



Mishler v. Kinder

2009 | Cited 0 times | California Court of Appeal | August 14, 2009

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"How sharper than a serpent's tooth it is to have a thankless child!"¹ This is a story of family strife. An elderly man divides his property among his three daughters. Eventually, he comes to believe that he is well loved by only one of his daughters, while the other two engage in endless legal attacks upon him. Dismayed, he rewrites his trust, leaving everything to the daughter he lives with, and nothing to the two daughters who anger and upset him with their legal challenges. The probate court thwarted the fathers intentions to leave everything to one daughter and disinherit the other two. We reverse.

FACTS

In August 2003, Peter T. Gallegos established a revocable trust (the Trust). The beneficiaries named in the Trust were Gallegoss three daughters, Carmelina Kinder, Margaret Kinder and Rosemary Kinder.² The original Trust instrument specified that Gallegoss daughters would share equally in the Trust assets and serve as co-trustees upon Gallegoss incapacity or death. At the time the Trust was created, Gallegos had a good relationship with all three of his daughters.

Shortly after establishing the Trust, Gallegos fell ill and was hospitalized. During that period, Gallegos was unable to manage his financial affairs. After receiving a blood transfusion, Gallegos was discharged to a nursing home. Over the objections of Margaret and Carmelina, Gallegos soon left the nursing home and moved in with Rosemary. Margaret sought intervention by police and Adult Protective Services, claiming that her father was endangered by Rosemary: Margarets claims were investigated and found to be meritless. On October 15, 2003, Gallegos filed a document indicating that he had resumed his position as sole trustee of the Trust. He also obtained a temporary restraining order preventing Margaret from harassing or contacting him.

In October 2003, Gallegos amended the Trust. As amended, the Trust identified Rosemary as the sole trustee in the event of Gallegoss incapacity or death, and added a "no contest" clause. Gallegos did not alter the manner in which the Trust was to be distributed upon his death. The attorney who drafted the 2003 amendments met with Gallegos three times and declared that he was competent to



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execute the amendments.

A petition was brought by Margaret and Carmelina claiming that Gallegos "is extremely ill and is no longer able to make decisions on his own behalf," and arguing that Rosemary was acting improperly. The probate court appointed a Probate Volunteer Panel (PVP) attorney to assess Gallegos's mental capacity. In her report to the probate court in January 2004, PVP counsel stated that Gallegos had previously suffered "a temporary incapacity" due to illness, but his doctors have determined that he is now capable of managing his personal and financial affairs. PVP counsel spent two hours with Gallegos and found that he is competent and has resumed his duties as trustee. Gallegos informed counsel that his three daughters cannot work together amicably as co-trustees, so he decided to have Rosemary serve as sole trustee and amended the Trust accordingly.

As further proof of Gallegos's competence, appointed counsel offered two letters from Gallegos's doctors. In a letter dated November 4, 2003, internist Marian Jalil stated that she spoke to Gallegos "at great length" and although he has "some medical problems," she found him "very alert and oriented" and "capable to handle his medical and financial affairs." An October 7, 2003, letter from Gallegos's primary physician, William Pevsner, stated that Gallegos "is perfectly competent to handle his own affairs as far as future medical care and welfare as well as his own personal finances. His change in mental status was caused by his anemia (low blood count) brought on by his chronic renal insufficiency."

On February 19, 2004, the probate court dismissed Margaret and Carmelina's petition. During the hearing, Margaret complained that she and Carmelina have not been able to see Gallegos because Rosemary was saying bad things about them to their father. Gallegos's PVP counsel replied that Gallegos "does not want to talk to them right now" because he "is upset and unhappy about the fact that they seem to be challenging his capacity." The court rejected Margaret and Carmelina's claims, observing that, "Simply said, he's resuming his duties based upon the declarations of the PVP attorney and doctors' declaration in this case." The court stated that it was "quite familiar with the file, quite familiar with the declarations, quite familiar with what occurred, why [Gallegos] filed the amendments, and disappointment in the three siblings acting as co-trustees in this matter Based upon the amendments and declarations of capacity, there's a reassumption as to role of trustee of his own estate in this case. Petitions dismissed in this matter." (*Italics added.*)³

In March 2004, one month after the probate court dismissed Margaret and Carmelina's challenge to his mental capacity, Gallegos executed a Trust "Amendment and Restatement." The March 2004 Amendment reduced the prospective beneficial interests of Margaret and Carmelina in the Trust to 5 percent each, leaving 90 percent of Trust assets to Rosemary.

In May 2004, Margaret filed a new petition challenging Gallegos's capacity. She claimed a "whitewash" of Gallegos's mental state, arguing that he had dementia even before he created the Trust. Margaret later withdrew her second petition challenging Gallegos's mental capacity.



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In June 2004, Gallegos filed a petition to establish the validity of his Trust and its amendments. In support of his petition, Gallegos submitted letters from his internist and podiatrist. The internist, Sanjay Khedia, stated on March 3, 2004, that Gallegos is "under my care" and opined that he is "mentally competent." The podiatrist, J.C. Beck, had been treating Gallegos since 2002, three or four times per month, for chronic diabetic ulcerations. In his letter of May 20, 2004, Dr. Beck noted Gallegos suffered a temporary decline in health while in a nursing facility in 2003, because he did not receive proper care or treatment during that time. After Gallegos moved in with Rosemary, Dr. Beck observed that Gallegos recovered his health, was "back to his old jovial self," and was able to communicate freely, comment on current events, voice logical opinions and had "appropriate objectives." In June 2006, another physician, Oliver Burrows, found no impairment in Gallegos's alertness, attention, ability to process information, memory, understanding, recognition and reasoning, and no thought disorders, hallucinations or delusions.

Margaret opposed Gallegos's petition to determine the validity of the Trust and its amendments. Margaret claimed that Gallegos "is and was seriously ill and is no longer able to make decisions on his own behalf." She alleged an "abundance of proof" that Gallegos "was suffering from dementia at the time of the making of the [original] trust." Nevertheless, Margaret argued that the original Trust is valid, but every modification to the Trust is invalid because of Rosemary's coercion and undue influence.

In support of her opposition, Margaret attached medical evaluations from September and October 2003, when Gallegos was ill, which stated that Gallegos was mentally impaired and unable to make decisions or take care of his own affairs. Margaret relied upon a letter from Dr. Pevsner dated September 12, 2003, stating that Gallegos "is unable to make decisions in his behalf." However, one month later, Dr. Pevsner reevaluated Gallegos and withdrew his prior assessment. Dr. Pevsner wrote that Gallegos is "oriented to person, place and time" and "is perfectly competent to handle his own affairs" In a separate "capacity declaration" completed on October 15, 2003, Dr. Pevsner indicated that Gallegos does not have "a pervasive and persistent or recurrent emotional state that appears inappropriate" and does not have dementia. Margaret was the person who took Gallegos to Dr. Pevsner for the October 15 capacity evaluation.

Margaret also submitted, in May 2006, an evaluation by psychiatrist Sarabjit Sandhu. Dr. Sandhu reviewed a video recording of Gallegos's deposition, made in May 2005. Dr. Sandhu opined that Gallegos "was showing cognitive and memory deficits that were severe enough to impact his behaviors, his functioning and his decision-making." Gallegos was unable to provide basic information and did not remember amending the Trust. Gallegos was "fixated on his anger" toward two of his daughters, insisting that they tried to send him to a nursing home to die. Gallegos repeatedly stated that "Every time they tried to send me away I took something more away from them." Dr. Sandhu concluded that Gallegos was susceptible to suggestion and manipulation and was "not competent to make rational decisions pertaining to his finances at the time of the deposition."



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In reply to Margaret's opposition to his petition to confirm the validity of his Trust and its amendments, Gallegos described Margaret's attack upon him as bold and shameless. Gallegos instructed Rosemary and her husband not to let Margaret and Carmelina visit because of their hostility to him.

In October 2004, while his petition was pending, Gallegos executed another modification to the Trust. The October 2004 modification omitted Margaret and Carmelina, leaving Rosemary as the sole beneficiary. In January 2005, Gallegos quitclaimed his interest in real property in California and Nevada to Rosemary. Margaret brought yet another petition in November 2005, to remove Rosemary as successor trustee, compel an accounting, and challenge the Trust amendments.

Despite Gallegos's age (80), his petition to establish the validity of the Trust and its amendments languished in the probate court for two and one-half years. Trial finally began on Gallegos's petition in December 2006 and dragged on periodically into January and February 2007. The testimony at trial was voluminous.

Testimony of Petitioner Gallegos

Gallegos was too ill to attend the trial. Among the evidence presented was Gallegos's deposition from September 2006. Gallegos identified himself, his birth date, and his choice and desire to live with Rosemary. He identified his signed Trust instrument, stating that he authorized its creation. He remembered making and signing the 2003 and 2004 amendments to the Trust, and told the attorney what he wanted the documents to say. It was his idea to change the Trust: no one forced him to do so, no one threatened him. Asked why he amended the Trust, Gallegos explained that "I was upset about things, what brought it on." He affirmed that he initially reduced the shares of Margaret and Carmelina to 5 percent, leaving 90 percent to Rosemary.⁴

Gallegos testified that he quitclaimed some of his property to Rosemary: in response to a question whether he was forced to sign the quitclaim, Gallegos replied, "No, they didn't even know I did it" until after he had made the transfer. Gallegos was astounded at a question whether Rosemary and her family ever tried to hurt him, noting that "they won't even take any money." No one prevents him from seeing Margaret or Carmelina; rather, he does not want to see them. Asked "Do you want Margaret to stop taking you to court?" Gallegos answered, "Yes, I would like to forget I got a daughter and son-in-law like that." Gallegos was convinced that Margaret and her husband entered his house while he was hospitalized and stole jewelry and money.

Testimony of Estate Planning Attorney Emadi

Estate planning attorney Bonnie Emadi testified regarding the amendments to the Trust. Emadi recalled that Gallegos was "quite upset" with Margaret and Carmelina, who "checked him into the hospice center and, according to [Gallegos], left him there to die" and also "ransacked his house."



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Gallegos did not feel that they should serve as trustees, because they were untrustworthy. Gallegos gave Emadi a letter from a physician declaring him to be competent. Emadi conversed with Gallegos who, though physically weak, "seemed alert mentally, and he knew his family and the nature of his assets," so that Emadi "felt him to be competent to make changes to his estate plan." Emadi considered whether Gallegos was there of his own free will, but after speaking to him "felt convinced that he wanted to make the changes that he was requesting." She perceived no duress, coercion or undue influence.

Several months after amending the Trust to name Rosemary as the sole successor trustee, Gallegos returned to Emadi's office. This time, Gallegos was "very angry" at Margaret and Carmelina for instituting court proceedings: he "expressed a desire to completely disinherit his daughters Carmelina and Margaret." Emadi and her partner advised Gallegos to leave "a small gift" of 5 percent each to Margaret and Carmelina, to avoid further litigation. This led to the March 2004 Amendment and Restatement executed by Gallegos. Emadi spoke to Gallegos's court-appointed PVP counsel, who opined that Gallegos "was definitely competent to make these decisions," an opinion that Emadi shared, and which was supported by a medical evaluation. Emadi described Gallegos as "stronger" than before and "completely lucid and sharp."

Gallegos requested another amendment to the Trust in October 2004, asking Emadi "to completely disinherit" Margaret and Carmelina and leave the entire Trust to Rosemary. Emadi testified that Gallegos "was increasingly discouraged with the behavior of his daughters," who continued to challenge his competency in court proceedings. He insisted that they take nothing, not even the 5 percent he had previously given. Emadi found Gallegos stronger than ever, and under no coercion, duress, or undue influence. Gallegos also asked Emadi to draft quitclaim deeds transferring his property to Rosemary, because Margaret was challenging the validity of the Trust. Emadi felt Gallegos "was fully capable to make this decision," knew the nature of his assets, and the consequences of making an outright gift. Emadi always met with Gallegos privately, without the participation of Rosemary or Ralph Kinder (Rosemary's husband).

Testimony of Court-Appointed PVP Attorney Stapleton

Testimony was given by court-appointed PVP counsel Victoria Stapleton, who has 26 years of experience working in estate planning, conservatorships and elder law. Stapleton met with Gallegos three or four times in January and February 2004, when his mental capacity had been called into question. Stapleton described Gallegos as "very lucid [and] clear. He knew what he wanted to do." They discussed Gallegos's property and income, his former employment, and his children. Gallegos did not want his three daughters to serve as co-trustees because they did not get along. Stapleton found Gallegos "very, very coherent, very well spoken." She did not doubt his competence or his capacity to serve as trustee. Gallegos told Stapleton that Rosemary and Ralph were taking "very, very good care of him." They took him to his doctors appointments, yet refused to let him reimburse them for his food or for gasoline. Gallegos was "very content" living with Rosemary. By contrast, he was



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"upset" that Margaret and Carmelina brought petitions questioning his ability to make his own decisions.

Stapleton noted that the Trust amendments were executed "almost contemporaneous" with the doctors reports finding him to be competent. She discussed the amendments with Gallegos and found that they were what he "wanted to accomplish." Stapleton specifically considered the possibility of undue influence. Yet, after speaking to him at length, alone, she "didn't get a feeling at any point in time that he was being prompted to tell me anything particular, that he was being pushed in any particular direction" because he answered her questions without hesitation, and not as if he were searching for "the right answer."

Testimony of Dr. Sanjay Khedia

Internist Khedia testified that Gallegos was a patient of his starting in February 2004. He assessed Gallegos's mental capacity in March 2004, and found him capable of making informed decisions regarding his medical care and his financial affairs. Dr. Khedia observed that Ralph cared for Gallegos and did not seem to exert any undue influence. On the "Mini Mental Status Examination," a standardized screening test for dementia that Dr. Khedia administered, Gallegos scored 26 out of 30. This score means that Gallegos is "mentally competent to make his own decision[s]."

Testimony of Dr. William Pevsner

Family practice physician William Pevsner began treating Gallegos in June 2003. Dr. Pevsner conceded that his letter declaring Gallegos incompetent in September 2003 was not based on an actual examination of Gallegos; rather, it was written at the request of an attorney representing Margaret and Carmelina. Dr. Pevsner examined Gallegos in October 2003, when he found him competent. Dr. Pevsner testified that when someone is anemic, as Gallegos was, "they can certainly seem like they're demented, acting strange. It affects the ability of the brain to make decisions." A blood transfusion can improve the mental state of someone with anemia. Dr. Pevsner described Gallegos as "rational in his thought" with clear speech and no indicia of dementia or incapacity in October 2003.

Testimony of Maria Guadalupe Garcia

Garcia, an employee at the nursing home where Gallegos stayed in September 2003, testified that on two occasions Gallegos cried after Rosemary and Ralph visited. Gallegos told Garcia that he loved his daughters and was saddened by disputes between them over money.

Testimony of Dr. Sarabjit Sandhu

Dr. Sandhu is the psychiatrist hired by Margaret. He never personally examined Gallegos. On



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cross-examination, Dr. Sandhu admitted that it is not "appropriate" for a doctor to render an opinion on mental capacity without personally examining the patient, saying "You have to have a face-on evaluation." Dr. Sandhu did not speak to any of the other doctors regarding their medical evaluations of Gallegos mental capacity.

Despite never evaluating Gallegos in person, Dr. Sandhu rendered an opinion that Gallegos had a "significant degree of dementia, and that he was not competent to make decisions." His opinion was based on medical evaluations dating from August to October 2003, and a portion of a videotaped deposition of Gallegos dating from 2005. Regarding the 2003 medical evaluations, Dr. Sandhu observed that "The physicians at the time deemed him not competent, . . . so, of course, he would not be able to make financial decisions as well." (*Italics added.*) Dr. Sandhu's impression of the videotape was that Gallegos "was showing significant cognitive and memory deficits at that time." (*Italics added.*) Dr. Sandhu noted that Alzheimers is a progressive disease. He was not sure how, in 2003, the hospital arrived at a determination that Gallegos had Alzheimers or dementia, or whether that diagnosis was correct.

Dr. Sandhu agreed that severe anemia would impact a patient, causing disorientation and confusion, and that a blood transfusion would improve the patient's cognitive ability. He was unaware that Gallegos received a blood transfusion in September 2003, or that the probate court declared Gallegos competent to resume the role of trustee in February 2004. Nevertheless, Dr. Sandhu did not believe that anemia contributed to Gallegos's confusion or disorientation. Dr. Sandhu agreed that a diabetic condition can cause mental impairment, so that if Gallegos was deposed for several hours, lack of food could affect his ability to answer questions.⁵

Upon learning that Gallegos scored 26 out of 30 on a competence test in March 2004, Dr. Sandhu thought this indicated "mild impairment or mild dementia" and he "would be concerned about the deficits, and I would want to explore further" He had no personal knowledge of Gallegos's capacity at the time Gallegos executed the amendments to the Trust; however, he thought it "possible but unlikely" that Gallegos was competent.

Testimony of Family Members

Considerable testimony came from family members, who largely contradicted each other's recollections and said things that would advance their personal interest in the outcome of this litigation.

Carmelina testified that Gallegos was incompetent to execute the Trust amendments, and that Rosemary prevented her from seeing Gallegos. Carmelina indicated that the animosity between family members began 30 years ago, when Margaret and her husband Ferer diverted assets from a family estate to themselves, using aliases. Gallegos learned of Margaret's wrongdoing and warned Rosemary about the misappropriation of assets.



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Margaret testified that she did not withdraw the petition filed by herself and Carmelina after she received a notice from Gallegos announcing that he was resuming the office of trustee in October 2003. When asked if she took any other actions to challenge Gallegos after he resumed his duties as trustee, Margaret replied, "I don't believe so," although the record shows that she filed two additional challenges, one in May 2004 and one in November 2005. Margaret conceded that she did not have any personal knowledge of Gallegos's competence in March and October 2004, when he amended the Trust, because she has not seen him at all since October 2003. She believes he is incompetent because he has refused to see her or her children. Margaret believes that Gallegos was sick and "didn't understand what was going on" at the time he executed the original Trust in August 2003; nevertheless, she feels that the original Trust is valid and enforceable because it reflected Gallegos's wishes.

Ralph testified that Gallegos asked to come home with Rosemary and signed himself out of the nursing home. Ralph did not forewarn Margaret and Carmelina because "they wanted [Gallegos] to stay there and he wanted to be out." Ralph recalled that each time that Gallegos was served with papers from Margaret, he would read them "over and over and over" and had to take sleeping pills because he was upset and it "made him miserable."⁶ Gallegos insisted on applying for a restraining order after Ferer (Margaret's husband) threw a rock at a vehicle driven by Rosemary's son. Each time that Gallegos was served with a petition from Margaret, he asked Ralph to make an appointment with Emadi to amend the Trust. Margaret had the keys to Gallegos's house. Gallegos believed that Margaret looted the property while he was away. Rosemary approved a blood transfusion for Gallegos; while he was receiving the first pint of blood, Margaret arrived and demanded that Gallegos be returned to the nursing home, so Gallegos never received the second pint of blood ordered by the doctor at the hospital.⁷

Rosemary testified that she was the only sister present when authorization was given for a blood transfusion. Margaret later came into the hospital and wanted to send Gallegos back to the nursing home immediately. After Rosemary left the hospital, Gallegos was transferred to the nursing home and did not receive a second transfusion.

THE TRIAL COURT'S DECISION

On March 8, 2007, before the probate court rendered its decision, Gallegos died. Though nearly three years had passed since Gallegos filed his petition to settle the validity of his Trust and its modifications, the matter remained unresolved when he died. On May 18, 2007, the probate court issued a tentative ruling, which formed the basis for its statement of decision. The court signed a statement of decision on June 12, 2007. The court entered a final order on August 10, 2007.

The court found that when Gallegos created the Trust in August 2003, he had a good, healthy relationship with his three daughters: he had capacity to create the Trust and was not under undue influence. His health declined rapidly after the Trust was created, as did the relationship between the



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three daughters. He was hospitalized several times. The day after Gallegos was taken from the nursing home by Rosemary and Ralph, he changed his bank accounts and amended the Trust. Gallegos believed that Margaret destroyed his house, stole jewelry and money, withdrew necessary medical treatment; put him in a hospice to die; and brought him sugary foods knowing he was diabetic. The court found that these beliefs were false.

Based on its findings of fact, the probate court concluded that Gallegos's actions with respect to his property were the result of Rosemary's fraud and undue influence. It determined that Rosemary received an undue benefit because the amendments "completely disinherited two of the three children of the Petitioner": this unequal treatment "was unnatural." The court observed that Gallegos "was old, forgetful and easily confused"; and had irrational beliefs that Margaret tried to kill him. The court accepted the testimony of Dr. Sandhu and rejected all contrary opinions. The court found that the petitioner "was not competent from September 2003 through September 25, 2006."

The court denied Gallegos's petition; it invalidated all of the amendments to the Trust; it invalidated 2003 documents in which Gallegos resumed the duties of trustee and signed a power of attorney; it invalidated a codicil to Gallegos's will; it invalidated the 2005 quitclaims deeds in which Gallegos transferred real property in California and Nevada to Rosemary; it invalidated the sale of property in West Covina to Rosemary; it ordered Rosemary to return all real or personal property to the Trust that was transferred to her by Gallegos and to file an accounting; The court awarded Margaret attorney fees and costs without specifying who would pay them.

Rosemary filed this appeal-prematurely-on July 9, 2007. On January 14, 2009, we ordered the probate court to appoint a special administrator to represent the Trust in this litigation. The special administrator has filed a brief urging reversal of the probate court's order.

DISCUSSION

1. Appealability

Appeal is taken from an order of the probate court invalidating Gallegos's modifications to the Trust on the grounds of incapacity and undue influence. The petition before the court was brought by Gallegos, as trustee, pursuant to Probate Code section 17200, subdivision (b)(3), which allows the court to determine the validity of a trust provision.⁸ The order is appealable. (§ 1304, subd. (a).)

2. Jurisdiction of the Probate Court

The probate court has jurisdiction over inter vivos trusts and may entertain petitions regarding the "internal affairs of the trust," including the validity of trust modifications, even when those issues arise during the lifetime of the trustor. (§17200, subd. (a); *Johnson v. Kotyck* (1999) 76 Cal.App.4th 83, 86; *Conservatorship of Irvine* (1995) 40 Cal.App.4th 1334, 1341-1342.) Section 17200 may be invoked



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when the mental capacity of a trustor to modify the trust is at issue. (Conservatorship of Irvine, *supra*, 40 Cal.App.4th at pp. 1341, 1346.) One of the requisite trust elements is "a competent trustor." (Keitel v. Heubel (2002) 103 Cal.App.4th 324, 337; Estate of Heggstad (1993) 16 Cal.App.4th 943, 947. See George v. Soares (1942) 54 Cal.App.2d 29, 31 [litigation challenging the competence of a deceased trustor to execute trust documents].)

The probate court had jurisdiction to entertain Gallegos petition regarding the validity of the Trust and its modifications. The question is: Did the probate court have jurisdiction to invalidate the Trust modifications after Gallegos died but before a successor trustee or special administrator was appointed?

"[A]fter the death of a person who commenced an action or proceeding, the court shall allow a pending action or proceeding that does not abate to be continued by the decedents personal representative or, if none, by the decedents successor in interest." (Code Civ. Proc., § 377.31.) The court "may make any order concerning parties that is appropriate to ensure proper administration of justice in the case, including appointment of the decedents successor in interest as a special administrator or guardian ad litem." (Code Civ. Proc., § 377.33.)

As a general rule, "judgment cannot be rendered for or against a decedent, nor can it be rendered for or against a personal representative of a decedents estate, until the representative has been made a party by substitution." (Sacks v. FSR Brokerage, Inc. (1992) 7 Cal.App.4th 950, 957.) "A long line of cases has therefore allowed direct attack upon a judgment obtained without substitution of a personal representative after a party has died." (Ibid., citing Leavitt v. Gibson (1935) 3 Cal.2d 90; Estate of Edwards (1978) 82 Cal.App.3d 885; Polony v. White (1974) 43 Cal.App.3d 44; Bliss v. Speier (1961) 193 Cal.App.2d 125; and Boyd v. Lancaster (1939) 32 Cal.App.2d 574.) In the context of a probate proceeding, when a party seeking relief dies before trial, "the action could no longer proceed . . . and it became necessary that someone be substituted . . . [Citation.] This was not done, and to the extent that the judgment purported to benefit [the deceased] or her non-appearing heirs, it is void." (Estate of Edwards, *supra*, 82 Cal.App.3d at p. 893.)

The general rule voiding a judgment taken against a decedent may not apply if there is no prejudice to the decedent, i.e., no lack of notice, no lack of proper representation, or any other disadvantage. (Sacks v. FSR Brokerage, Inc., *supra*, 7 Cal.App.4th at p. 957.) Lack of proper representation may occur when a party dies after a verdict but before a motion for new trial or an appeal: if a personal representative is not made a party for purposes of a motion for new trial or an appeal, the interests of the estate of the decedent are not represented. (Id. at pp. 957-958, citing Judson v. Love (1868) 35 Cal. 463.) But by the same token, if the administratrix of an estate dies partway through trial, and a portion of the evidence is produced in her absence, the ensuing judgment is not void because this is a "purely technical error" that caused no prejudice. (Collison v. Thomas (1961) 55 Cal.2d 490, 496. Accord: Leavitt v. Gibson, *supra*, 3 Cal.2d at p. 106 [no prejudice in the case of a partys death before the trial court rendered judgment "where the evidence has been wholly concluded . . ."].)



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We do not perceive that any prejudice was caused to Gallegos when the probate court issued its judgment after all of the evidence was presented. As in the Collison and Leavitt cases, Gallegos's demise before judgment did not affect the outcome of the trial, even if the outcome was unjustified, as discussed below. Accordingly, the lack of a personal representative or special administrator did not void the judgment entered after Gallegos's death. In any event, we have rectified the probate court's error in proceeding to judgment after Gallegos died by ordering the court to appoint a special administrator, who has filed a brief and participated in this appeal.

3. Effect of the 2004 Order Dismissing Margaret and Carmelina's Petition

Margaret and Carmelina brought a petition for instructions in the probate court in 2003. Because the petition challenged Gallegos's mental capacity, the court appointed PVP attorney Stapleton to represent him. Stapleton interviewed Gallegos at length and submitted a report; in addition, two doctors, Jalil and Pevsner, evaluated Gallegos and opined that he was competent to handle his own medical and financial affairs. In February 2004, the probate court (Judge George Genesta) said that he was familiar with the declarations of the PVP attorney and the doctors, and "[b]ased upon the amendments and declarations of capacity, there is a reassumption as to the role of trustee of his own estate in this case. Petitions dismissed in this matter."

Shortly after Judge Genesta's ruling that Gallegos had reassumed the role of trustee, Gallegos met with attorney Emadi to alter his estate plan. One month after the ruling, Gallegos executed a Trust amendment to reduce the percentage of the Trust going to Margaret and Carmelina to 5 percent each. Ten days later, Margaret filed yet another challenge in the probate court. This prompted Gallegos to go on the offensive and file a petition to establish the validity of his Trust and its amendments. Margaret opposed her father's petition. In October 2004, Gallegos disinherited Margaret and Carmelina entirely.

In its statement of decision, the probate court found that Judge Genesta "dismissed without prejudice the Petition for Instruction. The Court did not make any ruling or findings of fact regarding the trust amendments or capacity." We disagree. Judge Genesta made a factual ruling based on the material submitted to him from the PVP attorney and the doctors. He ruled that Gallegos had the capacity to reassume the role of trustee in his own estate. The dismissal was not "without prejudice."

Gallegos was denied the benefit of the February 19, 2004, ruling in his favor. Instead, a different judge in 2007 determined that Gallegos was mentally incompetent from September 2003 until September 2006, thereby contradicting the 2004 ruling that Gallegos had the capacity to manage Trust affairs. There is no proof that Gallegos was mentally incapacitated at any point during 2004, following the ruling declaring him capable of reassuming his duties. We believe that Judge Genesta's ruling must be given *res judicata* effect in subsequent litigation between the same parties on the same issue. Certainly, a Trust amendment executed one month after the 2004 ruling cannot be



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invalidated on the grounds of incapacity.

4. Lack of Mental Capacity

In the Due Process in Competence Determinations Act, the Legislature declared that there is a presumption "that all persons have the capacity to make decisions and to be responsible for their acts or decisions." (§ 810, subd. (a).) "A person who has a mental or physical disorder may still be capable of contracting, conveying, marrying, making medical decisions, executing wills or trusts, and performing other actions." (§ 810, subd. (b).) A judicial determination that someone "is totally without understanding, or is of unsound mind, or suffers from one or more mental deficits so substantial that, under the circumstances, the person should be deemed to lack the legal capacity to perform a specific act, should be based on evidence of a deficit in one or more of the persons mental functions rather than on a diagnosis of a persons mental or physical disorder." (§ 810, subd. (c).)⁹

A person has the capacity to make decisions if he understands and appreciates the rights, duties and responsibilities created or affected by the decision; the probable consequences for him and for persons affected by the decision; and the risks, benefits and alternatives involved. (§ 812.) When a person is suffering from mental fluctuations, but ""there are lucid periods, it is presumed that his will has been made during a time of lucidity." (Estate of Mann (1986) 184 Cal.App.3d 593, 604.) The testimony from the PVP and estate attorneys shows that Gallegos was aware of what he was doing at the time he requested and executed the Trust amendments. While the court, as trier of fact, "was free to disbelieve this testimony, "[d]isbelief does not create affirmative evidence to the contrary of that which is discarded." (Ibid.) There is no evidence pointing to incompetence in 2004, when Gallegos amended the Trust. On the contrary, the probate court found in February 2004 that Gallegos had the capacity to manage Trust affairs: this finding was made one month before the Trust was amended.

Gallegos's September 2006 deposition testimony, alone, is enough to obviate doubts about his lucidity. Gallegos answers each question without hesitation. He is alert, well oriented, able to process information, able to remember, and communicates well. Gallegos is familiar with the persons involved, is able to articulate his intention to disinherit two daughters, and offers a reason why. Specifically, he points to their repeated efforts to put him back in a nursing home and their petitions challenging his mental capacity, which caused him to change the Trust from "equal shares" to the point where eventually they got "nothing." Gallegos was firm in his desire that Rosemary receive "100 percent" of the Trust. (See footnote 4, ante.)

Gallegos's 2006 testimony is consistent with the statements he made to his attorneys regarding his reasons for amending the Trust. Initially, Gallegos told Emadi to amend the Trust in 2003 to make Rosemary the sole trustee because he believed that Margaret was untrustworthy, had ransacked his house, and checked him into the hospice center. Perhaps Gallegos was mistaken in his beliefs. Nevertheless, he did not alter Margaret or Carmelinas share of the Trust at that time. When Gallegos reappeared at Emadi's office in 2004, the reason he gave for reducing-and later eliminating- Margaret



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and Carmelinas beneficial interest was his anger at their repeated challenges to his mental capacity, which were made even after the probate court found in his favor on February 19, 2004. Estate planning attorney Emadi and PVP attorney Stapleton confirmed that Gallegos was "upset" with Margaret and Carmelina for their challenges. Having a "disturbed" attitude toward ones children does not amount to a showing that a testator is delusional, even if the testator had difficulty seeing "right and wrong, good and bad" with respect to his children. (Estate of Fritschi (1963) 60 Cal.2d 367, 371.)

We are confounded by the probate courts finding that Gallegos "was not competent from September 2003 through September 25, 2006." (*Italics added.*) Why September 25, 2006? Undoubtedly, this date was selected because Gallegoss deposition was taken on September 25, 2006. Gallegos was lucid and rational at his deposition, and he was definite about his intent to give 100 percent of the Trust assets to Rosemary. If the probate court was suggesting that Gallegos was incompetent when he testified on September 25, 2006-only to miraculously become competent the very next day, for the first time in three years-we reject the courts finding.

Apart from having Gallegoss testimony as proof of his mental capacity to make informed choices about his estate plan, we also have in the record before us testimonial and documentary evidence from five doctors (Pevsner, Jalil, Beck, Burrows, Khedia), all of whom personally examined and spoke to Gallegos, all of whom agreed that he was mentally aware, alert, oriented and otherwise unimpaired after recovering from anemia in September 2003. In addition, Gallegoss estate planning attorney and his court-appointed attorney evaluated Gallegoss capacity and found that he was competent to make the changes to the Trust, and was not subjected to duress, coercion or undue influence. Both attorneys described Gallegos as "very lucid" and clear about what he wanted to accomplish with the Trust.

The probate court relied almost exclusively on the testimony of hired expert Sarabjit Sandhu. Dr. Sandhu never met Gallegos and did not evaluate his mental state in person. Dr. Sandhu based his opinion about Gallegoss incompetence on outdated medical information from 2003, when everyone agrees that Gallegos was very ill. Dr. Sandhu did not consider any later medical evaluations. This lapse torpedoes the value of Dr. Sandhus testimony: he only considered Gallegoss mental state when he was hospitalized and anemic, and did not consider Gallegoss mental state at the time Gallegos executed the amendments to the Trust. Dr. Sandhu testified that the background material he used showed incompetence "at the time" the records were made in 2003.

The same problem arises with Dr. Sandhus reliance on Gallegoss 2005 videotaped deposition, a copy of which was given to him by Margaret. The 2005 videotape was not contemporaneous with the execution of the Trust amendments. Moreover, Dr. Sandhu reviewed only an unspecified portion of the videotape. Without a foundation, we do not know whether the videotape was improperly edited or fairly depicted the actual event. Dr. Sandhu admittedly did not know whether Gallegos was affected by lack of food due to his diabetic condition during the day-long deposition. Most critically,



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Dr. Sandhu admitted that it is not appropriate for a physician to evaluate a persons mental capacity without the benefit of a face-to-face meeting.

Expert opinion testimony must be based on conclusions or assumptions supported by evidence in the record. "The value of opinion evidence rests not in the conclusion reached but in the factors considered and the reasoning employed." (Pacific Gas & Electric Co. v. Zuckerman (1987) 189 Cal.App.3d 1113, 1135.) Opinion testimony based on factors that are remote, conjectural or speculative "cannot rise to the dignity of substantial evidence." (Ibid.; Roddenberry v. Roddenberry (1996) 44 Cal.App.4th 634, 651-652.) "When a trial court has accepted an experts ultimate conclusion without critical consideration of his reasoning, and it appears the conclusion was based upon improper or unwarranted matters, then the judgment must be reversed for lack of substantial evidence." (Pacific Gas & Electric Co. v. Zuckerman, supra, 189 Cal.App.3d at p. 1136.)

Competency evaluations made at or near the time that Gallegos executed the Trust amendments are the only ones that should be considered. Mental capacity is determined at the time the donative instrument is executed. (Estate of Fritschi, supra, 60 Cal.2d at p. 372.) Dr. Sandhus opinions, based on outdated medical information from 2003 and a 2005 videotape, do not constitute substantial evidence that Gallegos was incompetent at the time he executed the Trust amendments in 2004. Dr. Sandhu could only conjecture or speculate that Gallegos was incompetent in 2004. His conclusions are not supported by evidence in the record; therefore, his testimony must be rejected.

5. Fraud and Undue Influence

Since the early common law, the courts have recognized a persons fundamental right to dispose of his property in the manner he chooses. (Estate of Fritschi, supra, 60 Cal.2d at p. 373.) "[A] legion of decisions strike down attempts of juries to invalidate wills upon the ground of undue influence in order to indulge their own concepts of how testators should have disposed of their properties." (Ibid.) Undue influence "is the legal condemnation of a situation in which extraordinary and abnormal pressure subverts independent free will and diverts it from its natural course in accordance with the dictates of another person." (Estate of Sarabia (1990) 221 Cal.App.3d 599, 605.) "[T]he circumstances must be inconsistent with voluntary action on the part of the testator. [citation]; and "[the] mere opportunity to influence the mind of the testator, even coupled with an interest or a motive to do so, is not sufficient." (Estate of Fritschi, supra, 60 Cal.2d at pp. 373-374.)

There is a presumption of undue influence only if three prerequisites are shown: (1) a confidential relationship; (2) active participation by the person alleged to exert undue influence "in the actual preparation or execution of the will"; and (3) undue profit. (Estate of Sarabia, supra, 221 Cal.App.3d at p. 605.) It is not enough to claim that a beneficiary has a confidential relationship with the testator: there must be evidence that the beneficiary ""was active in procuring the execution of the will," or ""proof that the one occupying such relationship displayed activity in the preparation of the will to his undue profit." (Estate of Fritschi, supra, 60 Cal.2d at p. 374.) When a beneficiary attends the



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execution of a will, and offers the use of her pen, but does not participate in any of the discussions between the testator and the attorney who prepared the will, such "incidental activities" "fail to reach the proportion of a showing of her actual participation in procuring the execution of the will." (Id. at pp. 374-375.) Even if the beneficiary urged the decedent to make a will, procured the attorney to draw the will, was present at its execution and paid the attorney, there still is no undue influence absent ""activity on the part of the beneficiary in the matter of the preparation of the will."" (Id. at p. 376. Accord: Estate of Mann, supra, 184 Cal.App.3d at p. 608.) This is true even if the testator is gravely ill with cancer and susceptible to influence because of his deteriorated physical and mental condition. (Estate of Fritschi, supra, 60 Cal.2d at p. 376.)

In this case, there is no evidence that Rosemary actually participated in the preparation and execution of the Trust amendments. At most, Rosemary or Ralph called attorney Emadi to schedule an appointment and drove Gallegos to the law office. But there is no proof that Rosemary or Ralph ever participated in any discussions with the attorney or secured the execution of the amendments. On the contrary, Emadi testified that she and her partner met with Gallegos privately, questioned him as to why he wished to make the amendments, and assured themselves that the preparation was not the product of undue influence. Emadi prepared the amendments and all other documents at Gallegos's direction alone. PVP attorney Stapleton evaluated Gallegos and confirmed that he was doing what he wanted. In short, "[t]he scattered and incidental ingredients of possible undue influence never galvanized into [the beneficiary's] active participation of procurement of the will." (Estate of Fritschi, supra, 60 Cal.2d at pp. 377.)

The uncontradicted testimony shows that Gallegos was infuriated with the repeated court petitions challenging his mental capacity. The probate court did not acknowledge that Gallegos was increasingly upset by his daughters' petitions challenging his mental capacity, by their petition-flinging process server, and by their attempt to force him into a nursing home through government intervention. The court did not acknowledge that Gallegos was very content living with Rosemary, and felt that she and Ralph took good care of him. Although Dr. Pevsner believed, in August 2003, that Gallegos "was terminally ill with end stage congestive heart failure," the record shows that Gallegos lived until March 2007 in Rosemary's care.

The probate court deemed it "unnatural" that the Trust not be divided equally; however, this fails to take into account that it is "unnatural" for children to challenge their parent in court, behavior that could (and in this case did) lead to disinheritance. Gallegos initially only changed the successor trustee in 2003, without altering the beneficial interests of the three daughters, despite his belief that Margaret ransacked his house. However, after continued legal challenges, Gallegos steadily diminished Margaret and Carmelina's interest, reflecting his anger at them for repeatedly dragging him into court during the last four years of his life, and for trying to force him into a nursing home when he wanted to live with family members. His anger at their aggressiveness did not make his decision to disinherit them the product of fraud or undue influence.



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5. Award of Attorney Fees

There is no statutory basis for awarding attorney fees to Margaret. The Probate Code only authorizes an award of fees and costs for a beneficiary's successful contest of a trustee's accounting. (§ 17211, subd. (b).) This was not such a proceeding. Rather, it was a petition by a trustor to confirm the validity of his Trust and its amendments. In any event, because the probate court's findings are not supported by substantial evidence, the court's award of attorney fees to Margaret must be reversed. Margaret is no longer the prevailing party in this litigation.

CONCLUSION

In trust cases, effectuating the intent of the trustor is the court's paramount consideration. (§ 21102; *Gardenhire v. Superior Court* (2005) 127 Cal.App.4th 882, 888.) Gallegos's intent is clear: he amended the Trust in ways that reflected his dissatisfaction with the behavior of Margaret and Carmelina. Ultimately, he disinherited them because he was upset by their petitions challenging his mental capacity. Gallegos asked the probate court to confirm the validity of his Trust and its amendments to ward off future legal challenges and cement his estate plan. Five physicians examined Gallegos and attested to his mental capacity. Two lawyers attested to his mental capacity, and confirmed his stated intentions to disinherit Margaret and Carmelina. These capacity evaluations were made contemporaneously with the execution of the Trust amendments. Gallegos himself reconfirmed his intentions to disinherit two daughters during a deposition in 2006, when he was rational and coherent. The presumption of mental capacity (§ 810) was not overcome by substantial evidence, nor was there substantial evidence of fraud or undue influence.

DISPOSITION

The judgment is reversed. The matter is remanded to the probate court with directions to appoint Rosemary Kinder as the sole successor trustee of the Peter T. Gallegos Trust. Costs on appeal are to be paid by Margaret Kinder to Special Administrator Timothy S. Mishler, for the benefit of the Trust.

We concur: DOI TODD, J., ASHMANN-GERST, J.

1. Shakespeare, *King Lear*, act I, scene 4.
2. Gallegos's three daughters married three brothers named Kinder; hence, they all have the same surname. We shall refer to the Kinder family members by their first names to avoid confusion.
3. During an initial hearing on January 8, 2004, the court indicated that it would dismiss without prejudice if the parties stipulated to it; "otherwise, you submit to me." The parties did not reach a stipulation, so the court reached the merits of the petition on February 19.



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4. To give the flavor of Gallegos's mental state, we reproduce part of his testimony. Rosemary's attorney asks, "Was it your intention to take Margaret out of your trust as the beneficiary under this document?" Gallegos answers, "Yes, ma'am. Would you like a reason?" He then states, "I took them off because I had all three of my daughters at one time, but they put me in a home where they prepare you to die, and as you can see I am alive." Continuing, Gallegos says that Rosemary and her husband "got me out of that place. I mean, they actually took me out of that place one night or else I wouldn't be here." Well aware of Margaret's efforts to challenge his competency and invalidate the Trust amendments, Gallegos said defiantly, "Well, that is what she thinks she can do. I guess they are not going to force me to change it, I will tell you that. . . . I made up my mind I don't [sic] want nothing to do with them," adding, "They are incompetent for doing what they did. They were all going to get their equal shares until they started this here and they weren't satisfied. I kept taking a little away, 5 percent, 10 percent, 20 percent, until it went up to nothing. And they keep on going. Here they are again, that's right." Asked whether he wished for Rosemary to get "100 percent" of the Trust, Gallegos answered, "You better believe it."

5. The hospital records show that Gallegos is diabetic.

6. On one occasion, a process server pulled his car up to the patio where Gallegos and Ralph were sitting and threw Margaret's petition at Gallegos.

7. In her testimony, Margaret blamed Ralph and Rosemary for taking Gallegos away before the second transfusion.

8. All statutory references in this opinion are to the Probate Code, unless otherwise indicated.

9. There is a long list of factors to consider when determining whether someone lacks capacity to execute trust instruments. These include: alertness (such as orientation to time, place, person and situation and ability to concentrate); ability to process information (such as short- and long-term memory; ability to communicate with others, recognition of people and objects; ability to reason logically and to plan, organize and carry out actions in one's own rational self-interest); thought processes (whether there is "[s]everely disorganized thinking," hallucinations, delusions, uncontrollable, repetitive or intrusive thoughts); ability to modulate mood and affect (deficits include pervasive or persistent and inappropriate euphoria, anger, anxiety, fear, panic, depression, hopelessness, apathy). (§ 811.)

