or more deficits in the mental functions listed in paragraphs (1) to (4), inclusive, of subdivision (a) of Probate Code Section 811"; or, is 18 years of age or older and has "*substantial difficulty*" managing the same activities for the same reasons as described above.[13]

Rendering Probate Code §21380 Moot

There are a number of ways to render PC § 21380 inapplicable or to rebut the presumption that the transfer was the product of fraud or undue influence.

A review by an independent attorney that results in the execution of a Certificate of Independent Review (CIR) is the primary methodology to help ensure that a gift to a care custodian does not fail as a result of applying the statutory provisions discussed above. But, if there isn't a CIR, can the transfer be salvaged?

In such a case, a presumptively disqualified donee may rebut the presumption where the court determines on clear and convincing evidence that the transfer was not the product of fraud, menace, duress, or undue influence.[14] That burden of proof requires the care custodian to persuade the court that it is "highly probable" that the fact is true.

Setting Aside or Defending the Prohibited Transfer

If you are the party attacking the donative transfer as being the product of undue influence, there are several evidentiary hurdles to overcome before the burden of proof shifts to the proponent of the document to establish that it was not the product of undue influence, each of which must be established by a preponderance of the evidence.

The first is that there was a "donative transfer" involved. In *Jenkins v. Teegarden*, a transfer is "donative" if it is for inadequate consideration.[15] The transfer can still be donative even if good consideration is given that would otherwise be sufficient to support a contract.[16]

Next, the attacking party must prove that the recipient was a care custodian at the time of the execution of the instrument or donative transfer. A careful examination of the definition of care custodian in PC § 21362(a) reveals that there is an exclusion for persons who provide care services without remuneration. Though remuneration is not defined as compensation nor does it include either the donative transfer at issue or the reimbursement of expenses, existing records should be carefully examined to see if others are being paid for "caregiver" services on a regular and substantial basis.

Also, what is the effect of the forgiveness of debt on the applicability of this section? Is the forgiveness of indebtedness remuneration?

Another element that should be established by the attacking party is that the services actually provided constitute

"health or social services." This element raises issues of the timing and nature of the relationship, whether payment was involved, what was the nature of the services provided, and whether or not the services provided were the result of the dependent adult's condition.

When considering how to attack the transfer, one must carefully examine the definition of what makes an individual an "dependent adult."

The key is the PC § 811 mental function deficit criteria and/or inability to provide for his or her personal needs for physical health, food, clothing or shelter. To establish those criteria or lack thereof, medical records will be needed. In addition to medical records, it will be important to identify witnesses with observational information current with the time of the execution of the documents containing the donative transfer.

Further, an examination of whether or not the deficits are isolated and temporary incidents such as might be caused by a UTI, a medication or other brief illness from which the transferor has or will recover, is important. In the unreported decision of *Stover v. Padayao*, because the decedent was not shown to be a "dependent adult," his friends, by definition, did not qualify as care custodians.[17]

Rebutting When Attacking the Gift

Probate Code § 21380(b) provides that the presumption is one which affects the burden of proof. It may be rebutted "by proving, by clear and convincing evidence, that the donative transfer, was not the product of fraud or undue influence."[18]

Probate Code § 86 provides that undue influence has the same meaning as in Section 15610.70 of the Welfare and Institutions Code.[19] The intention of the Legislature is that this Section supplement the common law meaning of "undue influence" without superseding it or without interfering with the operation of that law.

"Undue influence" means excessive persuasion that causes another person to act or refrain from acting by overcoming that person's free will and results in inequity.[20]

When determining whether a result was produced by undue influence, *all* of the following need to be considered: vulnerability of the victim; the influencer's apparent authority; actions or tactics used by the influencer; and equity of the result.

When considering the first factor, evidence includes such things as incapacity, illness, disability, injury, age, education, impaired cognitive function, emotional distress, isolation, dependency, and whether the influencer knew or should have known of the alleged victim's vulnerability.

Evidence of apparent authority includes status as a fiduciary, family member, care provider, health care professional, legal professional, spiritual advisor or other expert, while evidence of actions or tactics.

Evidence of actions or tactics used may embrace controlling the necessities of life, medication, the victim's interactions with third parties, access to information or sleep; use of affection, intimidation or coercion; and, initiation of changes in personal or property rights, use of quick changes or secrecy in making those changes, making changes at inappropriate times and places, and claims of expertise in making those alterations.

Evidence of the equity of a result may include the economic consequences to the victim, any divergence from the victim's prior intent or course of conduct or dealing, the relationship of the value conveyed to the value of any services or consideration received, and the appropriateness of the change in light of the nature and length of the relationship.

Evidence of an inequitable result, without more, is not sufficient to prove undue influence.[21]

Clear and Convincing Evidence Standard

The proponent of a valid gift to a prohibited transferee having been unsuccessful in defeating his or her client's classification as a care custodian of a dependent adult has one final chance to save the gift, namely, to show by clear and convincing evidence that the donative transfer was not the product of undue influence.

The function of the standard of proof is to instruct the fact finder concerning the degree of confidence society deems necessary in the correctness of factual conclusions for a particular type of adjudication, to allocate the risk of error between the litigants, and to indicate the relative importance attached to the ultimate decision.[22]

Here, the Legislature decreed that protecting our most vulnerable adults is so important that only if a care custodian can show by clear and convincing evidence that a donative transfer was not the product of undue influence will that gift be valid.

In *In re the Conservatorship of Wendland*, the California Supreme Court stated that, "The 'clear and convincing evidence' test requires a finding of high probability, based on evidence'"'so clear as to leave no substantial doubt' [and] 'sufficiently strong to command the unhesitating assent of every reasonable mind'"[23]

So, given this extremely high threshold of proof required to validate the donative transfer to a care custodian, the appellate courts—in the only reported case and two unreported cases—have yet to find a care custodian who has been able to meet this stringent level.

The following three cases are illustrative of the difficulty in meeting this level of proof.

Estate of Odian

Estate of Odian was decided under a former statute that dealt with a paid, live-in caregiver who became the primary beneficiary of a decedent's estate.[24]

The donor had never married, had no children or family within 3 degrees that she knew of, and had been preceded in death by her only sibling several years earlier. Both the decedent and her sister had identical wills, both prepared by an attorney they never met, that left their estates to the surviving sibling and then to charities neither sister had had any contact with, but had been recommended by their financial adviser.

Several years after her sister died, Ms. Odian hired a caregiver who lived with her and provided cooking, cleaning, assistance with paying bills, driving to appointments, and other services that fell under the "health or social services" umbrella.

During her final years, however, and as described by her longtime friend and dance companion of twenty-plus years, Ms. Odian emerged from her previously depressed and isolated state, becoming completely integrated into the caregiver's family and life, attending weddings and birthday parties, hosting holiday meals, re-engaging with old friends, and regaining a zest for life.

The decedent then prepared her own will that left her estate to the caregiver or her children if she failed to survive. When the charities under the prior will contested Decedent's last will, the court still found that the caregiver had not demonstrated by clear and convincing evidence that the will was not the product of undue influence.[25]

Estate of Savic

In *Estate of Savic* (unreported) a friend who provided social services including daily visitations, the control of finances, and taking care of other daily needs was found to be care custodian under former statute.[26]

Again, the caregiver didn't meet the clear and convincing threshold. Instead, the decedent's son who lived out of country and hadn't seen decedent in years prevailed under the terms of a will executed 13 years earlier.

Estate of Schmitt

Finally, in *Estate of Schmitt* (also unreported) the caregiver/beneficiary who worked five days a week for 17 years for a decedent was found to meet the definition of a care custodian.[27]

The care custodian didn't meet the clear and convincing threshold despite evidence from the longtime financial adviser that the decedent executed the beneficiary designation without claimant around or even being aware of the gift; instead, the account went to the estranged half-brother of the decedent.

It likely didn't help that the claimant tried admitting into evidence as the decedent's will a handwritten letter allegedly signed by decedent that bequeathed the house to her.

As it later turned out, it was revealed in a separate sub-trial that the signature on the document was not that of the decedent, but was likely a forgery.

The Impossibility of Proving a Negative

There is no published or unpublished case in which a person who has been found to be a care custodian has met the "clear and convincing evidence" burden of proof that the gift/transfer to that person was NOT the product of presumed undue influence.

In *Estate of Odian*, the only published case focusing on this specific issue, a paid caregiver who had become essentially the only family the decedent knew could not show by clear and convincing evidence that her designation as primary beneficiary—instead of charities the decedent was unaware of and to which she had never made a lifetime gift—was not the product of presumptive undue influence.[28]

In all other similar cases, most of which are unpublished decisions—*In re Estate of Pryor*,[29] *Estate of Winans*,[30] *Estate of Clementi*,[31] *Stover v. Padayao*, *Estate of Savic, Estate of Barrow*,[32] *Estate of Schmitt, Hernandez v. Kieferle*,[33] *In re Estate of Wisner*,[34] *Halverson v. Vallone*,[35] and *Silicon Valley Community Foundation v. Beltran*[36]—the appellate court avoided finding that the proponent of the "donative transfer" proved that the gift was "not the product of undue influence;" instead they found either that decedent was not a "dependent adult," that the nature of the services did not make the beneficiary a "care custodian" or that some other exception applied.

The takeaway from all of these cases is that there has never been a set of facts where a care custodian beneficiary overcame the presumption of undue influence, because proving a negative is simply impossible.

Therefore, unless it can be shown that a client is not a "care custodian," that the donor was not a "dependent adult" or that some other exception applies, it is highly unlikely that you will prevail in protecting the donative transfer.

Given the apparent impossibility of "proving a negative" (i.e., no undue influence was involved in the donative transfer), the authors of this article strongly recommend securing a Certificate of Independent Review in any instance in which a gift is intended to a non-family member who might be found to be the donor's care custodian.

In short, in addition to thoroughly documenting any advice given to a client in the case file, only by recommending the Certificate of Independent Review can the risk of discipline and/or a charge of malpractice be avoided.[37]

The authors would like to thank and acknowledge Yevgeny L. Belous not only for his contributions to "Gifts to Care Custodians and Certificate of Independent Review" which was published in the April 2017 edition of Valley Lawyer but more importantly for his friendship.

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[1] CAL. PROB. CODE §§ 21360 – 21392.
[2] CAL. PROB. CODE § 21392 (a).
[3] CAL. PROB. CODE § 21350 *et seq.*
[4] *Bernard v. Foley* (2006) 39 Cal.4th 794, See also Reinhardt, Nancy and Belous, Yevgeny L. "Gifts to Care Custodians and Certificate of Independent Review." *Valley Lawyer*. April 2017.
[5] CAL. PROB. CODE § 21380(b).
[6] CAL. PROB. CODE § 21362(a).
[7] *Id.*
[8] *Estate of Shinkle* (2002) 97 Cal. App. 4th 990.
[9] CAL. PROB. CODE § 21362(b).
[10] *Conservatorship of Davidson* (2003) 113 Cal.App.4th 1035.
[11] *Estate of Odian* (2006) 145 Cal.App.4th 152.
[12] *Estate of Austin (2010)* 188 Cal.App.4th 512.
[13] CAL. PROB. CODE § 21366. It is important to note the addition of the term "substantial" when comparing the "difficulty" necessary to find a person 18 to 64 years of age "dependent" as opposed to the "difficulty" required of someone 65 years of age or older.
[14] CAL. PROB. CODE § 21380(b).
[15] *Jenkins v. Teegarden* (2014) 230 Cal.App.4th 1128.
[16] *Id at 1131.*
[17] *Stover v. Padayao*, 2016 WL 5092760, Unreported in Cal.Rptr.3d (September 20, 2016).
[18] CAL. PROB. CODE § 21380(b).
[19] CAL. PROB. CODE § 86.
[20] CAL. WELFARE AND INSTITUTIONS CODE §15610.70(a).
[21] CAL. WELFARE AND INSTITUTIONS CODE §15610.70(b).
[22] *Weiner v. Fleischman* (1991) 54 Cal.3d 476, 487; accord, *Addington v. Texas* (1979) 441 U.S. 418, 423.
[23] *Conservatorship of Wendland* (2001) 26 Cal. 4th 519 at 552 (quoting In re Angelia P., supra, 28 Cal.3d 908, 919). Accord, *Sheehan v. Sullivan* (1899) 126 Cal. 189).
[24] *Estate of Odian* (2006) 145 Cal.App.4th 152.
[25] *Id.*
[26] *Estate of Savic, 2018* WL 2214714, Unreported in Cal.Rptr.3d (May 15, 2018).
[27] *Estate of Schmitt,* 2012 WL 4498447, Unreported in Cal.Rptr.3d (October 2, 2012).
[28] *Estate of Odian* (2006) 145 Cal.App.4th 152.
[29] *Estate of Pryor* (2009) 177 Cal.App.4th 1466.
[30] *Estate of Winans* (2010) 183 Cal.App.4th 102.
[31] *Estate of Clementi* (2008) 166 Cal.App.4th 375.
[32] *Estate of Barrow,* 2015 WL 5610453, Unreported in Cal.Rptr.3d (September, 24, 2015).
[33] *Hernandez v. Kieferle,* 2014 WL 1338100, Unreported in Cal.Rptr.3d (April 3, 2014).
[34] *In re Estate of Wisner,* 2010 WL 3769806, Unreported in Cal.Rptr.3d (September 29, 2010).
[35] *Halverson v. Vallone,* 2009 WL 1101240, Unreported in Cal.Rptr.3d (April 24, 2009).
[36] *Silicon Valley Community Foundation v. Beltran,* 2008 WL 2737428 (July 11, 2008).
[37] *Osornio v. Weingarten* (2014) 124 Cal.App.4th 324.

Test No. 132

This self-study activity has been approved for Minimum Continuing Legal Education (MCLE) credit by the San Fernando Valley Bar Association (SFVBA) in the amount of 1 hour. SFVBA certifies that this activity conforms to the standards for approved education activities prescribed by the rules and regulations of the State Bar of California governing minimum continuing legal education.

1. Milton became Judith's care custodian due to her diagnosis of dementia. Judith's family wishes to challenge the validity of the donative transfer from Judith to Milton by establishing that the transfer was the result of undue influence. Milton has the initial burden of proving that the donative transfer was not the product of undue influence by a preponderance of the evidence.
❑ True ❑ False

2. An individual may only be considered a "dependent adult" if he or she is 65 years or older, and unable to properly provide for his or her own personal needs for physical health, food, clothing or shelter.
❑ True ❑ False

3. In *Conservatorship of Davidson*, the Court concluded that cooking, gardening, driving the transferor to the doctor, running errands, grocery shopping, purchasing clothing or medication, and assisting the transferor with banking, did not qualify as health and social services if the service were provided without compensation.
❑ True ❑ False

4. Courts shall consider the following in determining whether a donative transfer was the product of undue influence: 1) The vulnerability of the victim; 2) The influencer's need for the donative transfer; 3) The actions or tactics used by the influencer; and, 4) The equity of the result.
❑ True ❑ False

5. A review of a donative transfer from a dependent adult to a care custodian by an independent attorney who prepares and executes a Certificate of Independent Review helps to ensure that the donative transfer does not fail.
❑ True ❑ False

6. If an individual provided health and social services to a dependent adult and was only compensated by the donative transfer at issue after the dependent adult's death, they fall within the exception of *Probate Code* Section 21362(a) for those persons who provide care services without remuneration.
❑ True ❑ False

7. Margaret is a personal assistant to Howard. Margaret shops for and provides assistance with finances to Howard, who is over the age of 65 years. Howard is able to perform the tasks himself, but prefers to delegate the work. Margaret is providing "health or social services" to Howard under *Probate Code* Section 21362(b).
❑ True ❑ False

8. The party challenging the validity of a donative transfer and alleging that the transfer is the product of undue influence must establish their case by a preponderance of the evidence.
❑ True ❑ False

9. If an instrument includes a gift to a prohibited transferee and became irrevocable on June 1, 2011, *Probate Code* Sections 21360 – 21392 apply.
❑ True ❑ False

10. Jacqueline is classified as a care custodian because she provided health or social services to her maternal aunt Gladys, who was a dependent adult receiving hospice care, and was not paid for said services.
❑ True ❑ False

11. In *Estate of Odian*, a live-in, paid caregiver who was cooking, cleaning, assisting with paying bills, and driving to appointments, among other services was deemed to be providing "health and social services."
❑ True ❑ False

12. An individual is not considered dependent adult if their deficits are isolated and temporary incidents such as might be caused by a medication or other brief illness from which the individual has recovered.
❑ True ❑ False

13. In order to establish the vulnerability of a victim for undue influence, evidence may include the victim's isolation and dependency, as well as whether the influencer knew or should have known of the alleged victim's vulnerability.
❑ True ❑ False

14. The donative transfer to an individual who is classified as a care custodian of a dependent adult is invalid even if the individual shows by clear and convincing evidence that the donative transfer was NOT the product of undue influence.
❑ True ❑ False

15. Tony is a 50 year old man who is unable to provide for his own personal needs. Tony also has deficits in mental function as a result of a rare neurological disorder. As a result, he has substantial difficulty managing his own financial resources, and is unable to resist fraud or undue influence. Tony is a dependent adult.
❑ True ❑ False

16. *Probate Code* 21350 et. seq., which are the predecessors to the current statutes, control all instruments that became irrevocable prior to January 1, 2011.
❑ True ❑ False

17. Undue influence means the application of excessive persuasion by one individual against another person which causes the latter to act or refrain from acting by overcoming the latter's free will, and results in inequity.
❑ True ❑ False

18. *Probate Code* Section 86 provides that undue influence has the same meaning as the definition provided in *Welfare and Institutions Code* Section 15610.70, and the Legislature intended *Probate Code* Section 86 to supplement the common law meaning of undue influence without superseding it or without interfering with the operation of that law.
❑ True ❑ False

19. On January 15, 2009, Carrie began to care for Edward, who had been diagnosed with advanced Alzheimer's. Edward paid Carrie $20 per hour for 8 hours of work, 5 days of week. Carrie was to provide companionship, assist with medication, transportation, cooking, cleaning, and hygiene. Carrie provided these services for two months before Edward died on March 17, 2009. After Edward's death, Edward's children discovered that Edward had amended his Trust to leave 1/3 of the trust estate to Carrie. *Probate Code* Sections 21360 – 21392 apply.
❑ True ❑ False

20. The standard by which to rebut the presumption that a donative transfer to a care custodian of a dependent adult is the product of fraud or undue influence is by a preponderance of the evidence.
❑ True ❑ False

MCLE Answer Sheet No. 132

INSTRUCTIONS:

1. **Accurately complete this form.**
2. **Study the MCLE article in this issue.**
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Authorized Signature

5. **Make a copy of this completed form for your records.**
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ANSWERS:
Mark your answers by checking the appropriate box. Each question only has one answer.

1.	❑ **True**	❑ **False**
2.	❑ **True**	❑ **False**
3.	❑ **True**	❑ **False**
4.	❑ **True**	❑ **False**
5.	❑ **True**	❑ **False**
6.	❑ **True**	❑ **False**
7.	❑ **True**	❑ **False**
8.	❑ **True**	❑ **False**
9.	❑ **True**	❑ **False**
10.	❑ **True**	❑ **False**
11.	❑ **True**	❑ **False**
12.	❑ **True**	❑ **False**
13.	❑ **True**	❑ **False**
14.	❑ **True**	❑ **False**
15.	❑ **True**	❑ **False**
16.	❑ **True**	❑ **False**
17.	❑ **True**	❑ **False**
18.	❑ **True**	❑ **False**
19.	❑ **True**	❑ **False**
20.	❑ **True**	❑ **False**

APPENDIX B

SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

Date: November 25, 2013 DEPARTMENT 5

HONORABLE: Mitchell L. Beckloff DEPUTY SHERIFF: NONE	S. Jimenez, DEPUTY JUDICIAL ASSISTANT No REPORTER
BP 121262 (r/t BP 118944 and consolidated w/ BP 122107) **In re the Matter of the Bernardine Barrow Revocable Trust**	(Parties and Counsel checked if present) COUNSEL FOR PETITIONER N/A COUNSEL FOR RESPONDENT N/A

RULING ON SUBMITTED MATTER
(Trust and Will Contest; Prohibited Transferee)

This matter concerns the estate and trust of Ms. Bernardine Barrow. Ms. Barrow died on December 23, 2008 without issue. Ms. Barrow was a widow.

The parties before the court are Allan DeMille ("DeMille"), Ms. Barrow's first cousin, once removed; Karen L.G. O'Neill ("O'Neill"), a non-relative; and Richard Sorrentino ("Sorrentino"), a non-relative. At the heart of the dispute is the ultimate disposition of Ms. Barrow's substantial assets.

[Sorrentino's spouse, Debra Sorrentino, was named as a respondent in DeMille and O'Neill's Second Amended Verified Petition . . . filed December 29, 2010 (the "DeMille Petition"). With the exception of some brief testimony that Debra Sorrentino drove a housekeeper home after Ms. Barrow died, there was no evidence introduced during the trial in this matter related to Debra Sorrentino. Therefore, this decision discusses Debra Sorrentino no further. The court does find, however, that there was no evidence introduced by DeMille and O'Neill to support their allegations concerning Debra Sorrentino in the DeMille Petition.]

The parties filed a Joint Trial Statement ("JTS") on June 28, 2013. The matter was tried over the course of 11 days.

The following petitions are at issue in the case:

1. The Petition for Probate filed by O'Neill on October 5, 2009 (the "O'Neill Probate Petition") and Sorrentino's objections thereto filed January 19, 2010. The O'Neill Probate Petition seeks to admit to probate Ms. Barrow's will of June 11, 1997. [By stipulation, the parties have agreed that the admissibility of this will to probate shall be deferred.]

2. The Petition for Probate filed by Sorrentino on November 12, 2009 (the "Sorrentino Probate Petition") and O'Neill's objections thereto (the "O'Neill Probate Objections") filed January 20, 2010. The Sorrentino Probate Petition seeks to admit to probate Ms. Barrow's will of July 16, 2008.

3. O'Neill's Verified Petition to Determine Invalidity of Certain Trust

Distributions . . . filed March 1, 2010 (the "O'Neill Petition") and Sorrentino's objections thereto filed June 8, 2010 (the "Sorrentino O'Neill Objections").

4. Sorrentino's Petition for Orders (A) Determining Validity and Terms of Trust . . . filed March 4, 2010 (the "Sorrentino Petition") and O'Neill's objections thereto filed August 6, 2010 (the "O'Neill Sorrentino Objections").

5. The DeMille Petition and Sorrentino's objections thereto filed August 2, 2011 (the "Sorrentino DeMille Obections").

Contested Issues: (JTS pp. 6-7.)

[Based on the Sorrentino Probate Petition and the O'Neill Probate Objections]

1. The validity of the 2008 Will.

[Based on the Sorrentino Petition and the O'Neill Sorrentino Objections]

2. The validity of the 2007 Initial Trust Declaration and the 2008 Restatement.

3. Whether O'Neill violated the No-Contest clause in the 2007 Initial Trust Declaration and the 2008 Restatement.

[Based on the O'Neill Petition and the Sorrentino O'Neill Objections]

4. Whether the gifts to Sorrentino under the 2007 Initial Trust Declaration and the 2008 Restatement are invalid under the Probate Code section 21350.

a. Was a valid Certificate of Independent Review under Probate Code section 21351(b) obtained?

b. Were the gifts the product of fraud, menace, duress or undue influence? Sorrentino contends that this issue is only relevant if a valid Certificate of Independent Review was not obtained; O'Neill contends that it also is relevant if a valid Certificate of Independent Review was obtained.

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[Based on the DeMille Petition and the Sorrentino DeMille Objections]

5. Whether the 2007 Initial Trust Declaration and the 2008 Restatement were the product of undue influence.

6. Whether the gifts to Sorrentino under the 2007 Initial Trust Declaration and the 2008 Restatement are invalid under the Probate Code section 21350.

7. Was a valid Certificate of Independent Review under Probate Code section 21351(b) obtained?

8. If a valid Certificate of Independent Review was not obtained, were the gifts the product of fraud, menace, duress or undue influence? Sorrentino contends this issue only is relevant if a valid Certificate of Independent Review was not obtained; DeMille contends that it also is relevant if a valid Certificate of Independent Review was obtained.

Relevant Stipulated Facts: (JTS pp. 7-8.)

Ms. Barrow executed the following wills drafted by attorney Lambert Michael Javelera:

1. June 11, 1997 Will
2. April 19, 1998 Will
3. January 17, 1999 Codicil (re: April 19, 1998 Will)
4. February 7, 1999 Will
5. January 5, 2002 Will
6. April 6, 2006 Codicil (re: January 5, 2002 Will)

Ms. Barrow executed the following trusts and wills drafted by attorney Christopher Botti:

1. December 6, 2007 Trust ("Initial Trust Declaration")
2. December 6, 2007 Will ("2007 Will")
3. July 16, 2008 Trust ("Restatement")
4. July 16, 2008 Will ("2008 Will")

Richard was a care custodian to Ms. Barrow as of December 6, 2007 and July 16, 2008.

During closing argument, O'Neill and DeMille's counsel withdrew any claim that Ms. Barrow lacked sufficient capacity to execute the estate planning documents in issue.

ANALYSIS OF CONTESTED ISSUES AS RAISED BY THE PARTIES IN THEIR JTS

1. The validity of the 2008 Will.

In her verified O'Neill Probate Objections, O'Neill alleges (among other things) that the 2008 Will is invalid due to a lack of capacity. (O'Neill Probate Objections p. 4.)

During closing argument, O'Neill withdrew her claim that Ms. Barrow lacked capacity to execute the 2008 Will.

The parties stipulated that Ms. Barrow executed the document. (JTS p. 7.)

The 2008 Will is self-proving. According to Attorney Botti, Ms. Barrow executed the 2008 Will in one of Attorney Botti's offices. Attorney Botti witnessed Ms. Barrow execute the 2008 Will. Attorney Botti testified that ordinarily at a signing ceremony in his office, Attorney Botti had staff there to act as a witness to the signing ceremony. Attorney Botti identified the second witness signature on the 2008 Will as that of an employee, Lupe Servin. Attorney Botti testified that it was "more likely that she was there" but he had no recollection of Ms. Servin being there.

Attorney Botti does not recall the signing ceremony for every will he witnesses. Attorney Botti does not have a practice of falsely attesting to wills.

Attorney Botti also testified that there was no doubt that Ms. Barrow intended the 2008 Will to be her Will. (Attorney Botti testified similarly about the 2007 Will.)

Based on the foregoing, the court finds that the 2008 Will is a valid will. Ms. Barrow executed the document and it was witnessed by two witnesses. Attorney Botti identified the signatures of both witnesses. While Attorney Botti was unable to recall the specifics of the signing ceremony, the 2008 Will was signed in one of his offices and witnessed by one of his employees. Given the passage of time and the volume of estate planning documents drafted by Attorney Botti in his various offices (Ventura, Fresno, Kern County, Santa Barbara County, Los Angeles County and Tulare County), Attorney Botti's lack of specific memory is reasonable and credible.

[The court notes that the O'Neill Probate Objections raise the following specific objections: (1) Probate Code section 8001 violation; (2) Sorrentino had no standing as he would be found to have predeceased the decedent due to elder abuse; (3) lack of capacity; (4) undue influence; (5) fraud; and (6) duress and/or menace. O'Neill did not raise an issue with the signing ceremony until after the testimony of Attorney Botti. It appears that O'Neill raised the issue during argument to undermine the credibility of Attorney Botti. Had the issue been raised prior to trial, Sorrentino would have been required to produce both witnesses to the 2008 Will. (See Prob. Code sec. 8253.) (Based on the testimony, the court could find by clear and convincing evidence that both the 2007 Will and the 2008 Will were admissible to probate pursuant to Probate Code section 6110, subd. (c)(2).)

With regard to the Probate Code section 8001 objection, the court notes that the court has discretion to appoint a late petitioning administrator. (*Estate of Buckley* (1982) 132 Cal.App.3d 434, 455.) The objection does not speak to the validity of the will, the issue the parties raised for resolution.

With regard to the lack of standing argument based on elder abuse, like Probate Code section 8001, the issue does not go to the validity of the will. A civil elder abuse action is currently pending against Sorrentino.

The court ultimately rejects herein O'Neill's claim of undue influence with regard to Ms. Barrow's estate planning documents. The 2008 Will is a pour-over will. Thus, any undue influence claim would properly be considered under the trust documents.

O'Neill had the burden of proof on her other attacks on the will – fraud, menace and duress. (Prob. Code sec. 8252, subd. (a).) No evidence was introduced specific to fraud,

menace or duress. Instead, O'Neill's attack on the estate planning documents was the claim of undue influence. To some extent, issues of fraud, menace and duress are subsumed within the undue influence analysis.]

2. The validity of the 2007 Initial Trust Declaration and the 2008 Restatement.

Care Custodians of Dependent Adults Are Prohibited Transferees

Generally, care custodians are presumptively disqualified "from being beneficiaries of testamentary transfers from dependent adults to whom they provide care services . . . ." (*Estate of Winans* (2010) 183 Cal.App.4th 102, 113.) The law reflects a legislative concern that individuals acting as care custodians for dependent adults may exercise undue influence over those dependent adults. (*See Bernard v. Foley* (2006) 39 Cal.4th 794, 816 [George, C.J. concurring].) "In enacting the statute, the Legislature sought to strike a balance between 'protecting prospective transferors from fraud, menace, or undue influence, while still ensuring the freedom of transferors to dispose of their estates as they desire and reward true 'good Samaritans.'" (*Estate of Winans*, *supra,* 183 Cal.App.4th at 113 [quoting Stats. 2006, ch. 215, sec. 1].)

[Probate Code section 21350 provides the specific statutory authority dictating that a care custodian is a prohibited transferee of a transferor disabled adult.

Probate Code section 21350, subd. (a)(6) provides:

"Except as provided in Section 21351, no provision, or provisions, of any instrument shall be valid to make any donative transfer to any of the following: A care custodian of a dependent adult who is the transferor."

Probate Code section 21350, subdivision (c) provides that a "'dependent adult' has the meaning as set forth in Section 15610.23 of the Welfare & Institutions Code and also includes those persons who (1) are older than age 64 and (2) would be dependent adults, within the meaning of Section 15610.23, if they were between the ages of 18 and 64."

Welfare & Institutions Code section 15610.23, subdivision (a) provides: "'Dependent adult' means any person between the ages of 18 and 64 years who resides in this state

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and who has physical or mental limitations that restrict his or her ability to carry out normal activities or to protect his or her rights, including, but not limited to, persons who have physical or developmental disabilities, or who physical or mental abilities have diminished because of age."

Probate Code section 21350, subdivision (c) further provides that, "The term 'care custodian' has the meaning set forth in Section 15610.17 of the Welfare & Institutions Code."

Welfare & Institutions Code section 15610.17, subdivision (y) defines a care custodian as any "person providing health services or social services to elders or dependent adults." (*See also Estate of Odian* (2006) 145 Cal.App.4th 152, 167 (person who cooks, cleans, drives, takes care of home is care custodian.))]

The proposition that a care custodian for a dependent adult is a prohibited transferee is not without exception. Probate Code section 21351 provides certain statutory exceptions. Two such exceptions are of relevance in this case.

Exception: Certificate of Independent Review

Probate Code section 21351, subdivision (b) provides that the prohibition on the testamentary transfer to a care custodian does not apply where a Certificate of Independent Review (a "CIR") has been obtained and the following conditions are met:

> "The instrument is reviewed by an independent attorney who (1) counsels the client (transferor) about the nature and consequences of the intended transfer, (2) attempts to determine if the intended consequence is the result of fraud, menace, duress, or undue influence, and (3) signs and delivers to the transferor an original certificate in substantially the following form, with a copy delivered to the drafter:"

Probate Code section 21351, subd. (b) sets forth a model CIR. (The statute provides that the CIR be "substantially" in the form set forth in the statute.)

Only one published Court of Appeal case has considered the CIR exception to Probate Code section 21350's prohibition of a care custodian receiving a testamentary transfer

from a dependent adult: *Estate of Winans, supra,* 183 Cal.App.4th at 102. *Winans* explained the operative terms of Probate Code section 21351, subdivision (b) (independent attorney, counseling, and confidentiality) and generally instructed on the estate plan review process when a prohibited transferee is involved.

Winans explained that an "independent attorney" is an attorney whose "personal circumstances do not prevent him or her from forming a disinterested judgment about the validity of the bequest." (*Id.* at 121.)

The counseling component of the statute is somewhat complex. "Proper counseling about the nature and consequences of a bequest to a disqualified person . . . requires the attorney to ensure the testator understands (1) the nature of the property bequeathed; (2) that a disqualified person will receive the property; and (3) that the 'natural objects' of the testator's bounty, if any, will not receive the property." (*Id.* at 117.) *Winans* further explains that, "The certifying attorney must also ensure the testator voluntarily intends this result and does not believe himself or herself to be under any compulsion, whether legal, financial or otherwise, to make the bequest. This may require the certifying attorney to confirm, for example, the testator is aware the disqualified person has already been fully compensated for the services provided to the testator or otherwise has no legal claim to the testator's bounty." (*Ibid.*)

Finally, *Winans* teaches that the counseling session should be "in complete privacy, with only the testator and the certifying attorney present." (*Id.* at 118.)

Exception: Clear and Convincing Evidence Otherwise

Probate Code section 21351, subdivision (d) provides that where the court determines "upon clear and convincing evidence, but not based solely upon the testimony of" the care custodian that the gift "was not the product of fraud, menace, duress or undue influence," the statutory prohibition on the testamentary transfer does not apply.

Ms. Barrow Was a Dependent Adult in 2007

At the time Ms. Barrow signed the Initial Trust Declaration, the Restatement, the 2007 Will and the 2008 Will, Ms. Barrow was a dependent adult. In 2007, Ms. Barrow was 89 years

old. In 2001, Ms. Barrow broke her wrist and thereafter had trouble writing. In 2005, Ms. Barrow started to complain to her doctor about having some memory problems. In June 2005, Dr. Jerge, Ms. Barrow's treating physician opined that Ms. Barrow was suffering from "some level of dementia."

[O'Neill and DeMille have argued that Ms. Barrow was a dependent adult as far back as 1996. As proof to support their assertion, they refer to a car accident in which Ms. Barrow was involved. In actuality, the car accident, according to Linn T. Hodge, III, Ms. Barrow's insurance agent and friend, occurred in 1998. Sorrentino initially testified that the car accident occurred in 1996 but later corrected his testimony and stated that the accident occurred in 1998. There is no other evidence before the court concerning the date of the auto accident. There is no evidence that the car accident injured Ms. Barrow in any way. Sorrentino testified that Ms. Barrow drove in 2002 and 2004 and that she did not stop driving until 2005.

In its statutory scheme, the legislature did not sweep all elders within the ambit of "dependent adult" status; age alone is insufficient to establish dependent adult status. To be labeled a dependent adult, an individual over the age of 64 must have "physical or mental limitations that restrict his or her ability to carry out normal activities or to protect his or her rights." (Prob. Code sec. 21350, subd. (c) and Welf. & Inst. Code sec. 15610.23, subd. (a).) The definition includes elders whose "physical or mental abilities have diminished because of age." (Welf. & Inst. Code sec. 15610.23, subd. (a).)

O'Neill and DeMille have the burden of proof on this issue. (Evid. Code sec. 500.)

It is clear that after May 2001, Ms. Barrow was an elder with physical limitations such that she would qualify as a dependent adult. At that time, she broke her wrist and it became difficult for her to write. Thereafter her physical limitations restricted her ability to carry out normal activities.

Dr. Terry Jerge, Ms. Barrow's long-time physician (Dr. Jerge's testimony is described in detail below), testified that Ms. Barrow was a "very healthy individual." He stated that "even though she was older, she had good health."

Dr. Jerge started treating Ms. Barrow in 1996. He found her "proactive" in her medical care at that time. Dr. Jerge testified that in 2005, he found her less involved in her care.

Based on the testimony of O'Neill and Dr. Jerge, it appears that Ms. Barrow did not have any mental acuity issues until 2005.]

The Parties Stipulated that Sorrentino was a Care Custodian in 2007 and 2008

Ms. Barrow's status as a dependent adult as of 2007 and Sorrentino's status as a care custodian presumptively disqualifies Sorrentino from any testamentary transfer by Ms. Barrow. (Prob. Code section 21350, subd. (a)(6).)

Attorney Freidman's CIR Eliminates the Testamentary Transfer Prohibition

Attorney Seth Freidman prepared a CIR for the Initial Trust Declaration. The court finds that Attorney Freidman is an independent attorney. Nothing in the facts suggests otherwise. There is no evidence that Attorney Freidman's "personal circumstances . . . prevent[ed] him . . . from forming a disinterested judgment about the validity of the bequest." (*Estate of Winans, supra,* 183 Cal.App.4th at 121.)

Attorney Botti prepared the Initial Trust Declaration and 2007 Will. Paul Morrision, Mr. Botti's law partner, contacted Mr. Freidman to ask Mr. Freidman if he would be willing to interview Ms. Barrow concerning a trust she executed. Mr. Morrison explained to Mr. Freidman that a CIR was needed. Mr. Freidman and Mr. Morrison went to college together and see each other on social occasions perhaps a couple of times a year. They have never before nor since worked on a legal matter together. Mr. Freidman is not dependent in any way upon Mr. Morrison or his firm professionally or personally.

Shortly after Mr. Freidman spoke with Mr. Morrision, Mr. Freidman spoke with Mr. Botti. Mr. Freidman had no relationship with Mr. Botti. Mr. Botti explained to Mr. Freidman that he had drafted a trust and a recipient of the property was "non-blood" and pursuant to the Probate Code, there needed to be a second opinion or independent counsel to talk to the settlor. Mr. Botti explained that the purpose of the consultation was to ensure that the gift was not the result of undue influence. Mr. Botti provided the relevant Probate Code statutes to Mr. Freidman. Mr. Botti also told Mr. Freidman that the estate was of

significant size and that the settlor lived in the Hancock Park area of Los Angeles. Mr. Botti left the cost of his services for the CIR up to Mr. Freidman.

Mr. Freidman understood that his task was to ensure that Ms. Barrow was acting independently and free of undue influence. (He also recognized that the Probate Code statutes were also concerned with fraud, menace and duress.) Mr. Freidman understood that his client was Ms. Barrow not Mr. Botti.

Mr. Freidman has no interest in any property Sorrentino might receive from Ms. Barrow's trust.

Mr. Freidman counseled Ms. Barrow confidentially. He met with her two full months after she executed her Initial Trust Declaration. Only Ms. Barrow and Mr. Freidman were in the room while they discussed the Initial Trust Declaration. (Mr. Freidman did not recall having the 2007 Will, a pour over will, at the time of his consultation.) Sorrentino did open Ms. Barrow's front door when Mr. Freidman arrived at the home. Sorrentino also took Mr. Freidman to the room where the counseling took place but Sorrentino did not remain in the room. In fact, Mr. Freidman was left alone waiting in the room until Ms. Barrow joined him.

[Other facts gleaned from the evidence do not undermine the finding that the counseling session was confidential. Mr. Freidman's meeting with Ms. Barrow was arranged through Sorrentino in a 60 to 90 second telephone call. Sorrentino gave Mr. Freidman Ms. Barrow's address during that phone call. Mr. Freidman had never spoken to Sorrentino before.]

Mr. Freidman's 60 to 90 minute confidential counseling session addressed both the nature and consequences of the bequest. Ms. Barrow provided the Initial Trust Document to Mr. Freidman. Mr. Freidman had not seen the document prior to Ms. Barrow giving it to him.

Mr. Freidman then had a conversation with Ms. Barrow about who was to receive her estate. Ms. Barrow told Mr. Freidman that she had created a trust with an attorney and that she was giving the bulk of her estate to Sorrentino.

Date: November 25, 2013 DEPARTMENT 5

HONORABLE: Mitchell L. Beckloff
DEPUTY SHERIFF: NONE

S. Jimenez, DEPUTY JUDICIAL ASSISTANT
No REPORTER

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(Parties and Counsel checked if present)

COUNSEL FOR PETITIONER N/A

COUNSEL FOR RESPONDENT N/A

Ms. Barrow explained the role that Sorrentino played her in life. She said that he took care of the house, took care of the bills, made sure that her employees were paid, and made sure that the house was run properly.

Mr. Freidman and Ms. Barrow spoke about her family. She told Mr. Freidman that she did not have any living relatives. She said she had no siblings and no children. She told Mr. Freidman that her husband was deceased. Ms. Barrow told Mr. Freidman that she was not leaving her estate to any family members.

Mr. Freidman reviewed the disposition plan in the Initial Trust Document (Article 2) with Ms. Barrow. He asked Ms. Barrow gift by gift whether it was her intention to make the gift reflected in the trust. Ms. Barrow indicated during the counseling session that the gifts were consistent with her desires. She specifically verified to Mr. Freidman the gifts she wanted to make to Sorrentino.

Mr. Freidman spoke generally to Ms. Barrow about the nature of her assets. Mr. Freidman told her she had a very nice home, the house appeared to be valuable, and that she had significant assets. Mr. Freidman did not specifically ask Ms. Barrow about her assets other than her home. Mr. Freidman asked Ms. Barrow whether she was certain about how she wanted to dispose of her assets. Ms. Barrow told Mr. Freidman, "Yes."

Mr. Freidman spoke specifically about Sorrentino's gift in relation to the other gifts Ms. Barrow was making through the Initial Trust Declaration. Mr. Freidman did not remember the exact language used for that discussion. Mr. Freidman did recall that the context of the conversation was about the home being worth millions of dollars while gifts to others were $75,000 resulting in Sorrentino receiving the bulk of the estate.

Mr. Freidman also spoke about undue influence with Ms. Barrow. He explained that he wanted to make sure the gifts under the trust were made of her own free will, that it was what she wanted to do and that it needed to be clear that Ms. Borrow was not making gifts because someone else wanted her to make them. Mr. Freidman believed that Ms. Barrow understood the concept of undue influence and told him that the gifts in her trust were what she wanted to do. She told Mr. Freidman that she was making the gifts of her own free will.

Mr. Freidman did not focus on Ms. Barrow's mental capacity. Mr. Freidman believed that Ms. Barrow gave him "logical answers" to his questions during the course of the "long conversation" with her.

Mr. Freidman read the relevant Probate Code statutes before he met with Ms. Barrow. He understood that he was also trying to determine whether the Initial Trust Declaration was the product of fraud, menace or duress as well as undue influence. Mr. Freidman did not believe that he needed to review the definitions of undue influence, fraud, menace or duress prior to his meeting with Ms. Barrow.

After his meeting with Ms. Barrow, Mr. Freidman spoke to Mr. Botti and told him that he had had a nice meeting with Ms. Barrow. Mr. Freidman told Mr. Botti that Ms. Barrow seemed perfectly reasonable and understanding with regard to what she wanted to do with her property. Mr. Freidman told Mr. Botti he would send him a CIR.

The day after his meeting with Ms. Barrow, Mr. Freidman sent Ms. Barrow a letter. (Exhibit 32.) The letter said: "Thank you for the opportunity to meet with you yesterday. I find you engaging and entertaining. I am enclosing an original of the Certificate of Independent Review along with the invoice for my services. I am sending another originally signed Certificate to your attorneys in Ventura. I can see by your relationship and history with Mr. Sorrentino that your mutual affection and caring friendship is evident and that there appears to be no undue influence."

Mr. Freidman used the word "engaging" in the letter because Ms. Barrow was engaging. During their meeting, they had had an active conversation; it was not one sided. Mr. Freidman explained, "She was a very nice woman."

Mr. Freidman believed the warm relationship between Ms. Barrow and Sorrentino was "evident" because she spoke in glowing terms about him. Mr. Freidman had the feeling that Ms. Barrow really cared for and respected Sorrentino. Mr. Freidman understood that Sorrentino had been around Ms. Barrow for a long time.

Mr. Freidman denied that Mr. Botti told him to write the letter describing his meeting with Ms. Barrow. Mr. Freidman admitted that he may have used "flowery" language in the letter because he "liked [Ms. Barrow] very much."

Mr. Freidman drafted and executed the CIR. (Exhibit 30.) The CIR refers to "trust documents." Mr. Freidman was referring to what he reviewed with Ms. Barrow in the CIR. Mr. Freidman obtained the language for the CIR directly from the Probate Code.

Mr. Freidman billed Ms. Barrow $750 for his services. Mr. Freidman was certain that he did not tell Sorrentino about his fee.

Mr. Freidman admitted that he did not ask Ms. Barrow about her specific relationships with beneficiaries of the Initial Trust Declaration other than Sorrentino. He also did not go through the entire trust with Ms. Barrow. Instead, Mr. Freidman focused on only the gift provisions of the Initial Trust Declaration with her.

Mr. Freidman estimated that the document he reviewed with Ms. Barrow was about 50 pages long. Mr. Freidman believed that the trust he reviewed with Ms. Barrow was longer than the Initial Trust Declaration provided for him to look at in court. (Exhibit 22.) He did admit, however, that he was not certain about the length of the Initial Trust Declaration.

Mr. Freidman did not ask Ms. Barrow if she could handle her own financial affairs. Mr. Freidman was not advised that Ms. Barrow suffered from dementia. Such knowledge may have made a difference to him in terms of his responsibility.

Based on all of the facts surrounding Mr. Freidman's 60 to 90 minute private counseling session with Ms. Barrow, the court finds that a valid CIR was prepared in connection with Ms. Barrow's Initial Trust Declaration. Mr. Freidman discussed Ms. Barrow's assets in a general way as well as the gifts she was making to specific individuals. Mr. Freidman discussed the somewhat minimal gifts to others with the large gift to Sorrentino. Mr. Freidman verified with Ms. Barrow that Ms. Barrow wanted the bulk of her estate to be given to Sorrentino. Mr. Freidman understood from Ms. Barrow that Ms. Barrow felt affection and closeness to Sorrentino.

O'Neill has raised a number of arguments concerning the CIR that the court has considered along with all of the evidence in finding that the CIR sufficiently complies with Probate Code section 21351, subdivision (b) such that Sorrentino is not a prohibited

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transferee. When all of the evidence concerning the CIR and Ms. Barrow's estate plan are considered, the court does not consider O'Neill's arguments persuasive.

O'Neill complains that Mr. Freidman is not an estate planning attorney. Probate Code section 21351, subd. (b) does not require an estate planning attorney to prepare a CIR. Mr. Freidman understood his task, had a sufficient understanding of the terms undue influence, fraud, menace and duress, and engaged in a substantive discussion with Ms. Barrow about her estate plan. It is of no consequence that Mr. Freidman may not understand the legal differences between a will and a trust. Mr. Freidman knew he was confidentially counseling Ms. Barrow to ensure that the estate planning documents reflected her wishes.

O'Neill argues that the document Mr. Freidman used in counseling Ms. Barrow was shorter than the Initial Trust Document received by the court. Mr. Freidman testified over five years after he counseled Ms. Barrow. Mr. Freidman testified (on redirect examination) that he could not be sure that the document he used in counseling Ms. Barrow was shorter. It is clear to the court from Mr. Freidman's testimony that Mr. Freidman knew the distributive terms of the estate plan, that Sorrentino was receiving the bulk of the estate, and that there were others receiving much smaller shares of the estate. The court does not find Mr. Freidman's testimony incredible because he cannot specifically remember trust provisions from a counseling session conducted over five years ago.

O'Neill claims that the CIR is defective in that it does not specifically name the instrument(s) reviewed by Mr. Freidman with Ms. Barrow. The statute provides the CIR must "substantially" be in the form set forth. Thus, failing to set forth the title of the document is not by itself fatal. Moreover, Mr. Freidman did not have a copy of the Initial Trust Declaration. Ms. Borrow gave him the document when she came into the confidential counseling session. Mr. Botti did not give Mr. Freidman a copy of the document. A reasonable inference can be drawn from the evidence that Mr. Freidman did not take Ms. Barrow's copy of the Initial Trust Document with him (otherwise his transmittal letter with the CIR would likely have included the Initial Trust Declaration). Mr. Freidman did not specifically name the instrument in his CIR because he did not have a copy of the document.

BP 121262 (r/t BP 118944 and consolidated w/ BP 122107) **In re the Matter of the Bernardine Barrow Revocable Trust**	(Parties and Counsel checked if present) COUNSEL FOR PETITIONER N/A COUNSEL FOR RESPONDENT N/A

O'Neill's complaint that the CIR misspells Ms. Barrow's name is inconsequential. Mr. Freidman spelled Ms. Barrow's name as Bernadine instead of Bernardine. Mr. Freidman's misspelling is just that. It does not negate his confidential counseling session with Ms. Barrow. There is no question that Mr. Freidman met with the subject of this lawsuit, Ms. Barrow.

The court rejects O'Neill's belief that Mr. Freidman was not an independent attorney.

The court acknowledges that Mr. Freidman did not know about O'Neill and did not specifically question Ms. Barrow about Ms. O'Neill. From the court's perspective, this is O'Neill's strongest argument about why the CIR and the counseling process was flawed. Mr. Freidman did, however, during a 60 to 90 minute session with Ms. Barrow review all of the gifts Ms. Barrow made in her estate plan. The dispositional plan is not extensive thus there was plenty of time available for discussing the rather simple estate plan.

O'Neill's concern that Mr. Freidman did not know about her relationship with Ms. Barrow overstates the importance of her relationship with Ms. Barrow and her relative standing with others who were important to Ms. Barrow. Ms. Barrow's estate plans over the years never suggested that O'Neill was the primary object of Ms. Barrow's bounty. (See immediately following section Sorrentino Was the Natural Object of Ms. Barrow's Bounty.)

In 1997, Ms. Barrow provided in her will that her home and substantial Chevron stock holdings (the bulk of her estate) pass to Mr. Hodge and Ms. Hodge or the survivor of them. O'Neill and her husband would only receive the bulk of the estate if both Mr. Hodge and Ms. Hodge predeceased Ms. Barrow. Ms. Barrow's 1997 will provided a car, $25,000, other personal property and the residue of the estate of O'Neill and her husband. (It is the 1997 Will that O'Neill seeks to admit to probate.) Thus, at best O'Neill was third in line to receive the bulk of Ms. Barrow's estate in 1997. There is no evidence that Ms. Barrow ever put O'Neill first in line to receive Ms. Barrow's home and stock holdings.

In 1999, at a time when Ms. Barrow unquestionably had no cognitive issues, Ms. Barrow provided in her will that O'Neill would receive some personal property and jewelry, O'Neill's husband and other O'Neill family members would receive only small cash gifts. Again, Ms. Barrow's estate plan did not provide substantial gifts to O'Neill.

Thus, the court is not persuaded that Mr. Freidman's lack of information about Ms. Barrow's history with O'Neill and any failure by him to specifically question Ms. Barrow about her invalidates the CIR.

Sorrentino Was the Natural Object of Ms. Barrow's Bounty

Contained within *Estate of Winans, supra,* 183 Cal.App.4th at 117, is some discussion instructing that appropriate counseling requires a discussion "that the 'natural objects' of the testator's bounty, if any, will not receive the property." Thus, *Estate of Winans* recognizes that there may be cases where a decedent has no 'natural objects' of her bounty. Historically, "[t]he expression 'natural objects' of the testator's bounty has reference to the descendents, surviving spouse, and parents of the testator, who, purely by reason of relationship, may be assumed to have had claims upon his bounty. [Citation omitted.] Nephews, nieces, brothers, sisters, and other collateral heirs, are not, because of such relationship alone, natural or normal objects of bounty. [Citations omitted.]" (*Estate of Nolan* (1938) 25 Cal.App.2d 738, 742.)

Here, Ms. Barrow had no issue, no surviving spouse and no parents. She had no "natural objects" of her bounty as the law has historically defined that term. The distant relatives Ms. Barrow had, she did not like and did not want anything to do with according to her long-time friend and insurance agent, Mr. Hodge. Sorrentino testified that Ms. Barrow had no interaction with her family and felt taken advantage of by them. DeMille, one of the parties to this lawsuit and a first cousin, once removed, has had no contact with Ms. Barrow "in many decades." (Stipulated Fact 4.d.) O'Neill testified that DeMille was "one of many" relatives Ms. Barrow complained about. Ms. Barrow told O'Neill that she did not feel close to anyone in her family.

If "natural objects" of one's bounty were considered more expansively than the manner in which it has historical been defined in the law and the quality of relationships is considered, the evidence supports a finding that Sorrentino was the "natural object" of Ms. Barrow's bounty. Sorrentino was in Ms. Barrow's life on a near daily or daily basis for the last 13 years of Ms. Barrow's long life. Their relationship began as a business arrangement and after several years Sorrentino became and remained Ms. Borrow's employee. Over time, they became friends and talked about their families. They spoke about their experiences with immediate family. Ms. Barrow shared her life story with

Sorrentino. She spoke about her younger days and spoke of her husband. They became close as time passed. While Sorrentino was her employee, he was also her friend. Mr. Freidman and others testified about the fondness with which Ms. Barrow spoke about Sorrentino.

In 1995, at the age of 77, when Sorrentino began doing construction work for Ms. Barrow, it appears that Ms. Barrow had no close family and very few close friends. It does not appear that Ms. Barrow was very social. Sorrentino was a constant in Ms. Barrow's day-to-day life for 13 years.

Mr. Hodge (an individual who stands to benefit from this litigation if O'Neill and DeMille are successful) testified that Ms. Barrow told him that she liked Sorrentino. Ms. Barrow spoke about Sorrentino and his children to Mr. Hodge. Mr. Hodge had the impression that Sorrentino "was a companion" to Ms. Barrow. Mr. Hodge also conceded that Sorrentino provided "wonderful" care to Ms. Barrow.

Mr. Hodge's wife, Mimi Hodge (who also stands to benefit from this litigation if O'Neill and DeMille are successful) sent a note to Sorrentino shortly after Ms. Barrow died. The note stated: "I just wanted you to know how much I appreciated the wonderful care you provided for [Ms. Barrow] during the last years. She told me she was sure that an angel sent you to her and I would not argue with that! I know how much your friendship meant to her, and her final days were certainly very peaceful and comfortable due to your monitoring the situation. She was a special lady and we will miss her." (Exhibit 49.)

Dr. Jerge got the impression Ms. Barrow had a lot of confidence in Sorrentino. He thought that Sorrentino took very good care of Ms. Barrow.

Even O'Neill admitted that she got the impression from Ms. Barrow that Ms. Barrow liked Sorrentino. Ms. Barrow spoke about Sorrentino "a lot." When Ms. Barrow and O'Neill spoke on the telephone, Ms. Barrow often shared stories with O'Neill about Sorrentino and his family. She also spoke about what she and Sorrentino had been doing around her home. In 2006, Ms. Barrow told O'Neill how wonderful Sorrentino was and how he was doing everything.

Date: November 25, 2013 DEPARTMENT 5

HONORABLE: Mitchell L. Beckloff
DEPUTY SHERIFF: NONE

S. Jimenez, DEPUTY JUDICIAL ASSISTANT
No REPORTER

BP 121262 (r/t BP 118944 and consolidated w/ BP 122107)

In re the Matter of the Bernardine Barrow Revocable Trust

(Parties and Counsel checked if present)

COUNSEL FOR PETITIONER N/A

COUNSEL FOR RESPONDENT N/A

Ms. Barrow's actions over the years demonstrate the quality of the relationship she had with Sorrentino. Long before there is any evidence that Ms. Barrow had any cognitive issues, in 1998, with the aid of her long-time and trusted attorney, Mike Javelera, Ms. Barrow nominated Sorrentino as her attorney-in-fact for health care decisions. (Exhibit 5.) Sorrentino did not know about the document until after Ms. Barrow died.

Also in 1998, again with the aid of Mr. Javalera, Ms. Borrow nominated Sorrentino as her conservator in a signed writing. Sorrentino did not know about the document until after Ms. Barrow died. (Exhibit 4.)

In 1999, again with the assistance of her long-time attorney, Ms. Borrow executed a will that provided for the bulk of her estate to go to Sorrentino. Sorrentino did not know about the will until after Ms. Barrow died.

[The court finds Sorrentino credible that he did not know about these decisions by Ms. Barrow in 1998 and 1999. Ms. Barrow named Mr. Hodge as a beneficiary of her will without telling Mr. Hodge. Mr. Hodge testified that he was surprised Ms. Barrow had named him as a beneficiary.]

O'Neill had a history with Ms. Barrow and they had been close at one time. The first time Ms. Barrow spoke to Sorrentino about O'Neill was in 1998. Ms. Barrow told Sorrentino about how she and her deceased husband had met O'Neill and O'Neill's future husband in Yosemite in 1978. Ms. Barrow and her deceased husband would vacation there two times a year. O'Neill and her future husband worked at the hotel where the Barrows lodged. During their off hours, O'Neill and her future husband would socialize with Ms. Barrow and her now deceased husband. Mr. Barrow was O'Neill's husband's best man at O'Neill's wedding in 1981. The Barrows joined O'Neill and her husband for one week in Hawaii during the O'Neill's honeymoon after the wedding.

Without question, at some point, Ms. Barrow had a close relationship with O'Neill. When they first met, Ms. Barrow was 62 years old and O'Neill was 22 years old. After they first met, Ms. Barrow gave gifts to O'Neill, O'Neill's husband, and O'Neill's children. The gift giving continued over the years and O'Neill received checks from Ms. Barrow. O'Neill described Ms. Barrow as a generous person to her and her family.

O'Neill and Ms. Barrow never lived in the same city. Since 1985, O'Neill has lived in Oregon. Ms. Barrow never visited O'Neill in Oregon.

From 2004 until Ms. Barrow's death, O'Neill visited with Ms. Barrow on only four occasions. (O'Neill presented no evidence concerning her visitation for years prior to 2004.) Three of those visits were only a few hours in duration. O'Neill's husband did not visit on any of those four occasions. (Other than gifts from Ms. Barrow to O'Neill's family, there is no evidence that O'Neill's husband had any kind of an ongoing relationship with Ms. Barrow.)

Sometime in 2004, Ms. Barrow and O'Neill had one visit that took place during an afternoon at Ms. Barrow's home. Ms. Barrow showed O'Neill the house and garden. O'Neill recognized during that visit that Ms. Barrow "knew [the] past." (Exhibit 59.)

In December 2005, O'Neill visited with Ms. Barrow at Ms. Barrow's home. O'Neill did "not [have] much time" for the visit. They visited on the sofa in the library. Ms. Barrow did not show Ms. O'Neill all of the house and showed O'Neill around only a "little" of the garden. (Exhibit 59.)

O'Neill did not visit with Ms. Barrow in 2006.

O'Neill visited with Ms. Barrow in Ms. Barrow's home in October 2007.

In March 2008, O'Neill arranged with Sorrentino for O'Neill to stay in Ms. Barrow's home for a two-night visit. During the visit, Sorrentino suggested some "alone" time for the two of them. He suggested that they go shopping together. O'Neill admitted that Ms. Barrow emphatically said, "No."

From 2004 through 2008, O'Neill spoke with Ms. Barrow on the telephone at least once every two weeks. (O'Neill estimated that in prior years, the two spoke more frequently.)

In 2005, O'Neill received a call from Ms. Barrow who asked O'Neill to come and visit. Ms. Barrow told her that she could stay as long as she liked and that she should come whenever she was able. O'Neill said that she was too busy to come and visit. Ms.

Barrow "gasped" when O'Neill told her that she could not come. Just as the telephone was being hung up, O'Neill heard Sorrentino say, "See, I told you so."

While O'Neill and Ms. Barrow at one time had a close relationship, the importance of that relationship to Ms. Barrow diminished over the 13 years that Sorrentino spent with Ms. Barrow. All of the evidence suggests that Sorrentino was Ms. Barrow's long-time employee and trusted friend.

[The facts of *Rice v. Clark* (2002) 28 Cal.4th 89 are strikingly similar to the facts of this case. In *Rice*, the decedent, a widow with no issue or close relatives, hired a handyman to fix a garage door at her home. Over the next few months, the handyman performed numerous repairs on the decedent's property. Eventually, the handyman quit his job and began working full time for the decedent. After four years, the decedent gave the handyman a raise. He took on additional duties – bill paying and bookkeeping. He also started accompanying the decedent to the bank and the grocery store. The decedent started giving large cash gifts to the handyman on a daily basis. Five years after the handyman began working for the decedent, the decedent drafted a will leaving the bulk of her estate to the handyman. After the decedent's death, a beneficiary of a prior will sued to invalidate the gifts to the handyman. The handyman prevailed on the grounds that the handyman "had not unduly benefited" from the estate plan and based on the decedent's "lack of close family or other friends," it appeared that the decedent's "'longtime employee and friend' was a natural recipient" of the decedent's bounty." (*Id.* at 92-93, 95.) (*Rice* was before the Supreme Court on a different issue. The Supreme Court set forth the history of the case. The findings discussed above were those of the trial court.)]

O'Neill's Probate Code section 21350, subd. (a)(4) Argument Is Unavailing

(O'Neill's counsel raised this issue during closing argument. The court is unable to locate a claim under Probate Code section 21350, subd. (a)(4) in any of the pleadings before the court. The issue is not identified in the JTS. To the extent the issue was not raised in the pleadings, the court treats the argument as an oral motion to amend the pleadings to include this legal argument by O'Neill and DeMille. As there is no prejudice to Sorrentino in granting the amendment, the court grants the implied motion to amend.)

BP 121262 (r/t BP 118944 and consolidated w/ BP 122107) **In re the Matter of the Bernardine Barrow Revocable Trust**	(Parties and Counsel checked if present) COUNSEL FOR PETITIONER N/A COUNSEL FOR RESPONDENT N/A

Probate Code section 21350, subdivision (a) (4) provides:

"Except as provided in Section 21351, no provision, or provisions, of any instrument shall be valid to make any donative transfer to any of the following:
Any person who has a fiduciary relationship with the transferor, including, but not limited to, a conservator or trustee, who transcribes the instrument or causes it to be transcribed."

O'Neill claims that Sorrentino is a prohibited transferee pursuant to Probate Code section 21350, subd. (a)(4).

While Sorrentino did have a confidential and fiduciary relationship with Ms. Barrow at the time she signed the Initial Trust Declaration, the Restatement, the 2007 Will and the 2008 Will, Sorrentino did not transcribe the instruments or cause them to be transcribed. (*Rice v. Clark*, *supra,* 28 Cal.4th 89, 105.)

Sorrentino "did not direct or oversee, or otherwise participate directly in, the will's or trust's transcription." Sorrentino "facilitated the instruments' preparation and execution" by assisting Ms. Barrow in providing relevant information in the estate planning booklet, "but he did not direct [Attorney Botti], or anyone else, to include particular gifts or other provisions in the instruments." (*Ibid.*)

Sorrentino's actions were insufficient to fall within the ambit of Probate Code section 21350, subdivision (a)(4).

Clear and Convincing Evidence Exists That the Transfer Was Not the Product of Fraud, Menace, Duress or Undue Influence

Even assuming that the CIR is insufficient to overcome the statutory transfer prohibition to Sorrentino, clear and convincing evidence exists that the testamentary transfer is not the product of fraud, menace, duress or undue influence. Clear and convincing evidence is evidence which persuades "that it is highly probable that the fact is true." (CACI No. 201; *see also Nevarrez v. San Marino Skilled Nursing and Wellness Centre* (2013) 221 Cal.App.4th 102, 112.) The court cannot rely solely on the testimony of the prohibited transferee in evaluating this exception.

Estate of Lingenfelter (1952) 38 Cal.2d 571 is helpful in considering the exception contained in Probate Code section 21351, subdivision (d). According to *Ligenfelter*, the following factors are indicia of undue influence: provisions of the testamentary document are unnatural, dispositions of the testamentary document are "at variance with the intentions of the decedent, expressed both before and after its execution," the relationship between the chief beneficiary and the decedent "afforded to the former an opportunity to control the testamentary act," the decedent's mental and physical condition was "such as to permit a subversion of . . . freedom of will," and the chief beneficiary was active in procuring the testamentary instrument. (*Id.* at 585. [Citations omitted.])

Natural Disposition: The court's discussion concerning the "natural objects" of Ms. Barrow's bounty in connection with the issues raised by the CIR is equally applicable here. (See above section Sorrentino Was the Natural Object of Ms. Barrow's Bounty.) The evidence of Ms. Barrow's fondness for Sorrentino is extensive. Additionally, there is little evidence that anyone else in Ms. Barrow's life was viewed by her as favorably as Sorrentino. Based on the facts, there is nothing unnatural in the disposition of Ms. Barrow's assets to Sorrentino. His relative standing was above all others in her life. She had no immediate family, did not care for her distant relatives, and appears to have had no close friends. Sorrentino was a daily or near daily presence in Ms. Barrow's life for 13 years. She trusted him. She felt close to him.

Expressed Intentions: Over the span of many years, Ms. Barrow expressed to many that Sorrentino was to receive the bulk of her estate. Ms. Barrow told O'Neill sometime between 1997 and 2000 (well before there is any evidence that her cognition was impaired) that Sorrentino was going to receive her house and the money necessary to maintain it. (It is interesting to note that in Ms. Barrow's 1997 will, she made a gift of her house in the same paragraph as a gift of her Chevron stock so that the house came with funds that could be used to maintain it. It appears that Ms. Barrow believed that the house should come with sufficient funds to maintain it. See Exhibit 3. See also Exhibit 6.) Ms. Barrow had to have told her long-time attorney Mr. Javelera that she wanted Sorrentino to have her home and Chevron stock as he reflected those desires in her 1999 will. Ms. Barrow told her long-time housekeeper "a long time ago" that Sorrentino was going to receive her house. Ms. Barrow told Mr. Freidman that she wanted Sorrentino to have the bulk of her estate.

At the time that Ms. Barrow told O'Neill that she was going to leave her house and money to maintain it to Sorrentino, Ms. Barrow also stated her intention to leave O'Neill some unspecified amount of money from the estate. Ms. Barrow's statements to O'Neill were completely consistent to the dispositional plan created in the Initial Trust Declaration.

Ms. Barrow's estate plans dating back to 1999 consistent provide the bulk of her estate to Sorrentino. Until 2007, these plans were all created with Mr. Javelera, Ms. Barrow's long-time attorney.

[Over the years, Ms. Barrow had relied upon her long-time and trusted attorney, Mr. Javelera, to draft testamentary documents. Ms. Barrow told O'Neill that Mr. Javelera was "fantastic." In 2007, however, Mr. Javelera was unavailable to assist Ms. Barrow with her estate planning efforts. Mr. Javelera was diagnosed with Parkinson's Disease in 2004. He died in May 2009. According to his son, the disease affected Mr. Javelera's cognition throughout the last couple of years of his life.]

Based on the facts, Ms. Barrow's final estate plan is consistent with her stated intentions for years. Her plan to leave the bulk of her estate to Sorrentino was nothing new and was long established.

Control: Ms. Barrow had a distinct personality. She was opinionated and strong minded. Dr. Jerge, Ms. Barrow's long-time physician described Ms. Barrow as having a mind of her own. Mr. Hodge similarly testified: "It was her world and we just lived in it."

There is no question that as Ms. Barrow aged, circumstances were ripe for Sorrentino to control Ms. Barrow. The evidence is that Ms. Barrow started suffering some cognitive decline beginning in 2005. No one, including O'Neill, testified otherwise. [To the extent Leonor Larios testified otherwise – and the court is not sure that she did as her testimony was jumbled – the court finds Ms. Larios' testimony worth very little weight as it was riddled with problems.]

There is no evidence, however, that when Ms. Barrow was represented by her long-time counsel whom she labeled "fantastic," she was controlled by anyone when she named Sorrentino as her attorney-in-fact for health care decisions, signed a written nomination as conservator, or provided the bulk of her estate to Sorrentino through her 1999 will.

The same is true of her 2002 will. Based on the witness signatures, that will was also drafted by Mr. Javelera.

Thus, while there was an opportunity for Sorrentino to control Ms. Barrow in 2007 and 2008, given the consistency in her estate planning from 1999 forward when she was not cognitively compromised in any way, it is unlikely that Sorrentino did exercise control over Ms. Barrow's estate planning.

[The court recognizes that about 10 years into Ms. Barrow's relationship with Sorrentino, Ms. Barrow began making a number of substantial gifts to Sorrentino. She paid for a tractor, a car, architectural plans, and paid his credit card bills among other things. The court has considered these gifts in the context of the undue influence claim. Ms. Barrow intended for Sorrentino to receive the bulk of her assets. Her gifts to him were consistent with that plan. As she spent down her estate, only Sorrentino would ultimately be affected.]

Mental and Physical Condition: As noted above, the earliest that Ms. Barrow may have started a cognitive decline was 2005. It is clear that the last few months of Ms. Barrow's life were cognitively impaired.

Probate Code section 810, subdivision (a) provides a rebuttable presumption that "all persons have the capacity to make decisions and to be responsible for their acts or decisions." Aside from some of Ms. Larios's problematic and unreliable testimony, there is little to suggest that Ms. Barrow did not maintain capacity until the months just before her death. While Ms. Barrow may have had some mild dementia beginning in 2005, the only medical evidence is that such mild dementia would not have impeded Ms. Barrow's ability to make intelligent decisions.

Dr. Jerge, Ms. Barrow's board certified internist physician since 1996 provided the court with a complete historical perspective of Ms. Barrow's medical needs and care. Little in his testimony suggested that Ms. Barrow had mental or physical limitations such that she was vulnerable to her free will being overcome in 2007 and in 2008 until just months before her death. (A large part of Dr. Jerge's practice includes the elderly.) Dr. Jerge's testimony was the only medical evidence before the court.

Date: November 25, 2013 DEPARTMENT 5

HONORABLE: Mitchell L. Beckloff
DEPUTY SHERIFF: NONE

S. Jimenez, DEPUTY JUDICIAL ASSISTANT
No REPORTER

BP 121262 (r/t BP 118944 and consolidated w/ BP 122107) **In re the Matter of the Bernardine Barrow Revocable Trust**	(Parties and Counsel checked if present) COUNSEL FOR PETITIONER N/A COUNSEL FOR RESPONDENT N/A

Dr. Jerge testified that Ms. Barrow overall was a "very healthy individual." He explained that "even though she was older, she had good health."

Dr. Jerge described some chronic conditions Ms. Barrow suffered from such as thyroid issues, osteoporosis and blood pressure issues. Additionally, over the years, Ms. Barrow did have some acute health episodes. For example, in May 2001, she broke her wrist and at one point after that she suffered from Bels Palsy.

In 2005, Ms. Barrow complained to Dr. Jerge about short-term memory problems. This was Ms. Barrow's first complaint about memory to Dr. Jerge. Dr. Jerge did not actually observe any memory issues with Ms. Barrow.

In June 2005, Dr. Jerge believed that Ms. Barrow was suffering from "some level of dementia." Dr. Jerge labeled the dementia as "mild." Dr. Jerge opined that Ms. Barrow's mild dementia would not impede her ability to make intelligent decisions.

In all of the years he treated Ms. Barrow, Dr. Jerge never challenged Ms. Barrow's mentation. Dr. Jerge did not quiz her.

In July 2005, Ms. Barrow suffered from hallucinations over a weekend. Ms. Barrow saw Dr. Jerge about the hallucinations. At the time Dr. Jerge saw her, he conversed with Ms. Barrow and Ms. Barrow was "fine" and "rationale." She knew that she had had hallucinations over the weekend and that the hallucinations were not real. Dr. Jerge was pleased that Ms. Barrow understood that the hallucinations were not real because if she hadn't know, Ms. Barrow's medical situation would have been more severe.

Dr. Jerge prescribed 5 milligrams of Aricept per day for Ms. Barrow on July 11, 2005.

On August 8, 2005, Ms. Barrow did not present with any signs of decreased mental functioning to Dr. Jerge. Dr. Jerge did not notice any deterioration in Ms. Barrow's functioning. If there had been a dramatic change in Ms. Barrow's baseline at that time, Dr. Jerge would have made a note of it in Ms. Barrow's chart.

On October 26, 2005, Dr. Jerge increased Ms. Barrow's prescription for Aricept to 10 milligrams a day. Dr. Jerge explained that the recommended dose for Aricept is 10

milligrams a day. Dr. Jerge had started Ms. Barrow on 5 milligrams per day for 30 to 60 days to determine how Ms. Barrow would tolerate the lower dose of medication.

On November 28, 2005, Dr. Jerge saw Ms. Barrow on an office visit. Dr. Jerge's notes indicate that Sorrentino indicated that the Aricept may have helped Ms. Barrow with her anxiety. Dr. Jerge did not note any marked decrease in capacity that day. If he had noticed such a decrease, he would have noted it in Ms. Barrow's chart.

On March 20, 2006, Dr. Jerge saw Ms. Barrow for an annual physical. He did not make any notations in her chart related to Ms. Barrow's mental functioning. He did not give Ms. Barrow any testing that day related to capacity. If Dr. Jerge had observed any capacity issues with Ms. Barrow, he would have noted it on her chart.

On January 15, 2007, Ms. Barrow told Dr. Jerge that she was having trouble with her memory. Dr. Jerge did not observe any capacity issues on that visit as if he had, he would have noted it in her chart. The examination that day took 30 to 45 minutes. (They discussed different subjects that day but did not discuss Ms. Barrow's will.)

On April 4, 2007, Ms. Barrow told Dr. Jerge that she was having recent memory problems (i.e. short term). Dr. Jerge believed that Ms. Barrow's responses to his conversation with him were appropriate during the visit.

On June 18, 2007, Dr. Jerge saw Ms. Barrow for a rash. On that visit, there was no discussion of memory issues and Dr. Jerge did not note any. Had he observed any memory issues, he would have noted it in her chart.

Dr. Jerge believed that Ms. Barrow's "mild cognitive deficits" until three months before her death would not have interfered with Ms. Barrow's decision-making ability.

On January 14, 2008, Dr. Jerge saw Ms. Barrow. The examination lasted 30 to 40 minutes. Dr. Jerge did not note any change in Ms. Barrow's mental functioning. Dr. Jerge did not observe anything at that time that would have affected her ability to make a decision.

On March 6, 2008, Ms. Barrow saw Dr. Jerge. Dr. Jerge did not note any decline in mental functioning.

Dr. Jerge explained that during any of his examinations of Ms. Barrow, if there was "no significant deterioration from baseline," he would not have made any note in her chart; there would be nothing to record. Thus, the doctor would have noted any significant changes he observed in Ms. Barrow during his examinations.

O'Neill testified that she did not note any decline in Ms. Barrow's mental acuity prior to 2005. In 2005, O'Neill thought that Ms. Barrow started to suffer cognitive decline because she didn't see any puzzles in Ms. Barrow's home. O'Neill also based her belief of Ms. Barrow's failure to take O'Neill through her whole house when O'Neill visited in 2005.

Active Procurement: Sorrentino's actions in connection with the Initial Trust Declaration establish that he had the opportunity to influence Ms. Barrow. He referred Ms. Barrow to Mr. Botti, obtained the estate planning workbook for her to fill out, he filled out the booklet albeit at Ms. Barrow's direction, and he drove Ms. Barrow to Mr. Botti's office to sign the Restatement and 2008 Will.

Sorrentino argues that *Estate of Watkins* (1947) 81 Cal.App.2d 465, 475 provides that Sorrentino did not actively procure the Initial Trust Declaration. While *Estate of Watkins* supports Sorrentino's claim, as in *Estate of Watkins*, at a minimum, his actions were sufficient to establish the opportunity to influence Ms. Barrow.

Considering all of the factors enunciated in *Estate of Lingenfelter, supra,* 38 Cal.2d at 571 and the evidence received the by court, the court finds by clear and convincing evidence (i.e., that it is highly probable) that Ms. Barrow's Initial Trust Declaration and 2007 Will are not the product of undue influence and that the estate planning documents are consistent with her own free will and choice.

[There is no real claim that Ms. Barrow's estate planning documents are the product of fraud, menace or duress. O'Neill's petition set forth as Pleading 3 in the JTS raises the issue of undue influence (para. 7) and prohibited transferee (para. 3). O'Neill and DeMille's petition set forth as Pleading 5 in the JTS is similar and discusses elder abuse.

Nothing in the facts adduced at trial suggests Duress (Civ. Code sec. 1569), Menace (Civ. Code sec. 1570), or Fraud (Civ. Code secs. 1571-1573). As noted earlier, the terms are largely subsumed within the analysis of the undue influence claim.]

The Testamentary Transfers Were Not the Result of Undue Influence

O'Neill and Sorrentino disagree whether O'Neill can assert a claim of undue influence where the court has determined that a valid CIR exists. The court agrees with O'Neill as Probate Code section 21350 "supplements the common law doctrine" related to undue influence. (*Bernard v. Foley* (2006) 39 Cal.4th 794, 800.)

Civil Code section 1575 defines undue influence. "Undue influence consists: 1. In the use, by one in whom a confidence is reposed by another, or who holds a real or apparent authority over him, of such confidence or authority for the purpose of obtaining an unfair advantage over him; 2. In taking an unfair advantage of another's weakness of mind; or 3. In taking a grossly oppressive and unfair advantage of another's necessities or distress."

In the context of testamentary dispositions, undue influence can result in a will or portions thereof being set aside. (See Prob. Code sec. 6104.) "In order to set aside a will on grounds of undue influence, '[e]vidence must be produced that pressure was brought to bear directly on the testamentary act . . . . Mere general influence . . . is not enough; it must be influence used directly to procure the will and must amount to *coercion* destroying free agency on the part of the testator.' . . . There must be proof of '"a pressure which overpowered the mind and bore down the volition of the testator at the very time the will was made."'" (*Estate of Mann* (1986) 184 Cal.App.3d 593, 606 [citations omitted].)

In the context of a challenge to a testamentary disposition, a party challenging the validity of a testamentary document ordinarily bears the burden of proving the document's invalidity. (Will substitutes such as revocable *inter vivos* trusts and allegations of undue influence are governed by the same principles as wills. *See* (2006) CEB Cal. Trust and Probate Litigation sec. 6.23 pp. 137-138.)

Where undue influence is alleged, however, a presumption of undue influence arises where "(1) the person alleged to have exerted undue influence had a confidential relationship with the testator; (2) the person actively participated in procuring the

instrument's preparation or execution; and (3) the person would benefit unduly by the testamentary instrument." (*Rice v. Clark*, *supra,* 28 Cal.4th at 97.) This presumption shifts the burden of proof to the will proponent who must demonstrate by a preponderance of the evidence that the testamentary document was freely made. (*Estate of Mann, supra*, 184 Cal.App.3d at 606.)

Confidential Relationship: A confidential relationship is grounded in trust. "It is not confined to any specific association of parties. It appears when the circumstances make it certain that the parties do not deal on equal terms, but on one side there is an overmastering influence, or, on the other, weakness, dependence, or trust, justifiably reposed. The mere existence of kinship does not, of itself, give rise to such relation. It covers every form of relation between parties wherein confidence is reposed by one in another, and former relies and acts upon representations of the other and is guilty of no derelictions on his own part." (Black's Law Dictionary, 6th ed., p. 298 ["confidential relation"]).

There is no question that Sorrentino had a confidential relationship with Ms. Barrow. Ms. Barrow trusted Sorrentino and relied upon him. There is substantial evidence that Ms. Barrow had a strong fondness for Sorrentino. In fact, she told her friend that an angel sent him to her.

Procurement of the Estate Planning Documents: While the court concedes that *Estate of Watkins*, *supra*, 81 Cal.App.2d at 475 supports Sorrentino's claim that he did not actively procure the Initial Trust Declaration and Restatement, the court finds otherwise for purposes of this analysis. Sorrentino referred Ms. Barrow to Mr. Botti, obtained the estate planning workbook for her to fill out, he filled out the booklet albeit at Ms. Barrow's direction, and he drove Ms. Barrow to Mr. Botti's office to sign the Restatement and 2008 Will.

Unnatural Disposition/Undue Benefit: The "undue benefit requirement involves a qualitative analysis. [Citation omitted.]" (*Estate of Auen* (1994) 30 Cal.App.4th 300, 311.) In considering undue benefit, the particular circumstances surrounding the disposition must be examined. Undue benefit can be described as "'something that's unwarranted, excessive, inappropriate, unjustifiable or improper.'" (*Ibid.* [quoting *Estate of Sarabia* (1990) 221 Cal.App.3d 599, 604].)

"To determine if the beneficiary's profit is 'undue' the trier must necessarily decide what profit would be 'due.' These determinations cannot be made in an evidentiary vacuum. The trier of fact derives from the evidence introduced an appreciation of the respective relative standings of the beneficiary and the contestant to the decedent in order that the trier of fact can determine which party would be the more obvious object of the decedent's testamentary disposition. That evidence may include dispositional provisions in previous wills executed by the decedent . . . or past expressions of the decedent's testamentary intentions. . . . It may also encompass a showing of the extent to which the proponent would benefit in the absence of the challenged will." (*Estate of Sarabia* (1990) 221 Cal.App.3d 599, 607 [citations omitted].)

The court's analysis throughout has discussed the relative standing of Sorrentino, O'Neill and DeMille. As for DeMille, Ms. Barrow complained about him. Ms. Barrow did not like her family and wanted nothing to do with them. In estate plans dating back to 1997, Ms. Barrow never provided for DeMille or any other relative. Given their relative standing with Ms. Barrow, as between DeMille and Sorrentino, nothing suggests that DeMille is "the more obvious object of" Ms. Barrow's testamentary disposition. In fact, the converse is true. Unlike DeMille, Ms. Barrow had a long standing relationship with Sorrentino marked with warmth and fondness.

Certainly, there is more to consider with O'Neill and Sorrentino. Nonetheless, as discussed above, Sorrentino is the more obvious object of Ms. Barrow's testamentary disposition. The court incorporates by reference its earlier discussion related to the "natural object" of Ms. Barrow's bounty. (See above section Sorrentino Was the Natural Object of Ms. Barrow's Bounty.)

Further, Ms. Barrow's estate plan going back to 1999, well before there is any evidence of any cognitive impairment, establishes that she desired for Sorrentino to take the bulk of her estate. Even in the 1997 will which O'Neill seeks to admit to probate, O'Neill did not receive the bulk of Ms. Barrow's estate. Instead, she was a third alternate beneficiary of the house and Chevron stock as well as the residuary beneficiary.

Thus, O'Neill and DeMille have failed to shift the burden of proof to Sorrentino to demonstrate that the gifts under Ms. Barrow's estate plan were not the result of undue

influence. Moreover, had O'Neill and DeMille been successful at shifting to Sorrentino the burden of demonstrating that the gifts under the estate plan were not the result of undue influence, he successfully met his burden. (See above section Clear and Convincing Evidence Exists That the Transfer Was Not the Product of Fraud, Menace, Duress or Undue Influence.)

O'Neill and DeMille Have Not Provided Any Evidence That the Testamentary Transfers Were the Result of Fraud, Menace or Duress

As noted above, the claims of fraud, menace and duress have largely been subsumed within the court's consideration of undue influence.

Based on the foregoing, the court finds that the Initial Trust Declaration and Restatement are valid.

[The dispositional provisions of the Initial Trust Declaration and the Restatement are identical. The only changes Ms. Barrow made in the Restatement related to provisions concerning the successor trustees of her trust. As Sorrentino in able and willing to act as successor trustee and has been doing so, the changes in the Restatement are of no consequence.

Probate Code section 21350 only applies to donative transfers. The changes made in the Restatement would not have required a CIR. To the extent it could be argued that Probate Code section 21350 did apply, the court would find that Sorrentino is entitled to the exemption contained in Probate Code section 21351, subd. (d). (See section above Clear and Convincing Evidence Exists That the Transfer Was Not the Product of Fraud, Menace, Duress or Undue Influence.)]

3. Whether O'Neill violated the No-Contest clause in the 2007 Initial Trust Declaration and the 2008 Restatement.

O'Neill's challenge to the Initial Trust Document and Restatement based on Probate Code section 21350 did not violate the No-contest clause of the instruments. (*Graham v. Lenzi* (1995) 37 Cal.App.4th 248, 255.) Instead, the challenge under that section is a "means of enforcing a specific statutory mandate." (*Ibid.*)

O'Neill's other challenges, however, constituted a direct contest thereby invoking the No-contest clause contained in Article 2, Section B of both the Initial Trust Declaration and the Restatement. (Prob. Code sec. 21310, subd. (b).)

Probate Code section 21311, subd. (a)(1) provides that "[a] no contest clause shall only be enforced against the following types of contests: A direct contest that is brought without probable cause."

Probate Code section 21311, subd. (b) provides: "For the purposes of this section, probable cause exists if, at the time of filing a contest, the facts known to the contestant would cause a reasonable person to believe that there is a reasonable likelihood that the requested relief will be granted after an opportunity for further investigation or discovery."

According to the Law Revision Commission Comments to Probate Code section 21311, "The term 'reasonable likelihood' has been interpreted to mean more than merely possible, but less than 'more probable than not.'" The Commission also references two criminal cases to clarify the standard: *Alvarez v. Superior Court* (2007) 154 Cal.App.4th 642, 653 n.4 and *People v. Proctor* (1992) 4 Cal.4th 499, 523. Both cases use language similar to that in the Commission's comment. Another case, *Plumley v. Mockett* (2008) 164 Cal.App.4th 1031, 1047 in a civil context provides: "Probable cause is a low threshold designed to protect a litigant's right to assert arguable legal claims even if the claims are extremely unlikely to succeed."

The court finds that O'Neill had probable cause to bring her direct contest to the Initial Trust Declaration and the Restatement and therefore she did not violate the relevant No-contest clause.

O'Neill had a number of reasons to be suspicious of Sorrentino's involvement with Ms. Barrow's estate planning documents. After Ms. Barrow's death, his behavior was unfortunate and difficult. His reference to O'Neill as "Honey" and thrice declaring he "had all the power" reasonably created immediate distrust.

O'Neill requested information from Sorrentino and he "flew into a rage." O'Neill questioned Sorrentino and he hung up on her.

From O'Neill's perspective, she knew that Ms. Barrow had hallucinations in 2005. O'Neill had her own belief that Ms. Barrow's mental acuity declined beginning in 2005. O'Neill knew from Sorrentino that as of 2005, Ms. Barrow had trouble using her address book and could not dial the phone.

O'Neill had also heard Sorrentino say, "See I told you so," when O'Neill was unable to visit.

Probable cause is a low threshold. The relevant facts, as O'Neill understood them, provided her with probable cause to bring her direct contest to the estate planning documents.

4. Whether the gifts to Sorrentino under the 2007 Initial Trust Declaration and the 2008 Restatement are invalid under the Probate Code section 21350.

a. Was a valid Certificate of Independent Review under Probate Code section 21351(b) obtained?

b. Were the gifts the product of fraud, menace, duress or undue influence? Sorrentino contends that this issue is only relevant if a valid Certificate of Independent Review was not obtained; O'Neill contends that it also is relevant if a valid Certificate of Independent Review was obtained.

The gifts under the Initial Trust Declaration and Restatement are not invalid. Ms. Barrow obtained a valid CIR. The gifts were not the result of fraud, menace, duress or undue influence.

See discussion above for Contested Issue 2: The validity of the 2007 Initial Trust Declaration and the 2008 Restatement.

5. Whether the 2007 Initial Trust Declaration and the 2008 Restatement were the product of undue influence.

The Initial Trust Declaration and Restatement were not the product of undue influence.

Date: November 25, 2013 DEPARTMENT 5

HONORABLE: Mitchell L. Beckloff DEPUTY SHERIFF: NONE	S. Jimenez, DEPUTY JUDICIAL ASSISTANT No REPORTER
BP 121262 (r/t BP 118944 and consolidated w/ BP 122107) **In re the Matter of the Bernardine Barrow Revocable Trust**	(Parties and Counsel checked if present) COUNSEL FOR PETITIONER N/A COUNSEL FOR RESPONDENT N/A

See discussion above for Contested Issue 2: The validity of the 2007 Initial Trust Declaration and the 2008 Restatement.

6. Whether the gifts to Sorrentino under the 2007 Initial Trust Declaration and the 2008 Restatement are invalid under the Probate Code section 21350.

The gifts to Sorrentino under the Initial Trust Declaration and the Restatement are not invalid under Probate Code section 21350.

See discussion above for Contested Issue 2: The validity of the 2007 Initial Trust Declaration and the 2008 Restatement.

7. Was a valid Certificate of Independent Review under Probate Code section 21351(b) obtained?

Ms. Barrow obtained a valid CIR.

See discussion above for Contested Issue 2: The validity of the 2007 Initial Trust Declaration and the 2008 Restatement.

8. If a valid Certificate of Independent Review was not obtained, were the gifts the product of fraud, menace, duress or undue influence? Sorrentino contends this issue only is relevant if a valid Certificate of Independent Review was not obtained; DeMille contends that it also is relevant if a valid Certificate of Independent Review was obtained.

The gifts were not the product of fraud, menace, duress or undue influence.

See discussion above for Contested Issue 2: The validity of the 2007 Initial Trust Declaration and the 2008 Restatement.

Date: November 25, 2013 DEPARTMENT 5

HONORABLE: Mitchell L. Beckloff DEPUTY SHERIFF: NONE	S. Jimenez, DEPUTY JUDICIAL ASSISTANT No REPORTER
BP 121262 (r/t BP 118944 and consolidated w/ BP 122107) **In re the Matter of the Bernardine Barrow Revocable Trust**	(Parties and Counsel checked if present) COUNSEL FOR PETITIONER N/A COUNSEL FOR RESPONDENT N/A

ORDERS RELATED TO THE PETITIONS IN ISSUE

1. While the parties have deferred on the issue of O'Neill's Probate Petition, in this order the court is admitting the 2008 Will to probate. Thus, as a matter of law, the 1997 will cannot be admitted to probate. No legal reason exists to delay decision on the 1997 will. Accordingly, O'Neill's Probate Petition is DENIED and Sorrentino's objections thereto are SUSTAINED.

Pursuant to Probate Code section 1002, costs are awarded to Sorrentino.

2. The Sorrentino Probate Petition is GRANTED IN PART. The 2008 Will is admitted to Probate. Consistent with the JTS, the balance of the petition (i.e., appointment of an administrator) is deferred.

Pursuant to Probate Code section 1002, costs are awarded to Sorrentino.

3. The O'Neill Petition is DENIED. The Sorrentino O'Neill Objections are SUSTAINED.

Pursuant to Probate Code section 1002, costs are awarded to Sorrentino.

4. The Sorrentino Petition is GRANTED IN PART. JTDs 1-4 are GRANTED. JTDs 5-8 (relating to the No-contest clause issue) are DENIED. The O'Neill Sorrentino Objections are DENIED.

Pursuant to Probate Code section 1002, costs are awarded to Sorrentino.

5. The DeMille Petition is DENIED except as to JTD 1 (relating to Ms. Barrow's status as a dependent adult from at least December 6, 2007). JTD 1 is GRANTED. The Sorrentino DeMille Objections are SUSTAINED.

Pursuant to Probate Code section 1002, costs are awarded to Sorrentino and Debra Sorrentino.

SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

Date: November 25, 2013 DEPARTMENT 5

HONORABLE: Mitchell L. Beckloff DEPUTY SHERIFF: NONE	S. Jimenez, DEPUTY JUDICIAL ASSISTANT No REPORTER
BP 121262 (r/t BP 118944 and consolidated w/ BP 122107) **In re the Matter of the Bernardine Barrow Revocable Trust**	(Parties and Counsel checked if present) COUNSEL FOR PETITIONER N/A COUNSEL FOR RESPONDENT N/A

A copy of this minute order is sent by the Clerk by way of First-Class Mail as follows:

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CERTIFICATE OF MAILING

I am over the age of 18 years and not a party to the within action. I am familiar with the Los Angeles Superior Court practice for collection and processing of correspondence and know that such correspondence is deposited with postage prepaid with the United States Postal Service the same day it is delivered to the mailroom in the Los Angeles Superior Court. I declare under penalty of perjury under the laws of the State of California that I delivered a true copy of the document to which this is attached to the parties or their attorney addressed as listed above by placing the copy in a sealed envelope to the mail room of this court.

Date: November 25, 2013

Sherri R. Carter, Executive Officer/
Clerk of the Superior Court of California,
County of Los Angeles.

by: S. Jimenez, Deputy Clerk

Minutes Entered:

Filed 9/24/15

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

Estate of BERNARDINE BARROW, Deceased.	B253958 (Los Angeles County Super. Ct. No. BP121262, BP118944)
KAREN L.G. O'NEILL et al., Petitioners and Appellants, v. RICHARD SORRENTINO, Objector and Respondent.	
RICHARD SORRENTINO, Petitioner and Respondent, v. KAREN L.G. O'NEILL et al., Objectors and Appellants.	B253958 (Los Angeles County Super. Ct. No. BP121262, BP118944)

APPEAL from an order of the Superior Court of Los Angeles County, Mitchell L. Beckloff, Judge. Affirmed.

Balisok & Associates, Russell S. Balisok; Beltran, Beltran, Smith, Oppel & Mackenzie and Thomas E. Beltran for Petitioners, Claimants and Appellants Karen L.G. O'Neill and Allan B. DeMille.

Loeb & Loeb, David C. Nelson, Gabrielle A. Vidal and Amy L. Koch for Claimant, Petitioner and Respondent Richard Sorrentino.

This case concerns the deceased Ms. Bernardine Barrow (Barrow) and specifically who will receive the bulk of her estate: a house worth millions of dollars as well as substantial stock holdings. The possible contenders are: (1) Richard Sorrentino (Sorrentino), who was initially hired by Barrow for some construction work for the house and then over 13 years became her closest and most trusted friend and caretaker, (2) Karen O'Neill (O'Neill), who Barrow met while vacationing and talked with on the phone frequently but drifted from after 30 years, or (3) Allan DeMille (DeMille), a distant relative with whom Barrow had not spoken in many decades and about whom Barrow frequently complained. The trial court found for Sorrentino, specifically that Barrow's December 6, 2007 declaration of trust (2007 Trust), July 16, 2008 restated amendment to Bernardine Barrow revocable trust dated December 6, 2007 (2008 Restatement), and July 16, 2008 last will and testament (2008 Will), are all valid and not the product of undue influence by Sorrentino. O'Neill and DeMille appeal. We affirm.

BACKGROUND

I. Facts of the case

At her death in 2008, Barrow was a widow and had no surviving parents. She had no close friends. She had distant relatives but did not like or want anything to do with them. She had no interaction with her family and felt they had taken advantage of her. For example, DeMille is a first cousin, once removed, and had no contact with Barrow for many decades before she died. DeMille was one of many relatives about whom Barrow complained. The chronology below discusses how Barrow met O'Neill and Sorrentino as well as key facts concerning Barrow's health and estate planning efforts.

In 1978, Barrow (then age 62) and her husband met O'Neill (age 22) and her husband while vacationing in Yosemite. O'Neill and her husband worked at the hotel where the Barrows lodged. The four socialized together during the O'Neill's off hours. Over the years, Barrow sent gifts to O'Neill and her family.

In 1995, Barrow (age 77) hired Sorrentino to complete some construction work on her house. After completion of that project, he continued to work on other construction projects as requested by Barrow and assumed increasing responsibilities for daily personal tasks such as retrieving packages and carrying in groceries. Eventually, he became a salaried employee for house maintenance as well as a personal assistant and thus was responsible for managing and hiring other employees in the house (such as the housekeeper, gardener, and caregivers), obtaining personal items such as medicine, dry cleaning, and groceries, and driving Barrow to appointments. For the next 13 years until her death, Sorrentino was in Barrow's life on a near daily basis. Sorrentino took good care of Barrow; he was not only her employee but also her friend.

In 1996, Dr. Terry Jerge (a board certified internist with a large portion of his practice treating the elderly) began treating Barrow. He found her proactive in her medical care and in good health.

Sometime in 1996 or 1998, Barrow was involved in a car accident. The accident did not injure Barrow in any way.

In 1997, Barrow provided in her will that her home and substantial Chevron stock holdings (the bulk of her estate) would pass to Mr. and Mrs. Linn T. Hodge III, her insurance agent and friend, but if they were both deceased then to O'Neill. The remaining items (e.g., a car, $25,000, personal property) were left to O'Neill. Barrow did not leave anything to DeMille.

In 1998, Barrow nominated Sorrentino as her attorney-in-fact for health care decisions. She also nominated him as her conservator.

In 1999, Barrow executed a will providing the bulk of her estate to Sorrentino. Barrow did not provide in her will that O'Neill would receive any substantial gifts.

Barrow did not leave anything to DeMille. Consistent with that will, sometime between 1997 and 2000, Barrow told O'Neill that Sorrentino was going to receive the bulk of her estate. All wills after this date continued to leave the bulk of Barrow's estate to Sorrentino.

In 2001, Barrow broke her wrist and thereafter had trouble writing. Thus, she began having some physical limitations.

In 2002, Barrow again executed a will that gave the bulk of her estate to Sorrentino. Barrow did not leave anything to DeMille.

In 2004, O'Neill visited Barrow for an afternoon. O'Neill and Barrow never lived in the same city, and, while O'Neill visited Barrow at least four times, Barrow never visited O'Neill in return. O'Neill and Barrow did speak on the phone about every two weeks until Barrow's death.

In 2005, Barrow started complaining to Dr. Jerge about some memory problems. In June, Dr. Jerge opined that Barrow was suffering from "some level of dementia" but that this mild dementia would not have been so serious as to impede Barrow's ability to make intelligent decisions. In July, Barrow suffered from hallucinations over a weekend and spoke to Dr. Jerge about them. She knew that the hallucinations were not real; Dr. Jerge concluded that Barrow was "fine" and "rationale." He prescribed Barrow with Aricept. Also in 2005, O'Neill visited Barrow for a few hours (visit No. 2). Also around 2005, Barrow began making a number of substantial gifts to Sorrentino, including a tractor, a car, architectural plans, and paying his credit card bills, which may have been work-related expenses.

The wills and trusts at issue in this case were executed in 2007 and 2008. Barrow was 89 years old in 2007. Barrow executed at least 10 trusts and wills: the first six drafted by attorney Lambert Michael Javelera (Javelera) from 1997 to 2006,[1] and the last

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[1] June 11, 1997 will (1997 Will), April 19, 1998 will, January 17, 1999 codicil, February 7, 1999 will, January 5, 2002 will, and April 6, 2006 codicil.

four drafted by attorney Christopher Botti (Botti) from 2007 to 2008.[2] The new attorney took over because Javelera had health issues that made him unavailable. Sorrentino referred Barrow to Botti.

In December 2007, Barrow again left the bulk of her estate to Sorrentino, specifically, in the 2007 Trust and a 2007 will, prepared by Botti. Barrow did not leave anything to DeMille. Botti's law partner, Paul Morrison, contacted an old college friend, attorney Seth Friedman, to interview Barrow and prepare a certificate of independent review (CIR). Friedman met with Barrow two months after she executed the 2007 Trust. Only Friedman and Barrow were in the room when they discussed the 2007 Trust. The counseling session lasted 60 to 90 minutes. After meeting with Barrow, Friedman drafted and executed the CIR. He billed Barrow $750 for his services.

In 2008, Barrow executed the 2008 Restatement and 2008 Will, again leaving the bulk of her estate to Sorrentino. Barrow did not leave anything to DeMille. Also in 2008, O'Neill visited Barrow (visit No. 4). Unlike the other three visits, this one lasted two nights. Sorrentino suggested some alone time for the two women, but Barrow emphatically said no. Toward the end of 2008, Barrow was cognitively impaired. On December 23, Barrow passed away at age 90.

II. Procedural history

Several petitions were filed before the trial court. O'Neill and Sorrentino each filed separate petitions to admit to probate Barrow's 1997 Will and 2008 Will, respectively, in case No. BP118944. O'Neill and Sorrentino then each filed separate petitions to determine the validity of the 2007 Trust, in case No. BP121262. The trial court related the two cases and heard them together.

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[2] 2007 Trust, December 6, 2007 will (2007 Will), 2008 trust, and 2008 Will.

The trial court held a bench trial and heard testimony from several witnesses, including Sorrentino, Dr. Jerge, Botti, Friedman, Javelera's son (Javelera passed away in 2009), Mr. Hodge, and O'Neill.

In an organized and comprehensive opinion, the trial court explained its findings. Probate Code former section 21350[3] presumptively prohibits donative transfers from a dependent adult to her care custodian, such as the 2007 Trust and 2008 Restatement. But, the trial court found two exceptions in former section 21351 apply to remove that presumption: subdivision (b), because Friedman provided a valid CIR, and subdivision (d), because it found clear and convincing evidence that the donative transfers were not the product of undue influence. The trial court also decided that even though it already found the statutory exception applies, it would proceed to determine whether there was undue influence under common law; on that issue, the trial court concluded O'Neill and DeMille had failed to meet their burden of proof. The trial court also found that Sorrentino was not the transcriber of the 2007 and 2008 wills and trusts.

O'Neill and DeMille then filed a request for a statement of decision. Sorrentino responded. The trial court issued a statement of decision, adopted Sorrentino's response as the court's response to O'Neill and DeMille's objections, and deemed its tentative ruling to be the statement of decision.

DISCUSSION

I. Substantial evidence supports the trial court's finding that there is clear and convincing evidence of no undue influence.

A. Standard of review

If, on the entire record, there is substantial evidence to support the finding of the probate court, we uphold those findings. (*Estate of Odian* (2006) 145 Cal.App.4th 152, 167.) We do not pass on the credibility of witnesses, attempt to resolve conflicts in the evidence, or evaluate the weight of the evidence. (*Id.* at p. 168.) Rather, we draw all

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[3] All further statutory references are to the Probate Code unless otherwise indicated.

reasonable inferences in support of the findings, view the record most favorably to the probate court's order, and affirm even if other evidence supports a contrary conclusion. (*Estate of Young* (2008) 160 Cal.App.4th 62, 76.) Appellants have the burden of showing there is *no* substantial evidence supporting the probate court's order.

B. Applicable Probate Code sections

Former sections 21350 and 21351 provide the legal framework for this case. Former section 21350 presumptively prohibits a dependent adult (such as Barrow in 2007 and 2008) from making a donative transfer (such as the 2007 and 2008 wills and trusts at issue) to her care custodian (such as Sorrentino). But there are several exceptions, recited in former section 21351. Under subdivision (b), the transferor can obtain a CIR. Under subdivision (d), a court can determine upon clear and convincing evidence that the transfer was not the product of undue influence.

C. Substantial evidence supports the trial court's finding no undue influence

Here, the record shows substantial evidence to support the trial court's finding of no undue influence. In a well-reasoned opinion, the trial court explained that it relied on testimony from Dr. Jerge, Mr. Hodge, Friedman, Barrow's long-time housekeeper, Javelera's son, Sorrentino, and even O'Neill, plus stipulated facts from the parties and documentary evidence.

First, there is substantial testimony from essentially all the key witnesses (Dr. Jerge, Friedman, Mr. Hodge, and Sorrentino) that Sorrentino provided excellent care to Barrow, that Barrow and Sorrentino were close friends, and that Sorrentino was in Barrow's life on a near daily basis for the last 13 years of Barrow's life. That testimony is confirmed in documents such as Ms. Hodge's note to Sorrentino after Barrow died, which recites that Sorrentino provided "wonderful care" for Barrow. Other supporting documentary evidence includes legal documents in which Barrow nominated Sorrentino as her conservator and her attorney-in-fact for health care decisions in 1998, long before Barrow had cognitive issues.

In addition, there is substantial testimony from witnesses (Friedman, Javelera, Barrow's long-time housekeeper, and even O'Neill) that Barrow repeatedly expressed her intent to gift the bulk of her estate to Sorrentino. That testimony is confirmed in documents such as Barrow's 1999 and 2002 wills executing that intent.

Further, the only medical evidence before the trial court was Dr. Jerge's testimony. He opined that Barrow had no memory problems until 2005 and, even then, the mild dementia would not impede her ability to make intelligent decisions. Dr. Jerge opined that it was not until three months before her death that Barrow's decisionmaking ability was impaired. That testimony is confirmed in documents, specifically his contemporaneous notes describing Barrow's mental and physical health. Even testimony from O'Neill confirmed that there was no decline in Barrow's mental acuity until 2005. The trial court noted that even by that point, Barrow had already executed wills providing the bulk of her estate to Sorrentino (in 1999 and 2002).

Second, in contrast to Sorrentino, DeMille was not involved in Barrow's life. The parties stipulated that DeMille had no contact with Barrow for many decades. Even O'Neill testified that DeMille was one of many relatives about whom Barrow complained. Generally, several witnesses (Mr. Hodge, Sorrentino, and O'Neill) testified that Barrow did not like and had no interaction with her family.

Third, while O'Neill may have had a closer relationship to Barrow than DeMille, she was not as close to Barrow as Sorrentino. The trial court relied on O'Neill's own testimony that she only visited four times in four years, the visits did not last long, and during the last visit Barrow refused to spend alone time with O'Neill.

D. The testimony of trial witness Friedman, who the trial court found credible, can be substantial evidence supporting the trial court's decision.

O'Neill and DeMille argue at length that the trial court erred in relying on Friedman's testimony *for any purpose*. But, O'Neill and DeMille are essentially asking this court to reassess Friedman's credibility. That is not our role. A party's "lengthy arguments as to the credibility and effect of the testimonies" of witnesses "are not

appropriately addressed to this court"; "[t]he trier of fact was the exclusive judge of those matters." (*Brewer v. Simpson* (1960) 53 Cal.2d 567, 587.) "[T]he testimony of a witness whom the trier of fact believes, whether contradicted or uncontradicted, is substantial evidence, and we must defer to the trial court's determination that these witnesses were credible." (*Estate of Odian*, *supra*, 145 Cal.App.4th at p. 168.) Here, the trial court was entitled to credit entirely Friedman's testimony and discredit entirely any witness testimony proffered by O'Neill and DeMille. This problem—seeking an appellate court to perform the role of a trial court—runs throughout appellants' briefs and is the crux (and downfall) of its appeal.

E. Trial court can consider Barrow's 1997 and 1999 wills giving the bulk of her estate to Sorrentino and Barrow's statements that she intended the same

O'Neill and DeMille argue that the trial court erred in considering certain evidence of Barrow's actions (which the trial court found as showing Barrow intended to give the bulk of her estate to Sorrentino) because those actions, according to O'Neill and DeMille, were also the product of undue influence by Sorrentino. Specifically, (a) Barrow's 1997 and 1999 wills (in which, like the 2007 and 2008 wills and trust at issue, Barrow also gave the bulk of her estate to Sorrentino) and (b) Barrow's statements that she intended to give the bulk of her estate to Sorrentino.

1. 1997 and 1999 wills

O'Neill and DeMille's arguments are contradictory to Sorrentino's argument as to how the trial court should consider this evidence. Specifically, though all parties agree the former section 21350 presumption against a donative transfer from a "dependent adult" to her care custodian would apply to the 2007 and 2008 wills, they disagree as to the 1997 and 1999 wills. O'Neill and DeMille argue Barrow was a "dependent adult" due to her age of 77 and because she gave substantial gifts to Sorrentino. Sorrentino argues Barrow was not a "dependent adult" because Barrow did not have any physical limitations until she broke her wrist in 2001 nor cognitive decline until 2005.

The issue is not one of admissibility, as O'Neill and DeMille stipulated the documents could enter into evidence before the trial court, and they made no objection during trial. Instead, the issue is one of weight, and the trial court has complete discretion to credit (or discredit) this evidence. (See *Estate of Odian*, *supra*, 145 Cal.App.4th at p. 167.) The trial court found Sorrentino's argument more persuasive. Substantial evidence supports that finding, such as Dr. Jerge's medical testimony and notes, which the trial court pointed to.

2. Barrow's statements

O'Neill and DeMille argue the trial court should not have found credible the testimony from Sorrentino, Friedman, and even O'Neill, that Barrow told each of them she planned on giving the bulk of her estate to Sorrentino. Assessing the credibility of witness testimony is the role of the trial court. (See *Estate of Odian*, *supra*, 145 Cal.App.4th at p. 168.) Thus, the trial court was entitled to credit their testimony.

Further, O'Neill and DeMille argue that former section 21351, subdivision (d) precludes the trial court from considering Sorrentino's testimony *at all*. They misread the code provision, which only precludes the trial court from "solely" relying on the testimony of Sorrentino. Here, the trial court also relied on the testimony of Friedman, O'Neill, and Barrow's long-time housekeeper. The trial court expressly recognized that it was not solely relying on Sorrentino's testimony, in light of the Probate Code prohibition.

F. Trial court can consider Barrow's substantial gifts to Sorrentino as consistent with Barrow's later gift of the bulk of her estate to him.

O'Neill and DeMille argue the trial court failed to consider Barrow's substantial gifts to Sorrentino as evidence of undue influence. But, the trial court did, in fact, consider this evidence. Specifically, the trial court concluded these gifts did not show undue influence because were Barrow to gift the bulk of her estate to Sorrentino then only Sorrentino would ultimately be affected as Barrow spent down her estate with substantial gifts to him. While O'Neill and DeMille argue the trial court should have

come to a different conclusion, as an appellate court, we do not reweigh the evidence. (See *Estate of Odian*, *supra*, 145 Cal.App.4th at p. 168.)

G. Trial court can consider Sorrentino the natural object of Barrow's bounty.

O'Neill and DeMille argue that Sorrentino cannot be the natural object of Barrow's bounty for two reasons: (i) Sorrentino had undue influence on Barrow and (ii) only a descendent, surviving spouse, or parent can be the natural object of one's bounty. O'Neill and DeMille's first argument assumes the conclusion and therefore is rejected. As to their second argument, they cite *Estate of Nolan* (1938) 25 Cal.App.2d 738, but that case contains no bright-line rule that nonrelatives can never become the natural object of one's bounty. Instead, *Nolan* only concerned relatives: a beneficiary who was a cousin and contestants who were nephews and nieces. (*Id.* at p. 740.) *Nolan* merely explained that descendents, spouse, and parents, are assumed to be such "natural objects," merely by the close relationship, but that collateral heirs such as siblings and nephews or nieces, at least based on such relationship alone, are not so assumed. (*Id.* at p. 742.) Thus, we also reject O'Neill and DeMille's second argument.

H. Trial court's finding under the common law is also affirmed.

Because we decide there is sufficient evidence to support the trial court's finding of clear and convincing evidence of no undue influence, we do not reach O'Neill and DeMille's alternative arguments as to whether there was sufficient evidence of no undue influence under the common law. The statute supplements the common law. (*Bernard v. Foley* (2006) 39 Cal.4th 794, 800.) Thus, clear and convincing evidence of no undue influence satisfies both former section 21351, subdivision (d) and the common law.

II. O'Neill and DeMille's other arguments are moot

An appeal is moot when it is """"impossible for this court, if it should decide the case in favor of plaintiff, to grant any effectual relief whatever."""" (*City of Los Angeles v. County of Los Angeles* (1983) 147 Cal.App.3d 952, 958.)

A. O'Neill and DeMille's argument on former section 21351, subdivision (b)

Because we agree with the trial court that the exception in subdivision (d) applies, we need not decide whether another exception (subdivision (b)) also applies. As the opening paragraph to former section 21351 recites, the presumption against donative transfer "does not apply if *any* of the following conditions are met." (Italics added.)

B. O'Neill and DeMille's argument on former section 21350, subdivision (a)(4)

The trial court already held that the presumption against a donative transfer in former section 21350 applies, pursuant to subdivision (6), where the transferor is a dependent adult and the recipient is the care custodian of that dependent adult. O'Neill and DeMille argue that subdivision (4), where the recipient transcribes the trust or will, also applies. Were this court to determine whether subdivision (4) also applies, however, there would be no effectual relief for O'Neill and DeMille, as they have what they seek: the presumption has been applied. Further, as discussed above, we affirm the trial court's finding that an exception applies to remove that presumption.

C. O'Neill and DeMille's argument on California Rules of Court, rule 3.1590.

O'Neill and DeMille argue the trial court failed to provide a tentative decision pursuant to California Rules of Court, rule 3.1590, and therefore they did not have the opportunity to make objections and request a statement of decision to address the principal controverted issues. Here, the trial court did issue a proposed statement of decision, and then O'Neill and DeMille made objections and requested a statement of decision, to which the trial court responded. Thus, again, O'Neill and DeMille already have what they seek.

DISPOSITION

The order is affirmed. Costs are awarded to Richard Sorrentino.

NOT TO BE PUBLISHED.

JOHNSON, J.

We concur:

ROTHSCHILD, P. J.

CHANEY, J.

APPENDIX C

45 Cal.App.5th 802
Court of Appeal, Second District, Division 6, California.

Gary Forrest WILKIN, as Trustee, etc., Plaintiff and Appellant,
v.
William NELSON, Defendant and Respondent.

2d Civ. No. B294530
|
Filed 2/3/2020
|
Certified for Partial Publication.*

* The opinion in the above-entitled matter, filed on February 3, 2020, was not certified for publication in the Official Reports. For good cause, it now appears the opinion should be partially published in the Official Reports. The portions to be excluded from publication are Section II(B), entitled "Breach of Fiduciary Duty Claims," and Section II(C), entitled "Award of Attorney Fees on Expungement Motion."

Synopsis
Background: Decedent's son, as trustee, filed a probate petition requesting that decedent's separate and community property assets be transferred to her trust, claiming that her pour-over will required that all of her real and personal property be declared trust assets. Widower filed petition seeking reformation of the pour-over will to confirm decedent's intent to transfer only the residue of her separate property estate into the trust. The Superior Court, Santa Barbara County, No. 16PR00234, Jed Beebe, J., entered judgment reforming will, and son appealed.

[Holding:] The Court of Appeal, Perren, J., held that substantial evidence of decedent's intent that trust only hold her separate property supported probate court's decision to equitably reform pour-over will.

Appeal dismissed in part; otherwise affirmed.

West Headnotes (9)

[1] **Wills** Review

409Wills
409VIConstruction
409VI(I)Actions to Construe Wills
409k706Review

The interpretation of a will presents a question of law for independent review when there is no conflict or question of credibility in the relevant extrinsic evidence.

[2] **Wills** Review

409Wills
409VIConstruction
409VI(I)Actions to Construe Wills
409k706Review

To the extent the probate court's decision as to the interpretation of a will rests on its findings of fact, those findings are reviewed for substantial evidence.

[3] **Appeal and Error** Verdict, Findings, and Sufficiency of Evidence

30Appeal and Error
30XVIReview
30XVI(F)Presumptions and Burdens on Review
30XVI(F)2Particular Matters and Rulings
30k3935Verdict, Findings, and Sufficiency of Evidence
30k3936In general

Under the substantial evidence standard, Court of Appeal accepts the evidence most favorable to the order as true and discards the unfavorable evidence as not having sufficient verity to be accepted by the trier of fact.

[4] **Appeal and Error**🔑Equitable remedies in general

30Appeal and Error
30XVIReview
30XVI(D)Scope and Extent of Review
30XVI(D)18Remedial Matters in General
30k3642Equitable remedies in general

A trial court's exercise of its equitable powers is reviewed for abuse of discretion.

1 Cases that cite this headnote

[5] **Wills**🔑Right of action to reform will

409Wills
409VProbate or Contest of Will
409V(B)Actions to Establish or Determine Validity in General
409k224Right of action to reform will

Reformation of a will involves the exercise of the court's equitable powers.

[6] **Wills**🔑Right of action to reform will

409Wills
409VProbate or Contest of Will
409V(B)Actions to Establish or Determine Validity in General
409k224Right of action to reform will

Substantial evidence of decedent's intent that trust only contain her separate property supported probate court's decision to equitably reform pour-over will, which gave residue of estate to trust; there was evidence that purpose of trust was to leave decedent's separate rental property home to her two sons from prior marriage, drafting attorney confirmed that trust property was to hold separate property, trust stated it held "settlor's separate property," attorney's assistant stated that there was no discussion of effect trust and pour-over will would have on community property assets and that they discussed joint estate plan with husband to take care of "the rest of her property," and decedent simultaneously executed trust, will, and grant deed transferring the property.

[7] **Wills**🔑Testimony of scrivener

409Wills
409VIConstruction
409VI(A)General Rules
409k485Evidence to Aid Construction
409k487Showing Intention of Testator in General
409k487(6)Testimony of scrivener

The drafting attorney's testimony, although not conclusive, is entitled to much weight when interpreting a will.

[8] **Wills**🔑Right of action to reform will

409Wills
409VProbate or Contest of Will
409V(B)Actions to Establish or Determine Validity in General
409k224Right of action to reform will

Where there is a mistake in expression of the testator's actual and specific intent at the time the will was drafted, the will should be reformed to express that actual intent.

[9] **Wills**🔑Right of action to reform will

409Wills
409VProbate or Contest of Will
409V(B)Actions to Establish or Determine Validity in General
409k224Right of action to reform will

With regard to reformation of a will on grounds of mistake, while it is true that preference is to be given to an interpretation of an instrument that will prevent intestacy, no policy supports a rule that would ignore the testator's intent and unjustly enrich those who would inherit as a result of a mistake. Cal. Prob. Code § 21120.

Witkin Library Reference: 14 Witkin, Summary of Cal. Law (11th ed. 2017) Wills and Probate, § 207 [Use of Extrinsic Evidence in Reformation of Will.]

****804** Superior Court County of Santa Barbara, Jed Beebe, Judge (Super. Ct. No. 16PR00234)(Santa Barbara County)

Attorneys and Law Firms

M. Jude Egan, Santa Maria, for Plaintiff and Appellant.

Hoge, Fenton, Jones & Appel, Denise E. Chambliss, Pleasanton, for Defendant and Respondent.

Opinion

PERREN, J.

***804** William and Hanako Nelson were married in 1981.[1] In 2000, Hanako executed a trust leaving a separate property rental home to Gary and Jay Wilkin, her adult sons from a prior marriage. At that time, Hanako also executed a pour-over will granting "the residue of [her] estate" to the trustee for administration after her death. Hanako did not advise William of her estate plan, but he later discovered she ****805** had placed her rental home into a trust for the benefit of her sons.

[1] For convenience and clarity, we refer to the various family members by their first names.

Hanako died in 2016. Gary, who became the successor trustee, filed a probate petition requesting that Hanako's separate and community property assets be transferred to her trust. He claimed the pour-over will required that all of her real and personal property be declared trust assets.

William filed a petition seeking reformation of the pour-over will to confirm Hanako's intent to transfer only the residue of her separate property estate into the trust. He cited *Estate of Duke* (2015) 61 Cal.4th 871, 190 Cal.Rptr.3d 295, 352 P.3d 863 (*Duke*), which held that "an unambiguous will may be reformed to conform to the testator's intent if clear and convincing evidence establishes that the will contains a mistake in the testator's expression of intent at the time the will was drafted, and also establishes the testator's actual specific intent at the time the will was drafted." (*Id.* at p. 898, 190 Cal.Rptr.3d 295, 352 P.3d 863.)

Following a three-day evidentiary hearing, the probate court found that clear and convincing evidence supported equitable reformation of the will to provide for testamentary control and disposition of Hanako's separate property only. The court denied Gary's requests under Family Code section 1101[2] for a community property award against William and ordered Gary to reimburse William for the attorney fees incurred to expunge the lis pendens on one of William's properties. Gary appeals each of these rulings.

[2] All statutory references are to the Family Code unless otherwise stated.

***805** We dismiss the appeal from the attorney fees award because the order granting those fees is nonappealable.[3] (See Code Civ. Proc., §§ 405.38, 405.39.) In all other respects, we affirm.

[3] The appealability of the order awarding attorney fees under Code of Civil Procedure section 405.38 was not briefed by the parties. At our request, the parties submitted supplemental letter briefing on this issue.

I. FACTUAL AND PROCEDURAL BACKGROUND

William and Hanako each brought a separate property residence into the marriage. Hanako owned rental property located at 6155 Covington Way in Goleta (Goleta property). William had a residence in Castro Valley. Hanako and William, who were married for 34 years, had no prenuptial agreements or joint estate plans.

William has five adult children from a prior marriage, plus numerous grandchildren and great-grandchildren.

Hanako and her sons, Gary and Jay, enjoyed a close relationship with William's extended family. They spent holidays together and went on many trips, including a Hawaiian cruise arranged by Hanako.

In 2000, Hanako retained Stephen McKee, a certified specialist in trust estates and probate law, to prepare a trust. Hanako was friends with McKee's sister, Mary (Mimi) Warga, who also is one of McKee's legal assistants. McKee has a law office in Northern California, but spends most of his time in his Southern California office. Warga "was the primary contact for living trusts in the Northern California office."

Jay, who assisted his mother in obtaining the trust, told Warga that Hanako wanted "just trust for home" and was given a quote of $600. Jay's handwritten notes on McKee's standard intake questionnaire listed the Goleta property as the only asset to be controlled by Hanako's estate plan. Jay wrote: "Since remarriage, the aforementioned ****806** real estate is to be willed to Gary and Jay Wilkin. Father's wishes."

On March 28, 2000, Hanako and Jay met with Warga at her office to confirm and clarify Hanako's testamentary request for "just trust for home." Jay assisted Hanako in describing her intent, which was to leave the Goleta property to her sons equally. The meeting lasted approximately an hour.

According to Warga, Hanako did not request the preparation of any instruments other than the trust and a grant deed transferring the Goleta property into the trust. Warga testified there was no discussion regarding ***806** community property or a possible will and noted that the section of the questionnaire designating the proposed executor of the will was left blank. Jay testified, however, that Warga brought up the issue of a pour-over will and that Hanako agreed to purchase one. Jay paid for McKee's legal services with a $600 check. The memo line of the check contains the handwritten word "trust."

Jay testified that Warga told him what to write on the intake questionnaire, which lists only the Goleta property. In response to the question asking whether Hanako considered all her property to be community property, she answered "[n]o." The portions of the questionnaire seeking information about bank accounts, investments, retirement benefit plans, life insurance and any safe deposit boxes were either left blank or marked "N/A" (i.e., not applicable). The proposed successor trustees to Hanako's trust were listed on the form, but there were no proposed executors of a will. Warga explained that if the will had been discussed, the section regarding the executors would have been completed.

Page 7 of the questionnaire asks about "[d]istribution of balance of property (residue) in estate." This section was marked inapplicable, but Warga recalled Hanako raising the possibility of future joint estate planning with her husband which would involve "the rest of [Hanako's] property."

Warga sent the intake questionnaire to McKee, who then had a single phone call with Hanako. The only asset they discussed was the Goleta property. There was no conversation regarding the couple's community property, bank accounts or investments. McKee believed Hanako's sole testamentary intent was to place the Goleta property into a trust. Although he did not discuss this with Hanako, McKee's general practice is to prepare a pour-over will with any trust.

McKee and his Southern California staff prepared the estate planning documents and sent them to Warga. On May 3, 2000, Hanako met with Warga at Hanako's home to execute the trust and grant deed. The first page of the trust states: "The property transferred is the settlor's separate property and shall be known as the 'separate trust estate.' " Warga also provided Hanako with a pour-over will, which states in Article 2: "Residue – Pour-Over to Living Trust, to Descendants: I give the residue of my estate to the trustee of the trust identified below, terms the 'pour-over beneficiary,' to be held and administered by the trustee according to the terms and conditions of that trust." This was the first time Hanako had seen the documents.

Hanako signed all three documents, but did not read the pour-over will. Warga notarized the trust and deed and served as a subscribing witness to the ***807** will. Warga also brought another witness to sign the will. Warga explained to Hanako that the will "would cover any assets in her case, separate property assets, ... that were only in her name" and "that [those] would be left to the trust." Once again, there was no discussion regarding any community property assets.

****807** Warga mailed the original trust and pour-over will to Jay. Hanako never saw the will again. William did not learn of its existence until after Hanako's death.

In 2009, Hanako asked McKee to prepare a first amendment to the trust. That instrument nominated Gary as the new first successor trustee and moved Jay into second position. It also disinherited Jay from the trust, assuming Gary and his issue survived Jay. Jay had been experiencing substantial financial difficulties and Hanako

wished to protect the Goleta property from any creditors. The pour-over will was not discussed, amended or republished.

Previously, in 2007, William and Hanako's friend, Evelyn Moore, granted them a 50% interest in her San Leandro real property. That property was later sold and William and Hanako received half of the sale proceeds. Hanako spent her share on a Hawaiian cruise for 38 members of their extended families.

In 2012, William and his daughter, Mary Smith, jointly purchased a condominium in Maui. They each paid approximately half of the $100,000 purchase price. William's half came from the San Leandro property sale proceeds. Hanako approved of the purchase, which was intended to be a family vacation home.

Hanako subsequently developed dementia. In 2014, William engaged an estate planning attorney, Steven Dimick, to prepare a trust for the couple. Hanako went with William to the appointment, but Dimick said he could not do a trust for her because of her dementia. He advised William to get his own trust.

William designated Hanako as the primary beneficiary in his trust, with the residue going to his children upon her death. Based upon Dimick's advice, William funded the trust with $137,233.68 from the couple's joint accounts, leaving the accounts with a $168,658.67 balance. Most of that money was generated by William's employment and retirement accounts. William also transferred the Castro Valley residence and the Maui property into the trust.[4]

[4] The probate court found that William "brought his Castro Valley residence into [the] marriage with Hanako, and at no time did Hanako express an intent to exert testamentary control over this real property." The court later confirmed the residence "as community property, with Hanako's interest passing to [William] at her death."

***808** After Hanako's death, Gary filed a probate petition seeking to confirm the validity of Hanako's trust, the Goleta property's status as a trust asset and Gary's entitlement to all rents from that asset. He also sought a determination that Hanako's remaining assets, whether community or separate property, were transferred to the trust through the pour-over will.

William opposed Gary's petition and filed his own petition seeking to invalidate Hanako's trust as to any community property assets, to reform the pour-over will to include only Hanako's separate property and to determine that the Goleta property was a community asset. Gary opposed that petition, claiming William had breached his fiduciary duties under sections 721 and 1101 and Probate Code section 859. William later withdrew his claim as to the Goleta property.

Following the evidentiary hearing, the probate court issued its findings and order for judgment. The court found "on the issue of equitable reformation of [Hanako's] pour-over will [the evidence] satisfies the clear and convincing burden of proof" and ordered "that the residue clause of the will is equitably reformed and limited to apply only to disposition of [Hanako's] separate ****808** property." That property included Hanako's jewelry, 200 shares of PG&E stock, the master bedroom furniture and the Goleta property rent monies deposited in a Wells Fargo account. The court ordered William to return to Hanako's trust the $17,000 he had withdrawn from that account after her death. It also confirmed the Goleta property as Hanako's separate property.

The probate court determined the couple's community property assets belong to William as the surviving spouse, and concluded that the Maui property is his separate property because it was purchased with his inheritance from Moore. It rejected Gary's section 1101 claims regarding William's division of the couple's joint accounts. The court found that Gary lacked standing to pursue those claims and that they also are not supported by the evidence.

Finally, the probate court granted William's motion to expunge the lis pendens on the Castro Valley residence and awarded him $4,500 in attorney fees pursuant to Code of Civil Procedure section 405.38. The court denied Gary's requests for attorney fees.

***809** II. DISCUSSION

A. Equitable Reformation of the Pour-Over Will

Applying the clear and convincing evidence standard, the probate court found the residue clause in the pour-over will contains a mistake in Hanako's expression of intent at the time the will was drafted and must be reformed to reflect her actual specific intent. The court concluded: "On the dispositive issue of Hanako's intent, the evidence

shows that Hanako had a simple and direct intent – she wanted 'Just Trust for Home.' The reasonable conclusion is that Hanako did not intend to fund her separate property trust with community property. The Residue Clause of Hanako's Pour-Over Will is to be interpreted to comport with her express instructions and intent given to her estate planning attorney and his legal assistant for a trust for her separate property, not the Nelson community property." Gary contends substantial evidence does not support the court's findings. We disagree.

1. Standard of Review

[1] [2] [3]The interpretation of a will presents a question of law for our independent review when there is no conflict or question of credibility in the relevant extrinsic evidence. (*Johnson v. Greenelsh* (2009) 47 Cal.4th 598, 604, 100 Cal.Rptr.3d 622, 217 P.3d 1194; *Burch v. George* (1994) 7 Cal.4th 246, 254, 27 Cal.Rptr.2d 165, 866 P.2d 92, superseded by statute on other grounds as stated in *Estate of Rossi* (2006) 138 Cal.App.4th 1325, 1331-1332, 1339, 42 Cal.Rptr.3d 244.) To the extent the probate court's decision rests on its findings of fact, however, those findings are reviewed for substantial evidence. (*Crail v. Blakely* (1973) 8 Cal.3d 744, 750, 106 Cal.Rptr. 187, 505 P.2d 1027; *Ike v. Doolittle* (1998) 61 Cal.App.4th 51, 87, 70 Cal.Rptr.2d 887 (*Ike*).) The clear and convincing standard, however, "applies only at the trial level. On appeal, it is assumed that the trial court applied the proper standard and the judgment will not be upset if there is substantial evidence to support it." (*Shupe v. Nelson* (1967) 254 Cal.App.2d 693, 700, 62 Cal.Rptr. 352; see *Sheila S. v. Superior Court* (2000) 84 Cal.App.4th 872, 880-881, 101 Cal.Rptr.2d 187.) The parties agree the substantial evidence standard applies here. Under this standard, we "accept[ ] the evidence most favorable to the order as true and discard[ ] the unfavorable evidence as not having sufficient verity to be accepted by the trier of fact." (****809** *In re Michael G.* (2012) 203 Cal.App.4th 580, 595, 137 Cal.Rptr.3d 476.)

[4] [5]A trial court's exercise of its equitable powers is reviewed for abuse of discretion. (*City of Barstow v. Mojave Water Agency* (2000) 23 Cal.4th 1224, 1256, 99 Cal.Rptr.2d 294, 5 P.3d 853; *In re Marriage of Shimkus* (2016) 244 Cal.App.4th 1262, 1272, 198 Cal.Rptr.3d 799.) Reformation of a ***810** will involves the exercise of the court's equitable powers. (*Giammarrusco v. Simon* (2009) 171 Cal.App.4th 1586, 1603, 91 Cal.Rptr.3d 50; *Ike*, *supra*, 61 Cal.App.4th at p. 84, 70 Cal.Rptr.2d 887.)

2. Substantial Evidence Supports the Probate Court's Findings of Hanako's Intent and the Mistake in Drafting the Pour-Over Will

The testator in *Duke* executed a holographic will devising his entire estate to his wife. The will stated that if the couple died at the same time, the estate would be divided between two charities. The will did not provide for disposition of the estate if the wife predeceased the testator, which she did. The testator's intestate heirs and the charities both claimed the estate. (*Duke*, *supra*, 61 Cal.4th at p. 876, 190 Cal.Rptr.3d 295, 352 P.3d 863.) The charities asserted that "at the time the testator wrote his will, he specifically intended to provide in his will that the charities would inherit his estate in the event his wife was not alive when he died." (*Id.* at p. 875, 190 Cal.Rptr.3d 295, 352 P.3d 863.)

Because the will was unambiguous, the trial court excluded extrinsic evidence of the testator's intent and ruled in favor of the intestate heirs. (*Duke*, *supra*, 61 Cal.4th at p. 877, 190 Cal.Rptr.3d 295, 352 P.3d 863.) The Supreme Court reexamined and rejected the historic rule precluding the use of extrinsic evidence to correct a mistake in the expression of a testator's intent in an unambiguous will. (*Id.* at p. 879, 190 Cal.Rptr.3d 295, 352 P.3d 863.) It concluded that "[i]n cases in which clear and convincing evidence establishes both a mistake in the drafting of the will and the testator's actual and specific intent at the time the will was drafted, it is plain that denying reformation would defeat the testator's intent and result in unjust enrichment of unintended beneficiaries." (*Id.* at p. 890, 190 Cal.Rptr.3d 295, 352 P.3d 863 ["[T]he paramount consideration in construing a will is to determine the subjective intent of the testator"]; see *Placencia v. Strazicich* (2019) 42 Cal.App.5th 730, 741, 255 Cal.Rptr.3d 729 ["[T]he modern trend [is] toward favoring the decedent's intent over formalities"].)

Gary argues *Duke* does not apply here because the devise in the pour-over will is general and not specific. A specific devise is a "transfer of specifically identifiable property" (Prob. Code, § 21117, subd. (a)), while a general devise "is a transfer from the general assets of the transferor that does not give specific property." (*Id.*, subd. (b); see Ross & Cohen, Cal. Practice Guide: Probate (The Rutter Group 2019) ¶ 16:532, p. 16-182 [explaining the difference between specific and general devises].) The flaw in Gary's argument is that the will in *Duke* "left all

of [the testator's] property" to his wife, which is a general devise. (*Duke*, *supra*, 61 Cal.4th at p. 876, 190 Cal.Rptr.3d 295, 352 P.3d 863; Prob. Code, § 21117, subd. (b).) There is no suggestion the Supreme Court intended to limit its holding to specific devises. (See *Duke*, at p. 898, 190 Cal.Rptr.3d 295, 352 P.3d 863.)

***811** [6]Applying *Duke's* two-prong standard, we conclude substantial evidence supports the probate court's decision to equitably reform the pour-over will. Specifically, there is substantial evidence of Hanako's actual and specific intent at the time the trust and will were drafted. It is ****810** undisputed she wanted a trust to gift her separate property rental home, i.e., the Goleta property, to her two sons, and that she also "expressed some general desire to have a will to control the disposition ... of her separate property." The will as drafted contains a mistake in the expression of that intent. (See *Duke*, *supra*, 61 Cal.4th at pp. 890, 898, 190 Cal.Rptr.3d 295, 352 P.3d 863.)

[7]"The [drafting] attorney's testimony, although not conclusive, is entitled to much weight." (*Estate of Goetz* (1967) 253 Cal.App.2d 107, 114, 61 Cal.Rptr. 181.) McKee testified it is fair to state that Hanako's trust is a separate property trust. The instrument provides that "[t]he property transferred is the settlor's separate property and shall be known as the 'separate trust estate.' " During his deposition, McKee confirmed the trust did not include any community assets. He also acknowledged that he and Hanako did not discuss the pour-over will or her community property assets during their phone call.

Warga corroborated McKee's testimony. She testified that Hanako's exclusive intent when she signed the trust was to leave the Goleta property to her sons. Warga explained to Hanako the effect the trust and pour-over will would have on her separate property assets, but there was no discussion regarding her community property assets. To the contrary, Warga and Hanako discussed the possibility of a joint estate plan with William, which would take care of "[t]he rest of her property."

In addition, Hanako's simultaneous execution of the trust, the pour-over will and the grant deed transferring the Goleta property, as her separate property, into the trust further evidences her intent to control only her separate property through the estate plan. (See *Estate of O'Connell* (1972) 29 Cal.App.3d 526, 531-532, 105 Cal.Rptr. 590 ["Once the testamentary scheme or general intention [of a trust or will] is discovered, the meaning of particular words and phrases is to be subordinated to this scheme, plan or dominant purpose"]; *Estate of Goyette* (2004) 123 Cal.App.4th 67, 73, 19 Cal.Rptr.3d 760 [same].)

Carl Tucker Cheadle, an expert on the attorney standard of care in drafting estate planning instruments, testified that Hanako's trust is a separate property trust and, as such, should only hold separate property assets. He opined that if Hanako's intent was to transfer community property assets into the trust, the trust should have been amended to permit that transfer. He also agreed with the probate court that Gary's interpretation of Hanako's estate plan is ***812** illogical because the purpose of having a trust is to bypass probate. Jay testified that Hanako wanted to avoid a probate proceeding. At the time of Hanako's death, however, a pour-over will was exempt from probate only if the value of the assets totaled less than $150,000. (Former Prob. Code, § 13100.) Hanako's share of the community estate was significantly more than that. As the probate court aptly noted, "if it was your intention to have property passed by a nonprobate mechanism, you wouldn't depend on the probate of a will to transfer the properties there."

Moreover, Jay testified that at the time of the March 28, 2000 meeting with Hanako and Warga, he did not understand that Hanako's portion of the community property would go into the will. It is evident that Hanako also had no such understanding, to the extent a will was even discussed at that meeting. As the probate court observed, it is unclear whether Hanako knew she had any community property assets, let alone whether she intended to gift those assets through the trust and pour-over will. William testified that he and Hanako never discussed the concept of ****811** community property, and neither McKee nor Warga explained that concept to her. Jay and Gary also "testified (against their own interests) that Hanako never even used the term 'community property' in discussing her estate plans or testamentary intent before, during, or after the execution of the 2000 estate plans." The court noted that Hanako "was treated badly by those who should have advised her in the process" and that "had they respected her intelligence and ability to understand, ... they would have discussed these things with her."

[8] [9]In the absence of any evidence showing Hanako's intent to include community property assets in her estate plan, it was reasonable for the probate court to interpret the evidence of her intent as it did. (See, e.g., *Multani v. Knight* (2018) 23 Cal.App.5th 837, 857, 233 Cal.Rptr.3d 537.) Where, as here, there is "a mistake in expression [of] the testator's actual and specific intent at the time the will was drafted," the will should be reformed to express that actual intent. (*Duke*, *supra*, 61 Cal.4th at p. 896, 190 Cal.Rptr.3d 295, 352 P.3d 863.) It is true that "[p]reference is to be given to an interpretation of an

instrument that will prevent intestacy" (Prob. Code, § 21120), but "no policy underlying the statute of wills supports a rule that would ignore the testator's intent and unjustly enrich those who would inherit as a result of a mistake." (*Duke*, at p. 896, 190 Cal.Rptr.3d 295, 352 P.3d 863.)

3. The Probate Court Did Not Abuse Its Discretion In Reforming the Pour-Over Will

Given the probate court's finding that Hanako intended at the time the trust and pour-over will were drafted to provide for testamentary control and disposition of only her separate property, the decision to reform the pour-over ***813** will to conform to that actual and specific intent was well within the court's discretion. (See *Duke*, *supra*, 61 Cal.4th at pp. 890, 898, 190 Cal.Rptr.3d 295, 352 P.3d 863.) Gary has not demonstrated an abuse of that discretion.

B.-C.[**]

[**] See footnote *, *ante*.

III. DISPOSITION

The appeal from the order awarding attorney fees to William with respect to his motion to expunge the lis pendens is dismissed. In all other respects, the probate court's findings and order for judgment are affirmed. William shall recover his costs on appeal.

We concur:

GILBERT, P. J.

TANGEMAN, J.

All Citations

45 Cal.App.5th 802, 258 Cal.Rptr.3d 803, 20 Cal. Daily Op. Serv. 1680, 2020 Daily Journal D.A.R. 1744

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9 Cal.5th 989
Supreme Court of California.

CONSERVATORSHIP OF the Person of O.B.
T.B. et al., as Coconservators, etc., Petitioners and Respondents,
v.
O.B., Objector and Appellant.

S254938
|
July 27, 2020

Synopsis

Background: Mother and elder sister petitioned to be appointed limited conservators of young adult who was diagnosed with autism. The Superior Court, Santa Barbara County, No. 17PR00325, James F. Rigali, J., issued order establishing limited conservatorship. Conservatee appealed, and the Second District Court of Appeal affirmed, 32 Cal.App.5th 626, 244 Cal.Rptr.3d 192. The Supreme Court granted review.

[Holding:] The Supreme Court, Cantil-Sakauye, Chief Justice, held that an appellate court evaluating the sufficiency of the evidence in support of a finding must make an appropriate adjustment to its analysis when the clear and convincing standard of proof applied before the trial court; in general, when presented with a challenge to the sufficiency of the evidence associated with a finding requiring clear and convincing evidence, the court must determine whether the record, viewed as a whole, contains substantial evidence from which a reasonable trier of fact could have made the finding of high probability demanded by this standard of proof; disapproving *In re Marriage of Saslow*, 40 Cal.3d 848, 221 Cal.Rptr. 546, 710 P.2d 346, *Crail v. Blakely*, 8 Cal.3d 744, 106 Cal.Rptr. 187, 505 P.2d 1027, *Nat. Auto. & Cas. Co. v. Ind. Acc. Com.*, 34 Cal.2d 20, 206 P.2d 841, *Viner v. Untrecht*, 26 Cal.2d 261, 158 P.2d 3, *Stromerson v. Averill*, 22 Cal.2d 808, 141 P.2d 732, *Simonton v. Los Angeles T. & S. Bank*, 205 Cal. 252, 270 P. 672, *Treadwell v. Nickel*, 194 Cal. 243, 228 P. 25, *Steinberger v. Young*, 175 Cal. 81, 165 P. 432, and other cases.

Reversed and remanded.

West Headnotes (14)

[1] Evidence Degree of Proof in General

157Evidence
157XIVWeight and Sufficiency
157k596Degree of Proof in General
157k596(1)In general

The standard of proof that applies to a particular determination serves to instruct the fact finder concerning the degree of confidence society deems necessary in the correctness of factual conclusions for a particular type of adjudication, to allocate the risk of error between the litigants, and to indicate the relative importance attached to the ultimate decision.

[2] Evidence Preponderance of Evidence

157Evidence
157XIVWeight and Sufficiency
157k598Preponderance of Evidence
157k598(1)In general

The default standard of proof in civil cases is the preponderance of the evidence. Cal. Evid. Code § 115.

[3] Evidence Preponderance of Evidence

157Evidence
157XIVWeight and Sufficiency
157k598Preponderance of Evidence
157k598(1)In general

Preponderance of the evidence standard of proof simply requires the trier of fact to believe that the existence of a fact is more probable than its nonexistence.

[4] **Criminal Law** Reasonable Doubt

110Criminal Law
110XVIIEvidence
110XVII(V)Weight and Sufficiency
110k561Reasonable Doubt
110k561(1)In general

Standard of proof beyond a reasonable doubt applies to findings of guilt in criminal matters.

1 Cases that cite this headnote

[5] **Evidence** Degree of Proof in General

157Evidence
157XIVWeight and Sufficiency
157k596Degree of Proof in General
157k596(1)In general

The standard of proof known as clear and convincing evidence demands a degree of certainty greater than that involved with the preponderance standard, but less than what is required by the standard of proof beyond a reasonable doubt.

[6] **Evidence** Degree of Proof in General

157Evidence
157XIVWeight and Sufficiency
157k596Degree of Proof in General
157k596(1)In general

Clear and convincing evidence standard of proof requires a finding of high probability.

11 Cases that cite this headnote

[7] **Appeal and Error** Character and Amount of Evidence in General

30Appeal and Error
30XVIReview
30XVI(D)Scope and Extent of Review
30XVI(D)10Sufficiency of Evidence
30k3444Character and Amount of Evidence in General
30k3445In general

An appellate court evaluating the sufficiency of the evidence in support of a finding must make an appropriate adjustment to its analysis when the clear and convincing standard of proof applied before the trial court; in general, when presented with a challenge to the sufficiency of the evidence associated with a finding requiring clear and convincing evidence, the court must determine whether the record, viewed as a whole, contains substantial evidence from which a reasonable trier of fact could have made the finding of high probability demanded by this standard of proof; disapproving *In re Marriage of Saslow*, 40 Cal.3d 848, 221 Cal.Rptr. 546, 710 P.2d 346, *Crail v. Blakely*, 8 Cal.3d 744, 106 Cal.Rptr. 187, 505 P.2d 1027, *Nat. Auto. & Cas. Co. v. Ind. Acc. Com.*, 34 Cal.2d 20, 206 P.2d 841, *Viner v. Untrecht*, 26 Cal.2d 261, 158 P.2d 3, *Stromerson v. Averill*, 22 Cal.2d 808, 141 P.2d 732, *Simonton v. Los Angeles T. & S. Bank*, 205 Cal. 252, 270 P. 672, *Treadwell v. Nickel*, 194 Cal. 243, 228 P. 25, *Steinberger v. Young*, 175 Cal. 81, 165 P. 432, and other cases.

8 Cases that cite this headnote

[8] **Evidence** Sufficiency to support verdict or finding

157Evidence
157XIVWeight and Sufficiency
157k597Sufficiency to support verdict or finding

"Substantial evidence" is evidence that is of ponderable legal significance, reasonable in nature, credible, and of solid value, and substantial proof of the essentials which the law requires in a particular case.

1 Cases that cite this headnote

[9] **Evidence** Sufficiency to support verdict or finding

157Evidence
157XIVWeight and Sufficiency
157k597Sufficiency to support verdict or finding

Even if evidence is capable of being regarded as credible, reasonable, and solid, to amount to "substantial evidence" it also must be of ponderable legal significance.

1 Cases that cite this headnote

[10] **Evidence** Degree of Proof in General

157Evidence
157XIVWeight and Sufficiency
157k596Degree of Proof in General
157k596(1)In general

The clear and convincing standard of proof is used for various determinations where particularly important individual interests or rights are at stake.

[11] **Appeal and Error** Character and Amount of Evidence in General

30Appeal and Error
30XVIReview
30XVI(D)Scope and Extent of Review
30XVI(D)10Sufficiency of Evidence
30k3444Character and Amount of Evidence in General
30k3445In general

Question before a court reviewing a finding that a fact has been proved by clear and convincing evidence is not whether the appellate court itself regards the evidence as clear and convincing; it is whether a reasonable trier of fact could have regarded the evidence as satisfying this standard of proof.

21 Cases that cite this headnote

[12] **Mental Health** Questions of fact, verdicts, and findings

257AMental Health
257AIIIGuardianship and Property of Estate
257AIII(A)Guardianship in General
257Ak148Review
257Ak155Questions of fact, verdicts, and findings

Clear and convincing evidence standard of proof does not "disappear" on appeal in a conservatorship action; rather, court must account for the standard when addressing a claim that the evidence does not support a finding made under that standard. Cal. Prob. Code § 1801(e).

[13] **Appeal and Error** Character and Amount of Evidence in General

30Appeal and Error
30XVIReview
30XVI(D)Scope and Extent of Review
30XVI(D)10Sufficiency of Evidence
30k3444Character and Amount of Evidence in General
30k3445In general

An appellate court must account for the clear and convincing standard of proof when addressing a claim that the evidence does not support a finding made under this standard.

13 Cases that cite this headnote

[14] **Appeal and Error** Character and Amount of Evidence in General
Appeal and Error Verdict, Findings, and Sufficiency of Evidence

30Appeal and Error
30XVIReview
30XVI(D)Scope and Extent of Review
30XVI(D)10Sufficiency of Evidence
30k3444Character and Amount of Evidence in General
30k3445In general
30Appeal and Error
30XVIReview
30XVI(F)Presumptions and Burdens on Review
30XVI(F)2Particular Matters and Rulings
30k3935Verdict, Findings, and Sufficiency of Evidence
30k3936In general

When reviewing a finding that a fact has been proved by clear and convincing evidence, the question before the appellate court is whether the record as a whole contains substantial evidence from which a reasonable factfinder could have found it highly probable that the fact was true; in conducting its review, the court must view the record in the light most favorable to the prevailing party below and give appropriate deference to how the trier of fact may have evaluated the credibility of witnesses, resolved conflicts in the evidence, and drawn reasonable inferences from the evidence.

Witkin Library Reference: 9 Witkin, Cal. Procedure (5th ed. 2008) Appeal, § 371 [Where Clear and Convincing Evidence Is Required.]

31 Cases that cite this headnote

****43 ***331** Second Appellate District, Division Six, B290805, Santa Barbara County Superior Court, 17PR00325

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Opinion

Opinion of the Court by Cantil-Sakauye, C. J.

*****332 *995** Measured by the certainty each demands, the standard of proof known as clear and convincing evidence — which requires proof making the existence of a fact highly probable ****44** — falls between the "more likely than not" standard commonly referred to as a preponderance of the evidence and the more rigorous standard of proof beyond a reasonable doubt. We granted review in this case to clarify how an appellate court is to review the sufficiency of the evidence associated with a finding made by the trier of fact pursuant to the clear and convincing standard.

The issue arises here after the probate court appointed limited coconservators for O.B., a young woman with autism. In challenging this order, O.B. argues that the proof before the probate court did not clearly and convincingly establish that a limited conservatorship was warranted. (See Prob. Code, § 1801, subd. (e) ["The standard of proof for the appointment of a conservator pursuant to this section shall be clear and convincing evidence"].)

There is a split of opinion over how an appellate court should address a claim of insufficient evidence such as the one advanced here. One approach accounts for the fact that the clear and convincing standard of proof requires greater certainty than the preponderance standard does.

Courts adopting this view inquire whether the record developed before the trial court contains substantial evidence allowing a reasonable factfinder to make the challenged finding with the confidence required by the clear and convincing standard. (E.g., *T.J. v. Superior Court* (2018) 21 Cal.App.5th 1229, 1239-1240, 230 Cal.Rptr.3d 928 (*T.J.*).) Another position maintains that the clear and convincing standard of proof has no bearing on appellate review for sufficiency of the evidence. (E.g., *In re Marriage of Murray* (2002) 101 Cal.App.4th 581, 604, 124 Cal.Rptr.2d 342.) From this perspective, a court reviewing a finding requiring clear and convincing proof surveys the record for substantial evidence, without also considering whether this evidence reasonably could have yielded a finding made with the specific degree of certainty required by the clear and convincing standard.

We conclude that appellate review of the sufficiency of the evidence in support of a finding requiring clear and convincing proof must account for the level of confidence this standard demands. In a matter such as the one before us, when reviewing a finding that a fact has been proved by clear and convincing evidence, the question before the appellate court is whether the ***996** record as a whole contains substantial evidence from which a reasonable factfinder could have found it highly probable that the fact was true. Consistent with well-established principles governing review for sufficiency of the evidence, in making this assessment the appellate court must view the record in the light most favorable to the prevailing party below and give due deference to how the trier of fact may have evaluated the credibility of witnesses, resolved conflicts in the evidence, and drawn reasonable inferences from the evidence.

*****333** Because the Court of Appeal below took the position that the clear and convincing standard of proof " ' "disappears" ' " on appeal (*Conservatorship of O.B.* (2019) 32 Cal.App.5th 626, 633, 244 Cal.Rptr.3d 192) when it rejected O.B.'s challenge to the sufficiency of the evidence, we reverse.

I. Background

In August 2017, respondents T.B. and C.B. filed a petition in Santa Barbara County Superior Court requesting that they be appointed as limited coconservators for O.B., a young woman with autism spectrum disorder. T.B. and C.B. are O.B.'s mother and older sister, respectively. At the time T.B. and C.B. filed their petition, O.B. was 18 years old and resided with her great-grandmother, L.K., in Santa Barbara County.

The public defender was appointed as counsel for O.B. (See Prob. Code, § 1471.) A contested evidentiary hearing was held in the probate court to determine whether a limited conservatorship should be imposed. This hearing was conducted across several court sessions occurring between September 2017 and May 2018, with the probate court judge sitting as the trier of fact. Several witnesses testified at the hearing. Among them, T.B., C.B., L.K., and a cousin of O.B. testified to their interactions with and observations of O.B. Dr. Kathy Khoie, a psychologist, testified that in her opinion, O.B. was not a proper candidate for a limited conservatorship. ****45** Christopher Donati, an investigator with the Santa Barbara County Public Guardian's Office, similarly testified that he did not feel a limited conservatorship was necessary.

Before ruling on a limited conservatorship, the judge stated that he had "been involved in numerous hearings, and [O.B.] has been at all of them or most of them. So in addition to some of the different witnesses I am entitled to base my decision based in part on my own observation of [O.B.] at the proceedings." The judge found that a limited conservatorship was "appropriate" and appointed T.B. and C.B. as limited coconservators. The parties were asked if any requested a statement of decision. No one did, and the judge did not otherwise explain in detail how he had arrived at his findings. He said, "I can go through and comment on everybody's testimony. I don't see any reason to do that. The reviewing court can look at the record."

***997** O.B. appealed, raising several claims of error. The Court of Appeal affirmed. As relevant here, the appellate court rejected O.B.'s argument that the evidence before the probate court was insufficient to justify the appointment of limited coconservators. In making this argument, O.B. explained that the clear and convincing standard of proof applies to the decision to appoint a limited conservator and argued that the Court of Appeal "must apply the same standard in determining whether 'substantial evidence' supports the judgment." (*Conservatorship of O.B.*, *supra*, 32 Cal.App.5th at p. 633, 244 Cal.Rptr.3d 192.) In finding the evidence sufficient, the Court of Appeal observed that, contrary to O.B.'s position, " 'The "clear and convincing" standard ... is for the edification and guidance of the trial court and not a standard for appellate review. [Citations.] " 'The sufficiency of evidence to establish a given fact, where the law requires proof of the fact to be clear and convincing, is primarily a question for the trial court to

determine, and if there is substantial evidence to support its conclusion, the determination is not open to review on appeal.' [Citations.]" [Citation.] Thus, on appeal from a judgment required to be based upon clear and convincing evidence, "the clear and convincing test disappears ... ***334** [and] the usual rule of conflicting evidence is applied, giving full effect to the respondent's evidence, however slight, and disregarding the appellant's evidence, however strong." [Citation.]' [Citation.]" (*Id.*, at pp. 633-634, 244 Cal.Rptr.3d 192.)[1]

[1] The Court of Appeal also rejected other claims of error raised by O.B. (*Conservatorship of O.B.*, *supra*, 32 Cal.App.5th at pp. 632-633, 635-636, 244 Cal.Rptr.3d 192), none of which are presently before us.

We granted review.

II. Discussion

Our analysis of the issue before us begins with an explanation of the clear and convincing standard of proof and a survey of its various applications. We next assess how appellate courts have perceived their role in reviewing claims that the evidence before the trial court did or did not satisfy the clear and convincing standard. Ultimately, we conclude that logic, sound policy, and precedent all point toward the same conclusion: When reviewing a finding made pursuant to the clear and convincing standard of proof, an appellate court must attune its review for substantial evidence to the heightened degree of certainty required by this standard.

A. Clear and Convincing Evidence as a Standard of Proof

[1]A " '[b]urden of proof' means the obligation of a party to establish by evidence a requisite degree of belief concerning a fact in the mind of the trier of fact or the court." (Evid. Code, § 115.) "The burden of proof may require a ***998** party to ... establish the existence or nonexistence of a fact by a preponderance of the evidence, by clear and convincing proof, or by proof beyond a reasonable doubt." (*Ibid.*) The standard of proof that applies to a particular determination serves "to instruct the fact finder concerning the degree of confidence our society deems necessary in the correctness of factual conclusions for a particular type of adjudication, to allocate the risk of error between the litigants, and to indicate the relative importance attached to the ultimate decision." (****46** *Conservatorship of Wendland* (2001) 26 Cal.4th 519, 546, 110 Cal.Rptr.2d 412, 28 P.3d 151 (*Wendland*); see also *In re Winship* (1970) 397 U.S. 358, 369-373, 90 S.Ct. 1068, 25 L.Ed.2d 368 (conc. opn. of Harlan, J.).)

[2] [3] [4]"The default standard of proof in civil cases is the preponderance of the evidence." (*Wendland*, *supra*, 26 Cal.4th at p. 546, 110 Cal.Rptr.2d 412, 28 P.3d 151, citing Evid. Code, § 115.) This standard " 'simply requires the trier of fact "to believe that the existence of a fact is more probable than its nonexistence." ' " (*In re Angelia P.* (1981) 28 Cal.3d 908, 918, 171 Cal.Rptr. 637, 623 P.2d 198.) The more demanding standard of proof beyond a reasonable doubt, meanwhile, applies to findings of guilt in criminal matters. (*In re Winship*, *supra*, 397 U.S. at p. 364, 90 S.Ct. 1068.) Reasonable doubt " 'is not a mere possible doubt; because everything relating to human affairs is open to some possible or imaginary doubt. It is that state of the case, which, after the entire comparison or consideration of all the evidence, leaves the minds of jurors in that condition that they cannot say they feel an abiding conviction of the truth of the charge." (Pen. Code, § 1096.)

[5] [6]The standard of proof known as clear and convincing evidence demands a degree of certainty greater than that involved with the preponderance standard, but less than what is required by the standard of proof beyond a reasonable doubt. This intermediate standard "requires a finding of high probability." (***335** *In re Angelia P.*, *supra*, 28 Cal.3d at p. 919, 171 Cal.Rptr. 637, 623 P.2d 198; see also CACI No. 201 ["Certain facts must be proved by clear and convincing evidence .... This means the party must persuade you that it is highly probable that the fact is true"].)[2] One commentator has explicated, "The precise meaning of 'clear and convincing proof' does not lend itself readily to definition. It is, in reality, a question of how strongly the minds of the trier or triers of fact must be convinced that the facts are as contended by the proponent. ... Where clear and convincing proof is required, the proponent must convince the jury or judge, as the case may be, that it is *highly probable* that the facts which he asserts are true. He **999** must do more than show that the facts are probably true." (Comment, *Evidence: Clear and Convincing Proof: Appellate Review* (1944) 32 Cal. L.Rev. 74, 75.)

[2] The clear and convincing standard also has been described "as requiring that the evidence be ' "so clear as to leave no substantial doubt"; "sufficiently strong to command the unhesitating assent of every reasonable

mind." ' " (*In re Angelia P.*, *supra*, 28 Cal.3d at p. 919, 171 Cal.Rptr. 637, 623 P.2d 198.)

Today, the clear and convincing standard applies to various determinations " 'where particularly important individual interests or rights are at stake,' such as the termination of parental rights, involuntary commitment, and deportation." (*Weiner v. Fleischman* (1991) 54 Cal.3d 476, 487, 286 Cal.Rptr. 40, 816 P.2d 892, quoting *Herman & MacLean v. Huddleston* (1983) 459 U.S. 375, 389, 103 S.Ct. 683, 74 L.Ed.2d 548; see also *Santosky v. Kramer* (1982) 455 U.S. 745, 769, 102 S.Ct. 1388, 71 L.Ed.2d 599; *Addington v. Texas* (1979) 441 U.S. 418, 423-424, 99 S.Ct. 1804, 60 L.Ed.2d 323; *Woodby v. Immigration Service* (1966) 385 U.S. 276, 285-286, 87 S.Ct. 483, 17 L.Ed.2d 362.) Other findings requiring clear and convincing proof include whether a civil defendant is guilty of the "oppression, fraud, or malice" that allows for the imposition of punitive damages (Civ. Code, § 3294, subd. (a)), whether a conservator can withdraw life-sustaining care from a conservatee (*Wendland*, *supra*, 26 Cal.4th at p. 524, 110 Cal.Rptr.2d 412, 28 P.3d 151), whether conditions necessary for the nonconsensual, nonemergency administration of psychiatric medication to a prison inmate have been satisfied (Pen. Code, § 2602, subd. (c)(8)), and whether a publisher acted with the intent ("actual malice") that must be shown for a plaintiff to prevail in certain kinds of defamation cases (*Gertz v. Robert Welch, Inc.* (1974) 418 U.S. 323, 342, 94 S.Ct. 2997, 41 L.Ed.2d 789).

Going further back in time, "[t]he requirement in civil actions of more than a preponderance of the evidence was first applied in equity to claims which experience had shown to be inherently subject to fabrication, lapse of memory, or the flexibility of conscience." (Note, ****47** *Appellate Review in the Federal Courts of Findings Requiring More than a Preponderance of the Evidence* (1946) 60 Harv. L.Rev. 111, 112.) This court's early case law addressing the clear and convincing standard of proof commonly involved claims of this character, such as assertions that a written instrument should be reformed on the basis of fraud, mistake, or parol evidence. In one early case of this kind, *Lestrade v. Barth* (1862) 19 Cal. 660, we observed that when the correction of a mistake in a written instrument was sought in equity, the evidence showing such a mistake "must be clear and convincing, making out the mistake to the entire satisfaction of the Court, and not loose, equivocal or contradictory, leaving the mistake open to doubt." (*Id.*, at p. 675.) We later stated in *****336** *Sheehan v. Sullivan* (1899) 126 Cal. 189, 58 P. 543 (*Sheehan*) that "[t]he authorities are uniform to the point that to justify a court in determining from oral testimony that a deed which purports to convey land absolutely in fee simple was intended to be something different, as a mortgage or trust, such testimony must be clear, convincing, and conclusive — something more than that modicum of evidence which appellate courts sometimes hold ***1000** sufficient to warrant a finding where the matter is not so serious as the overthrow of a clearly expressed deed, solemnly executed and delivered." (*Id.*, at p. 193, 58 P. 543.)

B. Consideration of the Clear and Convincing Standard in Appellate Review for Sufficiency of the Evidence

The court in *Sheehan*, *supra*, 126 Cal. 189, 58 P. 543, also addressed how other appellate courts had evaluated claims that parol evidence introduced before the trial court had not adequately established that a written deed instrument, absolute on its face, was in fact a mortgage or trust. Our opinion in *Sheehan* observed that through such matters (e.g., *Mahoney v. Bostwick* (1892) 96 Cal. 53, 30 P. 1020) the authorities "clearly declare that the rule, as above stated [requiring clear and convincing evidence that the intent was contrary to the deed's terms], should govern trial courts, and that, where an absolute deed has been found to be something else, the sufficiency of the evidence to support the finding should be considered by the appellate court *in the light of that rule*." (*Sheehan*, at p. 193, 58 P. 543, italics added.) In other words, even though the standard of clear and convincing evidence directly governed only the determination made by the trier of fact, appellate courts assessing the sufficiency of the evidence still had to take this standard of proof into account by appropriately reframing their inquiry.

It was understood even at the time *Sheehan* was decided that this adjustment in appellate perspective when the clear and convincing standard applied below did not provide reviewing courts with a liberal license to substitute their views for the conclusions drawn by the trier of fact on matters such as witness credibility and the resolution of conflicts in the evidence. In *Jarnatt v. Cooper* (1881) 59 Cal. 703, for example, this court had explained, "It is doubtless a well-settled rule that the party alleging fraud or mistake is bound to prove his allegation by clear and convincing evidence. That is, that the evidence which tends to prove the alleged fraud or mistake, if standing alone, uncontradicted, would establish a clear *prima facie* case of fraud or mistake. If it does not, this Court may reverse the judgment on the ground of insufficiency of the evidence to justify the decision. But where the evidence which tends to prove

fraud or mistake, if standing alone, uncontradicted, is sufficiently clear and convincing, we can not reverse the judgment on the ground that such evidence is contradicted by other evidence, because the right to pass upon the credibility of witnesses is not vested in this Court." (*Id.*, at p. 706.)

Since *Sheehan*, we have reiterated — albeit sometimes subtly — that when the clear and convincing standard of proof applied in the trial court, an appellate court should review the record for sufficient evidence in a manner ***1001** mindful of the elevated degree of certainty required by this standard. This guidance often has been coupled with language recognizing the limits of such review. More than a century ago, in *Wadleigh v. Phelps* (1906) 149 Cal. 627, 87 P. 93, we upheld a finding that a deed, absolute on its face, was in fact a mortgage. (*Id.*, at p. 639, 87 P. 93.) In doing so, we expounded, "It is, of course, the universal rule that the presumption ****48** of law, independent of proof, is that such a deed is *****337** what it purports to be — viz. an absolute conveyance — and that this presumption must prevail unless the evidence to the contrary is entirely plain and convincing. This, however, does not mean that the evidence in the record on appeal must be entirely plain and convincing to an appellate court. This question of fact, like other questions of fact, is one for the trial court, and while, as said in *Sheehan v. Sullivan*, 126 Cal. 189, 193, 58 P. 543 ..., the appellate court will consider the question as to the sufficiency of the evidence in the light of that rule, it will not disturb the finding of the trial court to the effect that the deed is a mortgage, where there is substantial evidence *warranting a clear and satisfactory conviction to that effect*. All questions as to preponderance and conflict of evidence are for the trial court." (*Id.*, at p. 637, 87 P. 93, italics added; see also *Title Ins. and Trust Co. v. Ingersoll* (1910) 158 Cal. 474, 484, 111 P. 360; *Couts v. Winston* (1908) 153 Cal. 686, 688-689, 96 P. 357.)

Several of our more recent decisions involving the clear and convincing standard of proof also have recognized that this standard affects a reviewing court's assessment of the sufficiency of the evidence. In *In re Angelia P.*, *supra*, 28 Cal.3d 908, 171 Cal.Rptr. 637, 623 P.2d 198, we stated that when reviewing the sufficiency of the evidence supporting an order terminating parental rights, issued upon a finding of clear and convincing evidence (see Civ. Code, former § 232, subd. (a)), " 'the [appellate] court must review the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence — that is, evidence which is reasonable, credible, and of solid value — such that a reasonable trier of fact could find [that termination of parental rights is appropriate based on clear and convincing evidence].' " (*In re Angelia P.*, at p. 924, 171 Cal.Rptr. 637, 623 P.2d 198; see also *In re Jasmon O.* (1994) 8 Cal.4th 398, 423, 33 Cal.Rptr.2d 85, 878 P.2d 1297 [taking a similar view of the appellate court's responsibility in reviewing a finding under Civ. Code, former § 232].) In *Wendland*, *supra*, 26 Cal.4th 519, 110 Cal.Rptr.2d 412, 28 P.3d 151, where we reviewed a finding by the trial court that the clear and convincing standard had not been satisfied, we described our task as follows: "The 'clear and convincing evidence' test requires a finding of high probability .... Applying that standard here, we ask whether the evidence ... has that degree of clarity ...." (*Id.*, at p. 552, 110 Cal.Rptr.2d 412, 28 P.3d 151.) And most recently, in *In re White* (2020) 9 Cal. 5th 455, 465, 262 Cal.Rptr.3d 602, 463 P.3d 802 (*White*), we specified, "To deny bail under article I, section 12(b) [of the California Constitution], a trial court must also find, by clear and convincing evidence, " 'a substantial likelihood the person's release would ***1002** result in great bodily harm to others.' [Citation.] ... On review, we consider whether any reasonable trier of fact could find, by clear and convincing evidence, a substantial likelihood that the person's release would lead to great bodily harm to others."

As respondents observe, we have on other occasions provided somewhat different descriptions of the reviewing court's role in evaluating a finding requiring clear and convincing evidence. We often have emphasized the appellate court's general responsibility to review the record for substantial evidence, even when the clear and convincing standard of proof applied before the trial court. (E.g., *In re Marriage of Saslow* (1985) 40 Cal.3d 848, 863, 221 Cal.Rptr. 546, 710 P.2d 346; *Crail v. Blakely* (1973) 8 Cal.3d 744, 750, 106 Cal.Rptr. 187, 505 P.2d 1027 (*Crail*); *Nat. Auto. & Cas. Co. v. Ind. Acc. Com.* (1949) 34 Cal.2d 20, 25, 206 P.2d 841; *Viner v. Untrecht* (1945) 26 Cal.2d 261, 267, 158 P.2d 3; *****338** *Stromerson v. Averill* (1943) 22 Cal.2d 808, 815, 141 P.2d 732 (*Stromerson*); *Simonton v. Los Angeles T. & S. Bank* (1928) 205 Cal. 252, 259, 270 P. 672; *Treadwell v. Nickel* (1924) 194 Cal. 243, 260-261, 228 P. 25; *Steinberger v. Young* (1917) 175 Cal. 81, 84-85, 165 P. 432 (*Steinberger*).) In *Crail*, we explained that the clear and convincing "standard was adopted ... for the edification and guidance of the trial court, and was not intended as a standard for appellate review. 'The sufficiency of evidence to establish a given fact, where the law requires proof of the fact to be clear and convincing, is primarily a question for the trial court to determine, and if there is substantial evidence to support its conclusion, ****49** the determination is not open to review on appeal.' " (*Crail*, at p. 750, 106 Cal.Rptr. 187, 505 P.2d 1027.) Respondents extract from these decisions the principle that appellate

review of a finding made under the clear and convincing standard is limited to whether the finding is supported by evidence that is "credible, reasonable, and solid" — words commonly used in describing "substantial evidence." (See *In re Teed's Estate* (1952) 112 Cal.App.2d 638, 644, 247 P.2d 54.)[3]

[3] Dissenting in *Stromerson*, *supra*, 22 Cal.2d 808, 141 P.2d 732, Justice Traynor wrote, "While it rests primarily with the trial court to determine whether the evidence is clear and convincing, its finding is not necessarily conclusive, for in cases governed by the rule requiring such evidence 'the sufficiency of the evidence to support the finding should be considered by the appellate court in the light of that rule.' (*Sheehan*[, *supra*], 126 Cal. 189, 193, 58 P. 543; [citation].) In such cases it is the duty of the appellate court in reviewing the evidence to determine, not simply whether the trier of facts could reasonably conclude that it is more probable that the fact to be proved exists than that it does not, as in the ordinary civil case where only a preponderance of the evidence is required ... but to determine whether the trier of facts could reasonably conclude that it is highly probable that the fact exists. When it [is held] that the trial court's finding must be governed by the same test with relation to substantial evidence as ordinarily applies in other civil cases, the rule that the evidence must be clear and convincing becomes meaningless." (*Id.*, at pp. 817-818, 141 P.2d 732 (dis. opn. of Traynor, J.); see also Traynor, The Riddle of Harmless Error (1970) p. 29 ["When it is the responsibility of the trier of fact to observe the requirement of clear and convincing evidence ... it becomes the responsibility of the appellate court to test the finding accordingly"].)

***1003** The decisions of the Courts of Appeal also do not speak with one clear voice regarding how appellate review for sufficiency of the evidence should unfold when the standard of proof before the trial court was clear and convincing evidence. (*T.J.*, *supra*, 21 Cal.App.5th at pp. 1238-1239, 230 Cal.Rptr.3d 928 [discussing the views expressed on this subject].) One view downplays the significance of the clear and convincing standard of proof in this context. Within this group, a few courts have flatly stated that a requirement of clear and convincing proof before the trial court does not necessitate any modifications to the conventional approach to appellate review for substantial evidence in a civil matter. (*Ian J. v. Peter M.* (2013) 213 Cal.App.4th 189, 208, 152 Cal.Rptr.3d 323; *In re Marriage of Ruelas* (2007) 154 Cal.App.4th 339, 345, 64 Cal.Rptr.3d 600; *In re Marriage of Murray* (2002) 101 Cal.App.4th 581, 604, 124 Cal.Rptr.2d 342; *Patrick v. Maryland Casualty Co.* (1990) 217 Cal.App.3d 1566, 1576, 267 Cal.Rptr. 24.) Thus it has been said, "[t]he substantial evidence rule that applies on appeal, applies without regard to the standard of proof applicable at trial" (*In re Marriage of Ruelas*, at p. 345, 64 Cal.Rptr.3d 600), meaning that a court reviewing a finding requiring clear and convincing proof is "not required to find *more* substantial evidence to support the trial court's finding 'than [it] would if the burden of proof had *****339** been only a preponderance of the evidence' " (*Ian J. v. Peter M.*, at p. 208, 152 Cal.Rptr.3d 323).

Many courts have drawn a similar lesson from the Witkin treatise on California Procedure, which provides in relevant part, "In a few situations, the law requires that a party produce more than an ordinary preponderance; he or she must establish a fact by 'clear and convincing evidence.' [Citations.] But the requirement applies only in the trial court. The judge may reject a showing as not measuring up to the standard, but, if the judge decides in favor of the party with this heavy burden, *the clear and convincing test disappears*. On appeal, the usual rule of conflicting evidence is applied, giving full effect to the respondent's evidence, however slight, and disregarding the appellant's evidence, however strong." (9 Witkin, Cal. Procedure (5th ed. 2008) Appeal, § 371, p. 428, italics added.) The assertion that "the clear and convincing test disappears" (*ibid.*) on appeal fairly imparts that this standard of proof has no bearing whatsoever on appellate review for sufficiency of the evidence.[4]

[4] The following Court of Appeal decisions have echoed the Witkin treatise's "disappears" phrasing: *Morgan v. Davidson* (2018) 29 Cal.App.5th 540, 549, 240 Cal.Rptr.3d 235; *In re Alexzander C.* (2017) 18 Cal.App.5th 438, 451, 226 Cal.Rptr.3d 515; *Parisi v. Mazzaferro* (2016) 5 Cal.App.5th 1219, 1227, footnote 11, 210 Cal.Rptr.3d 574; *In re Z.G.* (2016) 5 Cal.App.5th 705, 720, 210 Cal.Rptr.3d 187; *In re F.S.* (2016) 243 Cal.App.4th 799, 812, 196 Cal.Rptr.3d 830; *In re J.S.* (2014) 228 Cal.App.4th 1483, 1493, 176 Cal.Rptr.3d 746; *In re Marriage of E. & Stephen P.* (2013) 213 Cal.App.4th 983, 989-990, 153 Cal.Rptr.3d 154; *Ian J. v. Peter M.*, *supra*, 213 Cal.App.4th at page 208, 152 Cal.Rptr.3d 323; *In re A.S.* (2011) 202 Cal.App.4th 237, 247, 134 Cal.Rptr.3d 664; *In re K.A.* (2011) 201 Cal.App.4th 905, 909, 136 Cal.Rptr.3d 461; *In re Levi H.* (2011) 197 Cal.App.4th 1279, 1291, 128 Cal.Rptr.3d 814; *In re E.B.* (2010) 184 Cal.App.4th 568, 578, 109 Cal.Rptr.3d 1; *In re I.W.* (2009) 180 Cal.App.4th 1517, 1526, 103 Cal.Rptr.3d 538; *In re Angelique C.* (2003) 113 Cal.App.4th 509, 519, 6 Cal.Rptr.3d 395; *In re J.I.* (2003) 108 Cal.App.4th 903, 911, 134 Cal.Rptr.2d 342; *In re Mark L.* (2001) 94 Cal.App.4th 573, 580-581, 114 Cal.Rptr.2d 499; *Sheila S. v. Superior Court* (2000) 84 Cal.App.4th 872, 881, 101 Cal.Rptr.2d 187; *Ensworth v. Mullvain* (1990) 224 Cal.App.3d 1105, 1111, footnote 2, 274 Cal.Rptr. 447.

**50 *1004 Another viewpoint regards an appellate court as obligated to review the record for substantial evidence in a manner mindful of the fact that the clear and convincing standard of proof applied before the trial court.[5] This approach recently was adopted by the court in connection with a dependency proceeding (see Welf. & Inst. Code, § 366.21, subd. (g)(1)(C)(ii)) in ***340 *T.J., supra*, 21 Cal.App.5th 1229, 230 Cal.Rptr.3d 928. The court in *T.J.* observed that "[i]f the clear and convincing evidence standard 'disappears' on appellate review, that means the distinction between the preponderance standard and the clear and convincing standard ... is utterly lost on appeal ...." (*T.J.*, at p. 1239, 230 Cal.Rptr.3d 928.) Such an outcome was regarded as compromising "the integrity of the review process," because if the clear and convincing standard has no bearing whatsoever on appellate review, "the ability of the appellate court to correct error is unacceptably weakened." (*Ibid.*) Moved by these considerations, the court in *T.J.* concluded that it must " 'review the record in the light most favorable to the trial court's order to determine whether there is substantial evidence from which a reasonable trier of fact could make the necessary findings *based on the clear and convincing evidence standard*.' " (*Ibid.*, quoting *In re Isayah C.*, *supra*, 118 Cal.App.4th at p. 694, 13 Cal.Rptr.3d 198.)

5 E.g., *Johnson & Johnson Talcum Powder Cases* (2019) 37 Cal.App.5th 292, 333, 249 Cal.Rptr.3d 642; *T.J.*, *supra*, 21 Cal.App.5th at pages 1239-1240, 230 Cal.Rptr.3d 928; *Pulte Home Corp. v. American Safety Indemnity Co.* (2017) 14 Cal.App.5th 1086, 1125, 223 Cal.Rptr.3d 47; *Pfeifer v. John Crane, Inc.* (2013) 220 Cal.App.4th 1270, 1299, 164 Cal.Rptr.3d 112; *In re Hailey T.* (2012) 212 Cal.App.4th 139, 146, 151 Cal.Rptr.3d 1; *In re Alexis S.* (2012) 205 Cal.App.4th 48, 54, 139 Cal.Rptr.3d 774; *In re Andy G.* (2010) 183 Cal.App.4th 1405, 1415, 107 Cal.Rptr.3d 923; *In re William B.* (2008) 163 Cal.App.4th 1220, 1229, 78 Cal.Rptr.3d 91; *In re Baby Girl M.* (2006) 135 Cal.App.4th 1528, 1536, 38 Cal.Rptr.3d 484; *In re Henry V.* (2004) 119 Cal.App.4th 522, 530, 14 Cal.Rptr.3d 496; *In re Isayah C.* (2004) 118 Cal.App.4th 684, 694, 13 Cal.Rptr.3d 198; *In re Alvin R.* (2003) 108 Cal.App.4th 962, 971, 134 Cal.Rptr.2d 210; *In re Luke M.* (2003) 107 Cal.App.4th 1412, 1426, 132 Cal.Rptr.2d 907; *Shade Foods, Inc. v. Innovative Products Sales & Marketing, Inc.* (2000) 78 Cal.App.4th 847, 891, 93 Cal.Rptr.2d 364; *In re Kristin H.* (1996) 46 Cal.App.4th 1635, 1654, 54 Cal.Rptr.2d 722; *In re Basilio T.* (1992) 4 Cal.App.4th 155, 170-171, 5 Cal.Rptr.2d 450; *Opsal v. United Services Auto. Assn.* (1991) 2 Cal.App.4th 1197, 1200, 10 Cal.Rptr.2d 352; *In re Victoria M.* (1989) 207 Cal.App.3d 1317, 1326, 255 Cal.Rptr. 498; *In re Amos L.* (1981) 124 Cal.App.3d 1031, 1038, 177 Cal.Rptr. 783.

All in all, it would be a fair summarization to say that although the trend within our more recent decisions has been to recognize that the application of the clear and convincing standard of proof before the trial court affects appellate review for sufficiency of the evidence, our case law also contains *1005 contrary suggestions that have contributed to what is now a significant split of authority among the Courts of Appeal.

C. The Clear and Convincing Standard of Proof Informs Appellate Review for Substantial Evidence

[7]We now dispel this uncertainty over the proper manner of appellate review by clarifying that an appellate court evaluating the sufficiency of the evidence in support of a finding must make an appropriate adjustment to its analysis when the clear and convincing standard of proof applied before the trial court. In general, when presented with a challenge to the sufficiency of the evidence associated with a finding requiring clear and convincing evidence, the court must determine whether the record, viewed as a whole, contains substantial evidence from which a reasonable trier of fact could have made the finding of high probability demanded by this **51 standard of proof.[6]

6 In announcing only a general rule, we recognize that different forms of appellate review may apply in certain circumstances when a determination has been made by the trier of fact under the clear and convincing standard of proof. (See, e.g., *McCoy v. Hearst Corp.* (1986) 42 Cal.3d 835, 845-846, 231 Cal.Rptr. 518, 727 P.2d 711 [discussing appellate review of findings of actual malice in defamation suits].)

This rule finds support in logic, in the policy interests that are often implicated when clear and convincing evidence supplies the standard of proof, and in precedent. First, "[a]s a matter of logic, a finding that must be based on clear and convincing evidence cannot be viewed on appeal the same as one that may be sustained on a mere preponderance." (*In re C.H.* (Tex. 2002) 89 S.W.3d 17, 25.) As we have long acknowledged (see, e.g., *Sheehan*, *supra*, 126 Cal. at p. 193, 58 P. 543), the clear and convincing standard of proof normally applies directly only before the trial court; appellate courts normally do not decide whether they themselves believe the evidence was so probative. And the fundamental question before an appellate court reviewing for sufficiency of the evidence is the same, regardless of the standard of proof that applied below: whether any reasonable trier of fact could have made the finding that is now challenged on appeal.

But the issue before a reviewing court in a given case is whether the trier of fact could ***341** have made the finding it *did* arrive upon, rather than a hypothetical finding involving a different standard of proof. Therefore, when reviewing a finding that demands clear and convincing evidence, an appellate court must determine whether the evidence reasonably could have led to a finding made with the specific degree of confidence required by this standard.

[8] [9]Taking the clear and convincing standard into account in this context is also logically consistent with the principle that an appellate court addressing a claim of insufficient proof reviews the record for substantial evidence ***1006** supporting the challenged finding. Substantial evidence is evidence that is "of ponderable legal significance," "reasonable in nature, credible, and of solid value," and " 'substantial' proof of the essentials which the law requires in a particular case." (*In re Teed's Estate*, *supra*, 112 Cal.App.2d at p. 644, 247 P.2d 54.) Respondents draw from this definition of substantial evidence in advocating for their approach to appellate review. They assert that "[s]olid, credible evidence is ... by definition, clear and convincing because we have rationally invested with determinative significance the trial court's rejection — on credibility, persuasiveness, or other grounds — of the evidence to the contrary," and "[t]he evidence necessary to support the decision below must be credible, reasonable, and solid; otherwise the judgment will be reversed." But these assertions ignore part of what makes substantial evidence *substantial*. Even if evidence is capable of being regarded as "credible," "reasonable," and "solid," to amount to substantial evidence it also must be "of ponderable legal significance." (*In re Teed's Estate,* at p. 644, 247 P.2d 54.) And whether evidence is "of ponderable legal significance" (*ibid.*) cannot be properly evaluated in situations such as the one at bar without accounting for the heightened standard of proof that applied before the trial court.

[10]Second, keeping the clear and convincing standard in mind when reviewing for sufficiency of the evidence helps ensure that an appropriate degree of appellate scrutiny attaches to findings to which this standard applies. As previously noted, the clear and convincing standard is used for various determinations where " 'particularly important individual interests or rights are at stake.' " (*Weiner v. Fleischman*, *supra*, 54 Cal.3d at p. 487, 286 Cal.Rptr. 40, 816 P.2d 892.) The selection of the clear and convincing standard in these situations reflects "a very fundamental assessment of the comparative social costs of erroneous factual determinations." (*In re Winship*, *supra*, 397 U.S. at p. 370, 90 S.Ct. 1068 (conc. opn. of Harlan, J.).) That is to say, the significant consequences of an erroneous true finding when these interests or rights are involved — such as an improper deportation, an unnecessary involuntary commitment, or an unjustified termination of parental rights — support the application of a heightened standard of proof, relative to the **52** preponderance standard. Yet the use of a clear and convincing standard of proof before the trial court may not by itself completely protect these interests, because "the trier of fact will sometimes, despite his best efforts, be wrong in his factual conclusions." (*Ibid.*) Admittedly, an appellate court that gives appropriate deference to the trier of fact will not be in a position to detect or correct some of these errors. But when a review of the record establishes that *no* reasonable factfinder could have found a matter proved to a degree of high probability, appellate intervention reaffirms that the interests involved are of special importance, that their deprivation requires a greater burden to be surmounted, ***342** and that the judicial system operates in a coordinated fashion to ensure as much.

***1007** Third, our holding is more consistent with our recent precedent and with the case law of other state high courts than would be a contrary rule that would have appellate courts ignore the clear and convincing standard when reviewing for substantial evidence. As discussed *ante*, in *In re Angelia P.*, *supra*, 28 Cal.3d at page 924, 171 Cal.Rptr. 637, 623 P.2d 198, *In re Jasmon O.*, *supra*, 8 Cal.4th at page 423, 33 Cal.Rptr.2d 85, 878 P.2d 1297, *Wendland*, *supra*, 26 Cal.4th at page 552, 110 Cal.Rptr.2d 412, 28 P.3d 151, and *White*, *supra*, 9 Cal.5th at page 465, 262 Cal.Rptr.3d 602, 463 P.3d 802, we recognized that the applicability of the clear and convincing standard of proof before the trial court was relevant to appellate review of the evidentiary record. (Cf. *Dart Industries, Inc. v. Commercial Union Ins. Co.* (2002) 28 Cal.4th 1059, 1082, 124 Cal.Rptr.2d 142, 52 P.3d 79 (conc. opn. of Brown. J.).) Moreover, a survey of the case law of other state courts of last resort reveals numerous recent decisions in which these courts have calibrated their review for sufficient evidence to reflect that the clear and convincing standard of proof applied to the finding at issue. (E.g., *In re N.G.* (Ind. 2016) 51 N.E.3d 1167, 1170; *Moore v. Stills* (Ky. 2010) 307 S.W.3d 71, 82-83; *In re B.D.-Y.* (2008) 286 Kan. 686, 187 P.3d 594, 606; *Ex parte McInish* (Ala. 2008) 47 So.3d 767, 778; *In re B.T.* (2006) 153 N.H. 255, 891 A.2d 1193, 1198; *In re S.B.C.* (Okla. 2002) 64 P.3d 1080, 1083; *In re C.H.*, *supra*, 89 S.W.3d at p. 25; *Hudak v. Procek* (Del. 2002) 806 A.2d 140, 150; *Rogers v. Moore* (Minn. 1999) 603 N.W.2d 650, 658; *In re N.H.* (1998) 168 Vt. 508, 724 A.2d 467, 470; *Estate of Robinson v. Gusta* (Miss. 1989) 540 So.2d 30, 33; *In Interest of Bush* (1988) 113 Idaho 873, 749 P.2d 492, 495;

Taylor v. Commissioner of Mental Health (Me. 1984) 481 A.2d 139, 153; *Blackburn v. Blackburn* (1982) 249 Ga. 689, 292 S.E.2d 821, 826.)

Our approach also harmonizes with the firmly established rule in criminal cases that the prosecution's burden of proving a defendant's guilt beyond a reasonable doubt affects how an appellate court reviews the record for substantial evidence. In *Jackson v. Virginia* (1979) 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (*Jackson*), the United States Supreme Court considered "what standard is to be applied in a federal habeas corpus proceeding when the claim is made that a person has been convicted in a state court upon insufficient evidence." (*Id.*, at p. 309, 99 S.Ct. 2781.) The *Jackson* court decided that "the critical inquiry on review of the sufficiency of the evidence to support a criminal conviction must be not simply to determine whether the jury was properly instructed, but to determine whether the record evidence could reasonably support a finding of guilt beyond a reasonable doubt." (*Id.*, at p. 318, 99 S.Ct. 2781.) The high court explained that "this inquiry does not require a court to 'ask itself whether *it* believes that the evidence at the trial established guilt beyond a reasonable doubt.' [Citation.] Instead, the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. [Citation.] This familiar standard gives full play to the responsibility of the trier of fact fairly to resolve ***1008** conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts. Once a defendant has been found guilty of the crime charged, the factfinder's role as weigher of the evidence is preserved through a legal conclusion that upon judicial review *all of the evidence* is to be considered in the ****53** light most favorable to *****343** the prosecution." (*Id.*, at pp. 318-319, 99 S.Ct. 2781.)

The decision in *Jackson* prompted this court "to review and define the California standard for review" of a claim brought by a defendant on direct appeal alleging that a criminal conviction lacked sufficient support in the evidentiary record. (*People v. Johnson* (1980) 26 Cal.3d 557, 562, 162 Cal.Rptr. 431, 606 P.2d 738.) We concluded in *Johnson* that the standard of review already established by our case law was consistent with the rule announced in *Jackson*. (*Johnson*, at p. 577, 162 Cal.Rptr. 431, 606 P.2d 738.) "[W]henever the evidentiary support for a conviction faces a challenge on appeal," we determined, "the court must review the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt." (*Id.*, at p. 562, 162 Cal.Rptr. 431, 606 P.2d 738.) We observed that when engaging in this review, an appellate court " 'must view the evidence in a light most favorable to respondent and presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence.' " (*Id.*, at p. 576, 162 Cal.Rptr. 431, 606 P.2d 738.)

[11]Thus it has long been the law that appellate inquiry into the sufficiency of the evidence associated with a criminal conviction both accounts for the beyond a reasonable doubt standard of proof that applied before the trial court and extends an appropriate degree of deference to the perspective of the trier of fact. And with infrequent exceptions, appellate courts have grasped what this kind of review entails. This experience contradicts respondents' argument that a rule that requires the clear and convincing standard of proof to be taken into account when reviewing for substantial evidence will encourage these same courts to overstep their authority by reweighing the evidence themselves. Out of an abundance of caution, however, we use this opportunity to emphasize that as in criminal appeals involving a challenge to the sufficiency of the evidence, an appellate court reviewing a finding made pursuant to the clear and convincing standard does not reweigh the evidence itself. In assessing how the evidence reasonably could have been evaluated by the trier of fact, an appellate court reviewing such a finding is to view the record in the light most favorable to the judgment below; it must indulge reasonable inferences that the trier of fact might have drawn from the evidence; it must accept the factfinder's resolution of conflicting evidence; and it may not insert its own views regarding the credibility of witnesses in place of the assessments conveyed by the judgment. (See, e.g., *People v. Veamatahau* (2020) 9 Cal.5th 16, 35-36, 259 Cal.Rptr.3d 205, 459 P.3d 10; ***1009** *People v. Gomez* (2018) 6 Cal.5th 243, 278, 307, 240 Cal.Rptr.3d 315, 430 P.3d 791.) To paraphrase the high court in *Jackson*, *supra*, 443 U.S. at page 318, 99 S.Ct. 2781, the question before a court reviewing a finding that a fact has been proved by clear and convincing evidence is not whether the appellate court itself regards the evidence as clear and convincing; it is whether a reasonable trier of fact could have regarded the evidence as satisfying this standard of proof.

This court's precedent offers less support for respondents' position that appellate review for sufficiency of the evidence should in no way account for the clear and convincing standard of proof that applied before the trial court. As observed *ante*, respondents emphasize language appearing in a line of decisions beginning with *Steinberger*, *supra*, 175 Cal. 81, 165 P. 432 *****344** and including our statement in *Crail*, *supra*, 8 Cal.3d 744, 106

Cal.Rptr. 187, 505 P.2d 1027, that the clear and convincing "standard was adopted ... for the edification and guidance of the trial court, and was not intended as a standard for appellate review. 'The sufficiency of evidence to establish a given fact, where the law requires proof of the fact to be clear and convincing, is primarily a question for the trial court to determine, and if there is substantial evidence to support its conclusion, the determination is not open to review on appeal.' " (*Crail*, at p. 750, 106 Cal.Rptr. 187, 505 P.2d 1027; see also *In re Marriage of Saslow*, *supra*, 40 Cal.3d at p. 863, 221 Cal.Rptr. 546, 710 P.2d 346; *Nat. Auto. & Cas. Co. v. Ind. Acc. Com.*, *supra*, 34 Cal.2d at p. 25, 206 P.2d 841; *Viner v. Untrecht*, *supra*, 26 Cal.2d at p. 267, 158 P.2d 3; ****54** *Stromerson*, *supra*, 22 Cal.2d at p. 815, 141 P.2d 732; *Simonton v. Los Angeles T. & S. Bank*, *supra*, 205 Cal. at p. 259, 270 P. 672; *Treadwell v. Nickel*, *supra*, 194 Cal. at pp. 260-261, 228 P. 25; *Steinberger*, 175 Cal. at pp. 84-85, 165 P. 432.) Respondents assert that representations such as this commit this court to the position that the clear and convincing standard of proof has no bearing on appellate review for substantial evidence.

We disagree. For starters, it is not perfectly clear that *Steinberger* and its progeny all stand for the proposition that the clear and convincing standard of proof's application before the trial court has no effect upon appellate review for sufficiency of the evidence. As it appeared in *Steinberger*, *supra*, 175 Cal. 81, 165 P. 432, the assertion that "if there be substantial evidence to support the conclusion reached below, the finding is not open to review on appeal" served to clarify a point made earlier in the opinion, that it was the province of the fact-finder to resolve conflicts in the evidence. (*Id.*, at p. 85, 165 P. 432.) Statements in our later decisions also could be read as stopping well short of the absolutist position respondents assign to them. To say that clear and convincing evidence is not a standard for appellate review is correct in the sense that an appellate court normally does not *itself* review the record for clear and convincing proof. Likewise, representations that an appellate court reviews the record for substantial evidence, without further explanation of what that evidence must establish, could be understood as more incomplete than incorrect.

***1010** We nevertheless appreciate that the decisions respondents rely upon have been interpreted, and not entirely without reason, as casting the clear and convincing standard of proof as irrelevant to appellate review for sufficiency of the evidence. (See, e.g., *Morgan v. Davidson*, *supra*, 29 Cal.App.5th at p. 549, 240 Cal.Rptr.3d 235.) Even so understood, however, these decisions mean only that our court has in the past sent mixed signals regarding the issue before us. As we have explained, the clear trend within our recent case law, which finds support in older decisions of this court, has been to recognize that when a heightened standard of proof applied before the trial court, an appropriate adjustment must be made to appellate review for sufficiency of the evidence. We confirm today that this modern trend is correct. We therefore disapprove *In re Marriage of Saslow*, *supra*, 40 Cal.3d 848, 221 Cal.Rptr. 546, 710 P.2d 346; *Crail v. Blakely*, *supra*, 8 Cal.3d 744, 106 Cal.Rptr. 187, 505 P.2d 1027; *Nat. Auto. & Cas. Co. v. Ind. Acc. Com.*, *supra*, 34 Cal.2d 20, 206 P.2d 841; *Viner v. Untrecht*, *supra*, 26 Cal.2d 261, 158 P.2d 3; *Stromerson v. Averill*, *supra*, 22 Cal.2d 808, 141 P.2d 732; *Simonton v. Los Angeles T. & S. Bank*, *supra*, 205 Cal. 252, 270 P. 672; *Treadwell v. Nickel*, *supra*, 194 Cal. 243, 228 P. 25; and *****345** *Steinberger v. Young*, *supra*, 175 Cal. 81, 165 P. 432, to the extent each could be read as regarding the use of the clear and convincing standard of proof before the trial court as having no effect on appellate review for sufficiency of the evidence. (See *Moss v. Superior Court* (1998) 17 Cal.4th 396, 401, 71 Cal.Rptr.2d 215, 950 P.2d 59; *People v. Carbajal* (1995) 10 Cal.4th 1114, 1126, 43 Cal.Rptr.2d 681, 899 P.2d 67.)[7]

[7] Insofar as they are inconsistent with our holding, we also disapprove *Ian J. v. Peter M.*, *supra*, 213 Cal.App.4th 189, 152 Cal.Rptr.3d 323, *In re Marriage of Ruelas*, *supra*, 154 Cal.App.4th 339, 64 Cal.Rptr.3d 600, *In re Marriage of Murray*, *supra*, 101 Cal.App.4th 581, 124 Cal.Rptr.2d 342, and *Patrick v. Maryland Casualty Co.*, *supra*, 217 Cal.App.3d 1566, 267 Cal.Rptr. 24, as well as the Court of Appeal decisions that have described the clear and convincing standard as disappearing on appeal: *Morgan v. Davidson*, *supra*, 29 Cal.App.5th 540, 240 Cal.Rptr.3d 235; *In re Alexzander C.*, *supra*, 18 Cal.App.5th 438, 226 Cal.Rptr.3d 515; *Parisi v. Mazzaferro*, *supra*, 5 Cal.App.5th 1219, 210 Cal.Rptr.3d 574; *In re Z.G.*, *supra*, 5 Cal.App.5th 705, 210 Cal.Rptr.3d 187; *In re F.S.*, *supra*, 243 Cal.App.4th 799, 196 Cal.Rptr.3d 830; *In re J.S.*, *supra*, 228 Cal.App.4th 1483, 176 Cal.Rptr.3d 746; *In re Marriage of E. & Stephen P.*, *supra*, 213 Cal.App.4th 983, 153 Cal.Rptr.3d 154; *In re A.S.*, *supra*, 202 Cal.App.4th 237, 134 Cal.Rptr.3d 664; *In re K.A.*, *supra*, 201 Cal.App.4th 905, 136 Cal.Rptr.3d 461; *In re Levi H.*, *supra*, 197 Cal.App.4th 1279, 128 Cal.Rptr.3d 814; *In re E.B.*, *supra*, 184 Cal.App.4th 568, 109 Cal.Rptr.3d 1; *In re I.W.*, *supra*, 180 Cal.App.4th 1517, 103 Cal.Rptr.3d 538; *In re Angelique C.*, *supra*, 113 Cal.App.4th 509, 6 Cal.Rptr.3d 395; *In re J.I.*, *supra*, 108 Cal.App.4th 903, 134 Cal.Rptr.2d 342; *In re Mark L.*, *supra*, 94 Cal.App.4th 573, 114 Cal.Rptr.2d 499; *Sheila S. v. Superior Court*, *supra*, 84 Cal.App.4th 872, 101 Cal.Rptr.2d 187; and *Ensworth v. Mullvain*, *supra*, 224 Cal.App.3d 1105, 274 Cal.Rptr. 447.
We also use this opportunity to comment upon another provision within the Witkin treatise's discussion of

> appellate review of findings involving clear and convincing evidence. After observing that "the clear and convincing test disappears" on appeal, the treatise adds that "[o]n appeal, the usual rule of conflicting evidence is applied, giving full effect to the respondent's evidence, however slight, and disregarding the appellant's evidence, however strong." (9 Witkin, Cal. Procedure, *supra*, Appeal, § 371, p. 428.) It should be understood that even if conflicts in the evidence are viewed this way by a reviewing court, giving "full effect" to the respondent's evidence, "however slight" (*ibid.*), does not necessarily mean that this evidence will amount to *substantial* evidence of "ponderable legal significance" (*In re Teed's Estate*, *supra*, 112 Cal.App.2d at p. 644, 247 P.2d 54) which reasonably could have been regarded as sufficient to establish a fact with the certainty required by the clear and convincing standard.

****55 *1011** [12]Finally, respondents raise a narrower argument sounding in legislative intent. They assert that even if we were to conclude here that the clear and convincing standard of proof does not simply disappear when an appellate court reviews for substantial evidence, the Legislature *thought* this standard vanished on appeal when it enacted the limited conservatorship statute (Stats. 1990, ch. 79, § 14, p. 523; see also Stats. 1980, ch. 1304, § 6, p. 4400) and specified that the standard of proof for the appointment of a conservator is clear and convincing evidence (Stats. 1995, ch. 842, § 7, p. 6410). Respondents argue that we should defer to this expectation in interpreting the requirement of clear and convincing evidence found in Probate Code section 1801, subdivision (e).

This argument is not persuasive. Respondents fail to identify anything within the text or legislative history of Probate Code section 1801 affirmatively establishing that the Legislature believed the clear and convincing standard of proof should be ignored by an appellate court reviewing a record for substantial evidence. Instead, respondents assert that when the Legislature recognized limited conservatorships and directed that the clear and convincing standard of proof applies to the appointment of a conservator, "it did so against *****346** the backdrop of 150 years of consistent precedent from this Court squarely holding that such standards [of proof] direct only the trial court, and do not apply ('disappear') on appeal." Thus, respondents claim, the Legislature should be regarded as having implicitly incorporated this judicially created rule within the statute. As we have explained, however, our precedent did *not* consistently articulate the view respondents ascribe to it. Therefore, even if we were to regard our case law as informing prevailing expectations among legislators, and these expectations as reflective of legislative intent, respondents' argument would still falter at the outset. Given the mixed signals sent by our past decisions, we still could not reasonably conclude that when the Legislature provided for limited conservatorships and specified in section 1801, subdivision (e) that the appointment of a conservator requires clear and convincing evidence, it intended for appellate courts to completely disregard this standard of proof when reviewing the record developed before the probate court for substantial evidence.

[13] [14]To summarize, we hold that an appellate court must account for the clear and convincing standard of proof when addressing a claim that the evidence does not support a finding made under this standard. When reviewing a finding that a fact has been proved by clear and convincing evidence, the question before the appellate court is whether the record as a whole contains substantial evidence from which a reasonable factfinder could have found it highly probable that the fact was true. In conducting its review, the court must view the record in the light most favorable to the prevailing party below and give appropriate deference to how the trier of fact may have evaluated the credibility of witnesses, resolved conflicts in the evidence, and ***1012** drawn reasonable inferences from the evidence. Because the Court of Appeal below believed that the clear and convincing standard of proof " ' "disappears" ' " on appeal (*Conservatorship of O.B.*, *supra*, 32 Cal.App.5th at p. 633, 244 Cal.Rptr.3d 192), we remand the cause to that court for it to reevaluate the sufficiency of the evidence in light of the clarification we have provided.

III. Disposition

We reverse the judgment of the Court of Appeal and remand the cause to that court ****56** for further proceedings consistent with this opinion.

We Concur:

CHIN, J.

CORRIGAN, J.

LIU, J.

CUÉLLAR, J.

KRUGER, J.

GROBAN, J.

9 Cal.5th 989, 470 P.3d 41, 266 Cal.Rptr.3d 329, 20 Cal. Daily Op. Serv. 7528, 2020 Daily Journal D.A.R. 7797

All Citations

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54 Cal.App.5th 147
Court of Appeal, Second District, Division 2, California.

IN RE V.L. et al., Persons Coming Under the Juvenile Court Law.
Los Angeles County Department of Children and Family Services, Plaintiff and Respondent,
v.
M.L, Defendant and Appellant.

B304209
|
Filed 9/1/2020

Synopsis
Background: Department of Children and Family Services filed petition alleging that children were dependent. The Superior Court, Los Angeles County, No. 19CCJP01609A-B, Lisa A. Brackelmanns, Judge Pro Tempore, ordered children removed from father's custody. Father appealed.

[Holding:] The Court of Appeal, Ashmann-Gerst, Acting P.J., held that removal of children from father's physical custody was warranted.

Affirmed.

West Headnotes (11)

[1] **Infants**Dependency, permanency, and rights termination in general

211Infants
211XIVDependency, Permanent Custody, and Termination of Rights; Children in Need
211XIV(F)Evidence
211k2155Degree of Proof
211k2157Dependency, permanency, and rights termination in general

Clear and convincing evidence to support a finding justifying removal of a child from parental custody requires a finding of high probability. Cal. Welf. & Inst. Code § 361(c).

2 Cases that cite this headnote

[2] **Infants**Dependency, permanency, and rights termination in general

211Infants
211XIVDependency, Permanent Custody, and Termination of Rights; Children in Need
211XIV(F)Evidence
211k2155Degree of Proof
211k2157Dependency, permanency, and rights termination in general

The evidence justifying removal of a child from parental custody must be so clear as to leave no substantial doubt; it must be sufficiently strong to command the unhesitating assent of every reasonable mind. Cal. Welf. & Inst. Code § 361(c).

1 Cases that cite this headnote

[3] **Infants**Future risk; past history or conduct

211Infants
211XIVDependency, Permanent Custody, and Termination of Rights; Children in Need
211XIV(D)Dependency, Permanency, and Termination Factors; Children in Need of Aid
211XIV(D)3Deprivation, Neglect, or Abuse
211k1976Future risk; past history or conduct

Actual harm to a child is not necessary before a child can be removed from parental custody; reasonable apprehension stands as an accepted basis for the exercise of state power. Cal. Welf. & Inst. Code § 361(c).

2 Cases that cite this headnote

[4] **Infants**Dependency, Permanency, and Rights Termination

211Infants
211XIVDependency, Permanent Custody, and Termination of Rights; Children in Need
211XIV(K)Appeal and Review
211k2411Questions of Fact and Findings
211k2415Dependency, Permanency, and Rights Termination
211k2415(1)In general

A juvenile court's removal order at a disposition hearing will be affirmed on appeal if it is supported by substantial evidence. Cal. Welf. & Inst. Code § 361(c).

[5] **Infants**Dependency, permanency, and rights termination in general

211Infants
211XIVDependency, Permanent Custody, and Termination of Rights; Children in Need
211XIV(F)Evidence
211k2155Degree of Proof
211k2157Dependency, permanency, and rights termination in general

Evidence at a disposition hearing sufficient to support the juvenile court's finding in support of removal must be reasonable in nature, credible, and of solid value; it must actually be substantial proof of the essentials that the law requires in a particular case. Cal. Welf. & Inst. Code § 361(c).

[6] **Infants**Presumptions, inferences, and burden of proof

211Infants
211XIVDependency, Permanent Custody, and Termination of Rights; Children in Need
211XIV(K)Appeal and Review
211k2409Presumptions, inferences, and burden of proof

In reviewing a juvenile court's removal order, the appellate court considers the evidence in the light most favorable to respondent, giving respondent the benefit of every reasonable inference and resolving all conflicts in support of the challenged order. Cal. Welf. & Inst. Code § 361(c).

3 Cases that cite this headnote

[7] **Infants**Presumptions, inferences, and burden of proof
InfantsDependency, Permanency, and Rights Termination

211Infants
211XIVDependency, Permanent Custody, and Termination of Rights; Children in Need
211XIV(K)Appeal and Review
211k2409Presumptions, inferences, and burden of proof
211Infants
211XIVDependency, Permanent Custody, and Termination of Rights; Children in Need
211XIV(K)Appeal and Review
211k2411Questions of Fact and Findings
211k2415Dependency, Permanency, and Rights Termination
211k2415(1)In general

When reviewing a finding that a fact has been proved by clear and convincing evidence in a dependency proceeding, the question before the appellate court is whether the record as a whole contains substantial evidence from which a reasonable fact finder could have found it highly probable that the fact was true; in making this assessment the appellate court must view the record in the light most favorable to the prevailing party below and give due deference to how the trier of fact may have evaluated the credibility of witnesses, resolved conflicts in the evidence, and drawn reasonable inferences from the evidence.

8 Cases that cite this headnote

[8] **Infants**Exposure of child to

211Infants

211XIVDependency, Permanent Custody, and Termination of Rights; Children in Need
211XIV(D)Dependency, Permanency, and Termination Factors; Children in Need of Aid
211XIV(D)3Deprivation, Neglect, or Abuse
211k1957Domestic Violence and Altercations
211k1959Exposure of child to

Three violent altercations between mother and father, two of which occurred in presence of both daughter and son, warranted removal of children from father's physical custody, even if children were old enough to report domestic violence in the future; father denied history of domestic violence and accused mother of fabricating two of the incidents, indicating that he was less likely to change his behavior in the future, and father drove his car in reckless manner after one of the incidents.

1 Cases that cite this headnote

[9] Infants Exposure of child to

211Infants
211XIVDependency, Permanent Custody, and Termination of Rights; Children in Need
211XIV(D)Dependency, Permanency, and Termination Factors; Children in Need of Aid
211XIV(D)3Deprivation, Neglect, or Abuse
211k1957Domestic Violence and Altercations
211k1959Exposure of child to

Even if a child suffers no physical harm due to domestic violence, a cycle of violence between parents constitutes a failure to protect a child from the substantial risk of encountering the violence and suffering serious physical harm or illness from it.

4 Cases that cite this headnote

[10] Infants Domestic Violence and Altercations

211Infants
211XIVDependency, Permanent Custody, and Termination of Rights; Children in Need
211XIV(D)Dependency, Permanency, and Termination Factors; Children in Need of Aid
211XIV(D)3Deprivation, Neglect, or Abuse
211k1957Domestic Violence and Altercations
211k1958In general

A parent's denial of domestic violence increases the risk of it recurring and is thus a consideration in determining whether a child is dependent.

3 Cases that cite this headnote

[11] Appeal and Error Relation Between Error and Final Outcome or Result

30Appeal and Error
30XVIIHarmless and Reversible Error
30XVII(A)In General
30k4157Relation Between Error and Final Outcome or Result
30k4158In general

A bedrock rule of appellate law is that an appellate court will not reverse an order unless it concludes it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error.

Witkin Library Reference: 16 Witkin, Summary of Cal. Law (11th ed. 2017) Juvenile Court Law, § 559 [Appeal; Procedure; In General.]

****435** APPEAL from an order of the Superior Court of Los Angeles County. Lisa A. Brackelmanns, Judge Pro Tempore. Affirmed. (Los Angeles County Super. Ct. No. 19CCJP01609A-B)

Attorneys and Law Firms

John P. McCurley, under appointment by the Court of Appeal, for Defendant and Appellant.

Mary C. Wickham, County Counsel, Kristine P. Miles, Assistant County Counsel and Melania Vartanian, Deputy County Counsel, for Plaintiff and Respondent.

Opinion

ASHMANN-GERST, Acting P. J.

***149** M.L. (father) appeals from the dispositional order removing eight-year old K.L. (son) and 15-year-old V.L. (daughter) (collectively minors) from his custody. Father argues that the record is insufficient to support removal of minors by clear and convincing evidence. Further, he argues that the juvenile court's failure to state the reasons for its decision to remove minors requires us to reverse the order. We conclude that the order must be affirmed. Integral to analysis of the first issue, we heed the holding of *Conservatorship of O.B.* (2020) 9 Cal.5th 989, 995–996, 266 Cal.Rptr.3d 329, 470 P.3d 41 (*O.B.*) establishing that when a statute requires a fact to be found by clear and convincing evidence, and when there is a substantial evidence challenge, the reviewing court must determine whether the record contains substantial evidence from which a reasonable trier of fact could find the existence of that fact to be highly probable.

FACTS

Background

Y.R. (mother) was in a relationship with father when she gave birth to the minors. After daughter was born, mother and father married. Eventually, she started a relationship with L.M. Mother and father separated while she was four months pregnant with L.M.'s child, L.R.[1] She later gave birth to L.R. in 2018.[2]

[1] The record suggests that father moved out of the family home in October 2017 after a domestic violence incident.

[2] L.R. is not a subject of this appeal.

Referral

The Department of Children and Family Services (Department) received a call alleging emotional abuse of minors and L.R. by father on January 18, 2019. The caller claimed father struck mother with his car as she was crossing a street; a woman named Gabriela got out of the car and pulled mother's hair; father did the same; and he was arrested for assault with a deadly weapon.

Investigation

Evidence Regarding the January 18, 2019 Incident

A neighbor provided the Los Angeles Police Department (LAPD) with surveillance video of the incident. A Department ****436** children's social worker ***150** (CSW) spoke with an LAPD Detective, who stated the video showed that mother was the primary aggressor and father was the victim. The detective also stated that father violated traffic laws because he drove past a stop sign at a high rate of speed.

The CSW summarized the surveillance video in the Department's detention report. It showed that mother opened father's car door and attacked him. Gabriela and minors' paternal uncle got out of the car to stop the attack. Father tried to reverse out of his parking spot and nearly injured paternal uncle and Gabriela. Mother and father then engaged in a mutual physical altercation, at which point paternal uncle walked away and then returned with paternal grandmother and son. "Prior to [father driving away], mother [ran] over to the passenger side of the vehicle, kick[ed] the door more than once, and appear[ed] to challenge ... [Gabriela]." Father drove away, and son threw something at father's car. Father returned "a few seconds later driving northbound on the street, fail[ed] to stop at the intersection, and mother ... walk[ed] towards the vehicle." The CSW wrote that the "video does not show mother being struck by a vehicle and it is unclear if she was injured during the incident. It is clear that mother instigated the situation and was the primary aggressor during the dispute, as father was sitting in his vehicle and he and his family members were blindsided by mother's attack."

Father stated that on the date of the incident, he was in his car with Gabriela and paternal uncle. Mother came out of nowhere and opened the car door. She began to slap and scratch father, and he could not get out of his car because she was holding onto his seatbelt. Paternal uncle got out of the car and tried to stop mother from hitting father, but mother tried to attack him, too. Gabriela got out of the car and she and mother started fighting over father. Father

admitted that he grabbed onto mother "pretty hard" out of self-defense, and that he was very upset at her unprovoked attack. He disclosed that son saw them fighting. After father, Gabriela and paternal uncle got back in the car, father drove away but returned moments later to get his wallet and some keys that had fallen in the street during the altercation. Father stated he never struck mother with the car, but the car did bump into her when she got in the way. According to father, mother's statement to the police that he assaulted her and intentionally struck her with the vehicle was a lie.

Paternal grandmother reported that paternal uncle came into her apartment asking them to call the police because mother had attacked father. Outside, paternal grandmother observed mother attacking father. Mother bumped into father's car when he tried to drive away.

Mother claimed that she drove to paternal grandmother's house to pick up son after he spent the night there. Mother parked far away and as she was ***151** crossing the street, she saw a blue Honda make a sudden U-turn and strike her. Gabriela exited the vehicle and paternal uncle held mother down while everyone pulled mother's hair, hit her, called her a whore, and told her to leave father alone. Son told different versions of what happened on January 18, 2019. In both versions, however, he consistently said father hit mother with his car and she went flying in the air. Daughter did not witness the incident. She said that when mother returned home following the incident, she "had lots of marks and scratches on her arms and knees. Her face was very swollen and her pants were ripped."

****437** Mother and father separately provided photographs to CSW to document their injuries from the incident. They showed that mother had abrasions to her knees and elbows, and bruises to her left forearm, and that father had two large scratches along his right shoulder and clavicle, as well as a scratch along his lip and chin.

History of Domestic Violence and Abuse

Mother, daughter and son claimed there had been two prior domestic violence incidents while mother was pregnant: in August 2017 in Las Vegas, father punched mother in the stomach; and, at a baby shower two months later in October 2017, mother and father fought over a phone which resulted in them knocking over tables and chairs. During the baby shower incident, daughter told her parents to stop fighting but they did not listen.

Per daughter, when father lived at the home, he would make minors kneel on the floor with boxes of rice or beans above them to tire them, and he would hit son with a belt or wire. Father was always angry.

Son said that when they lived together, father made him kneel on the floor while holding heavy items above his head, and father would sometimes "belt" son.

Mother and Father's Ambiguous Ongoing Relationship

After father moved out of the family home, he still frequented the family home and mother would cook for him. In August 2018, L.M. went to mother's home and saw father. This upset L.M. because he thought mother and father were in a sexual relationship.

Father's Representations

Father told a CSW that during the January 18, 2019 incident, mother told Gabriela that father was still in love with mother. He denied a history of ***152** domestic violence and indicated that mother has always been a jealous and insecure woman. He claimed mother made up the domestic violence allegations because she was upset he had moved on from her after he discovered that she was pregnant with L.M.'s child. Moreover, he claimed that his relationship with Gabriela had been affected by mother's insecurities because she had made harassing phone calls. He said he had to change his phone number in response.

In November 2019, father represented that Gabriela lived with him but was not his girlfriend.

Detention Hearing

At a detention hearing, the juvenile court ordered minors detained from father and released to mother. It also ordered: father to have visits with a monitor who was someone other than mother; father to stay away from mother and mother's house; and Gabriela to have no contact with minors. Minors' counsel requested and obtained an order that minors receive counseling, claiming they were showing great distress at the conduct of their parents, particularly father.

Dependency Petition; Amended Petition; Jurisdiction Hearing

The Department filed a petition under Welfare and Institutions Code section 300.[3] On May 1, 2019, Department filed an amended petition containing multiple counts; all but two counts were dismissed ****438** by the juvenile court. Those two counts, one under section 300, subdivision (a) and one under section 300, subdivision (b), alleged that mother and father "have a history of engaging in physical altercations" including "a recent incident ... when [son] was present ... [and] the parents engaged in mutual combat." They also alleged that in 2017 father "pushed the mother to the ground in the presence of [daughter] while mother was pregnant with [L.R]."

[3] All further statutory references are to the Welfare and Institutions Code unless otherwise indicated.

The juvenile court sustained the amended petition and ordered father to be given one hour of unmonitored visitation with minors a week.

Father's Participation in Services

In June 2019, a service provider reported that father was participating in parenting and domestic violence classes. Department informed the juvenile court that father was having six hours of monitored visits and one hour of ***153** unmonitored visits per week with minors. It noted that minors said they enjoyed spending time with father.

In August 2019, father was granted unmonitored visits for six hours on Saturdays and six hours on Sundays. The juvenile court's order instructed father that Gabriela was prohibited from being present.

Father completed his 12-week parenting skills class in August 2019 and completed his 26-week domestic violence program in October 2019.

In September 2019, minors and father reported that Gabriela had been present for short periods of time—going "in and out" to pick up her belongings—during their unmonitored visits at father's home.

A month later, a CSW reported that the visits were going well and there had been no reports of Gabriela being present.

Disposition Hearing

In November 2019, the juvenile court held a disposition hearing and father's counsel requested it order minors placed in father's home. The juvenile court denied the request and placed minors with mother. As to father, the juvenile court ordered, inter alia, individual counseling to address case issues; enhancement services; and unmonitored visits. The Department was given the discretion to allow overnight visits after it saw father's home and did a background check on Gabriela.

The juvenile court found "by clear and convincing evidence that it's reasonable and necessary to remove [minors] from the home because there's a substantial danger to the physical health, safety, protection or physical or emotional well-being of [minors], and there are no reasonable means by which [minors'] physical health can be protected without removing [them] from the home and the legal and physical custody[,] care, ... and control of the father." It also found that "it would be detrimental to the safety, protection, or physical or emotional well-being of [minors] to be returned to the home and the care, custody, and control of the father."

Father appealed.

DISCUSSION

This first issue raised by father is whether the order at the disposition hearing removing minors from his custody was supported by sufficient ***154** evidence. The second issue is whether the removal order should be reversed because the juvenile court did not state the facts it relied upon.

I. Relevant Law; Standard of Review.

[1] [2] [3]To remove a child from parental custody, the court must make one of five specified findings by clear and convincing evidence. (§ 361, subd. (c).) One ground for ****439** removal is that there is a substantial risk of injury to the child's physical health, safety, protection or

emotional well-being if he or she were returned home, and there are no reasonable means to protect the child. (§ 361, subd. (c)(1).) " 'Clear and convincing' evidence requires a finding of high probability. The evidence must be so clear as to leave no substantial doubt. It must be sufficiently strong to command the unhesitating assent of every reasonable mind. [Citations.]" (*In re David C.* (1984) 152 Cal.App.3d 1189, 1208, 200 Cal.Rptr. 115.) Actual harm to a child is not necessary before a child can be removed. "Reasonable apprehension stands as an accepted basis for the exercise of state power." (*In re Eric B.* (1987) 189 Cal.App.3d 996, 1003, 235 Cal.Rptr. 22.)

Section 361, subdivision (e) provides: "The court shall state the facts on which the decision to remove the minor is based." (See *In re D.P.* (2020) 44 Cal.App.5th 1058, 1067, 258 Cal.Rptr.3d 313; *In re Basilio T.* (1992) 4 Cal.App.4th 155, 171, 5 Cal.Rptr.2d 450.)

[4] [5] [6]A juvenile court's removal order at a disposition hearing will be affirmed on appeal if it is supported by substantial evidence. (*In re Amos L.* (1981) 124 Cal.App.3d 1031, 1038, 177 Cal.Rptr. 783.) "Evidence sufficient to support the [juvenile] court's finding must be reasonable in nature, credible, and of solid value; it must actually be substantial proof of the essentials that the law requires in a particular case. [Citation.]" (*In re N.S.* (2002) 97 Cal.App.4th 167, 172, 118 Cal.Rptr.2d 259.) We consider "the evidence in the light most favorable to respondent, giving respondent the benefit of every reasonable inference and resolving all conflicts in support of the [challenged order]. [Citation.]" (*In re Tracy Z.* (1987) 195 Cal.App.3d 107, 113, 240 Cal.Rptr. 445.)

The court in *T.J. v. Superior Court* (2018) 21 Cal.App.5th 1229, 1238–1239, 230 Cal.Rptr.3d 928 (*T.J.*) noted that "[t]he Court[ ] of Appeal do[es] not speak with one voice in describing how the substantial evidence standard is to be applied in dependency cases when the clear and convincing standard of proof was required at trial. Some cases hold the clear and convincing standard ' " 'disappears' " ' on appellate review. [Citations.] Others suggest we conduct our substantial evidence review ' "bearing in mind" ' the heightened standard of proof. [Citation.]" T.J. concluded that a reviewing court ***155** must apply the latter standard, i.e., it must give credence to the clear and convincing standard when applying the substantial evidence test. (*Id.* at p. 1239, 230 Cal.Rptr.3d 928.)

[7]Our Supreme Court recently resolved any dispute on this matter when it issued its opinion in *O.B.* and held that "appellate review of the sufficiency of the evidence in support of a finding requiring clear and convincing proof must account for the level of confidence this standard demands.... [W]hen reviewing a finding that a fact has been proved by clear and convincing evidence, the question before the appellate court is whether the record as a whole contains substantial evidence from which a reasonable fact finder could have found it highly probable that the fact was true. Consistent with well-established principles governing review for sufficiency of the evidence, in making this assessment the appellate court must view the record in the light most favorable to the prevailing party below and give due deference to how the trier of fact may have evaluated the credibility of witnesses, resolved conflicts in the evidence, and drawn reasonable inferences from the evidence." (*O.B., supra*, 9 Cal.5th at pp. 995–996, 266 Cal.Rptr.3d 329, 470 P.3d 41.)

****440** *O.B.*, of course, is a conservatorship case, not a dependency case. However, it signaled that its holding has broad application. In examining the clear and convincing evidence standard, it observed that the standard applies to various determinations, such as termination of parental rights, involuntary commitment, deportation, liability for punitive damages, whether a conservator can withdraw life-sustaining care from a conservatee, whether conditions necessary for the nonconsensual, nonemergency administration of psychiatric medication to a prison inmate have been satisfied, and whether a publisher acted with actual malice in certain defamation cases. (*O.B., supra*, 9 Cal.5th at p. 999, 266 Cal.Rptr.3d 329, 470 P.3d 41.) Also, the court surveyed prior decisions discussing how a finding by clear and convincing evidence should be reviewed in dependency cases, among others. (*Id.* at pp. 1001–1004, 266 Cal.Rptr.3d 329, 470 P.3d 41, citing T.J., *In re Angelia P.* (1981) 28 Cal.3d 908, 171 Cal.Rptr. 637, 623 P.2d 198, and *In re Jasmon O.* (1994) 8 Cal.4th 398, 33 Cal.Rptr.2d 85, 878 P.2d 1297.) In a footnote, *O.B.* disapproved of a host of dependency cases to the extent that they are inconsistent with *O.B.*'s holding. (*O.B., supra*, at p. 1010, fn. 7, 266 Cal.Rptr.3d 329, 470 P.3d 41.) We conclude that *O.B.* is controlling in dependency cases.

II. Evidence Sufficient.

A. Analysis.

[8]Mother and father had three violent altercations, two in 2017 and one at the beginning of 2019. The inference is that the first two incidents occurred in the presence of

both daughter and son because they both reported the incidents to ***156** a CSW during their interviews. As to one of the 2017 incidents, daughter was present and tried to stop her parents' altercation. The 2019 incident occurred, in part, in the presence of son and resulted in mother and father suffering injuries after engaging in mutual combat initiated by mother. This evidence shows an ongoing cycle of domestic violence.

The inference from the CSW's summary of the surveillance video, the statement by the police to the CSW, and father's admission that mother bumped into his car is that father dangerously poor judgment by driving through a stop sign at a high rate of speed, that his car either made physical contact with mother or was near her, and that he recklessly endangered mother's life in son's presence. An additional inference is that son was so angered or upset by the last incident that he threw something at father's car.

Father denied a history of domestic violence and accused mother of fabricating the 2017 incidents, indicating that he is unwilling to admit his role in the domestic violence. The inference from his denial is that he is less likely to change his behavior in the future. Though father argues in the reply that he did not deny his role in the January 18, 2019, incident, all he does is admit that he told a CSW that he grabbed mother "pretty hard" out of self-defense. He does not acknowledge his role in prior incidents of domestic violence, and he seeks to minimize his role in the January 18, 2019, incident by focusing on an isolated moment. He adverts to a "Domestic Violence for Batter[er]s Progress Report" stating that he "has been participating in class sharing how important his children and others are [to] him and he really regrets his behavior and now [ ]is learning how to love himself and others." This vague statement made by a third party does not establish that father accepts responsibility for his specific conduct.

[9] [10]Minors have been exposed to recurring domestic violence by mother and father, and the last incident precipitated ****441** the current dependency case. Even if a child suffers no physical harm due to domestic violence, a "cycle of violence between ... parents constitute[s] a failure to protect [a child] 'from the substantial risk of encountering the violence and suffering serious physical harm or illness from it.' [Citations.]" (*In re T.V.* (2013) 217 Cal.App.4th 126, 135, 157 Cal.Rptr.3d 693.) A parent's denial of domestic violence increases the risk of it recurring. (*In re Giovanni F.* (2010) 184 Cal.App.4th 594, 601, 108 Cal.Rptr.3d 885; *In re Gabriel K.* (2012) 203 Cal.App.4th 188, 197, 136 Cal.Rptr.3d 813 ["One cannot correct a problem one fails to acknowledge"].)

When the evidence is viewed in the foregoing light, i.e., the light favorable to the Department, we conclude a reasonable trier of fact could ***157** have found it highly probable that placement of minors with father would pose a substantial risk of them being harmed by exposure to future domestic violence, and that there were no reasonable means to protect minors without removal from father's physical custody.

B. Father's Arguments Unavailing.

Father suggests that the finding a risk of harm was based only on the domestic violence that occurred in 2017, and that those incidents did not provide clear and convincing evidence of a substantial risk of harm and that no alternative means existed to protect minors. This suggestion is unfounded. The juvenile court sustained the amended petition, which contained an allegation about the January 18, 2019, incident involving mutual combat. Impliedly, the incident was part of the reason for removal. While the evidence showed that mother was the aggressor, it also showed the father engaged with mother and then drove his car in a reckless manner.

Citing to *In re Daisy H.* (2011) 192 Cal.App.4th 713, 717, 120 Cal.Rptr.3d 709, father argues that the risk to the children of recurring domestic violence perpetrated by father was minimal because at the time of the disposition hearing, mother and he were separated and were living apart for several years. *In re Daisy H.*—a case holding that there was insufficient evidence of failure to protect—provides no guidance because it involved domestic violence that occurred seven years before the section 300 petition was filed, the children never witnessed domestic violence between the parents, the parents were separated, and there was no evidence of ongoing violence between them. Here, even though mother and father were separated, the January 18, 2019, incident is evidence of ongoing domestic violence. The record further indicates that father was still frequenting mother's home as of August 2018, and that she had still been cooking for him after he moved out in October 2017. Even though he claimed mother was harassing Gabriela and him, the inference from the record is that mother and father's relationship is unresolved. Also, minors witnessed domestic violence between mother and father, who were unable to control themselves and stop fighting even when minors interacted during the fights. The foregoing establishes that *Daisy H.* is inapposite.

Next, father contends that his willingness to participate in

services diminished any potential risk to minors. While that might be true, it is merely conflicting evidence regarding the risk that he posed to them. Under the substantial evidence test, it must be disregarded.

Father argues that minors did not have to be removed because they are old enough to report domestic violence in the future. But the issue is not whether ***158** the minors can report domestic violence after it happened. Rather it is whether there is a risk that they will be injured while any future domestic violence is occurring. Father ****442** also advances the notion that minors can be protected by the Department making unannounced visits. He relies on *In re Ashly F.* (2014) 225 Cal.App.4th 803, 170 Cal.Rptr.3d 523 (*Ashley F.*), a case involving child abuse by a mother and a father's failure to protect his children from her. We are not persuaded. In that case, the children were removed from their home even though "ample evidence" showed there were reasonable means to protect them by unannounced visits by the Department, public health nursing services, in-home counseling, and removal of mother rather than the children from the family home. The court asserted that mother had expressed remorse and was enrolled in parenting classes. For these reasons, the court reversed the removal order. (*Id.* at pp. 810–811, 170 Cal.Rptr.3d 523.) None of these options would protect minors, as is proven by the latest incident of domestic violence. It took place on a public street and involved father engaging in mutual combat and driving a car recklessly. Home visits will not prevent that type of incident from occurring. The other two incidents of domestic violence also happened outside the home. On top of that, father denied a history of domestic violence, and he is a source of danger, so he is not in the same shoes as the father in *Ashley F.*

Taking a different tack, father suggests that the juvenile court erred because he "promptly and diligently engaged in services and has made substantial progress in addressing the issues that led to dependency." Father thus tacitly contends that he eliminated the risk of harm that he might have previously posed to the minors. But at the time of the disposition hearing, he had not yet attended individual counseling sessions to address case issues. Also, even though father may well have made progress with his services, we cannot second guess an order supported by substantial evidence.

In the reply, father objects to the characterization of the January 18, 2019, incident as mutual combat because the police identified him as the victim and the CSW said mother was the primary aggressor. He contends that he had every right to defend himself. We remind father that we must view the evidence in the light most favorable to the Department. Though mother was the primary aggressor, there was ample evidence from which the juvenile court could conclude there was mutual combat. Regardless, once the altercation ended, father drove his car in a reckless manner. It is easy to conclude that driving his car in a reckless manner near mother was not necessary force "to protect from wrongful injury [to] the person or property of [himself], or of a spouse, child, parent, or other relative." (Civ. Code, § 50 [defining self-defense].)

***159 III. Failure to State Facts Harmless.**

[11]Father argues that the juvenile court's failure to state the facts it relied upon is reversible error because the removal order is not supported by substantial evidence. Because we have determined that substantial evidence does support the removal order, we reject father's argument. Aside from this, a bedrock rule of appellate law is that we will not reverse an order unless we conclude it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error. (*In re J.S.* (2011) 196 Cal.App.4th 1069, 1078, 126 Cal.Rptr.3d 868.) Here, because the last incident of domestic violence involving father was so dangerous and troubling, it is not reasonably probable that the juvenile court would have reached a different conclusion if it stated the facts it relied upon.

DISPOSITION

The order is affirmed.

We concur:

CHAVEZ, J.

HOFFSTADT, J.

All Citations

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