182 of 193 DOCUMENTS

Estate of OSCAR O. OTIS, Deceased.

B143732

COURT OF APPEAL OF CALIFORNIA, SECOND APPELLATE DISTRICT, DIVISION SEVEN

2002 Cal. App. Unpub. LEXIS 3638

February 26, 2002, Filed

PRIOR HISTORY: APPEAL from a judgment of the Los Angeles County Superior Court, Los Angeles County Super. Ct. No. BP053607 JOHN J. DEE, Petitioner and Respondent, v. MIDDY SHUTT AND RUTH AGNELLO, Objectors and Appellants. consolidated with No. BP014792). Henry W. Shatford, Judge.

DISPOSITION: Affirmed.

COUNSEL: Donaldson & Hart and Joseph F. Hart for Objectors and Appellants.

Sullivan, Workman & Dee and Henry G. Bodkin, Jr., for Petitioner and Respondent.

JUDGES: LILLIE, P.J. We concur: WOODS, J., PERLUSS, J.

OPINIONBY: LILLIE

OPINION: Contestants Middy Shutt (Shutt) and Ruth Agnello (Agnello), the sisters of the predeceased wife of Oscar Otis (decedent or Otis), appeal from a judgment admitting to probate Otis's second–to–last will dated December 8, 1986, and appointing John J. Dee (Dee) executor of the will. Appellants contend (1) the doctrine of law **[*2]** of the case applies to mandate a finding of Dee's undue influence as to the December 1986 will because a previous appellate decision upheld a finding of Dee's undue influence as to a September 1987 will, and (2) the judgment is not supported by substantial evidence.

FACTUAL AND PROCEDURAL BACKGROUND

Otis, a widower, died on March 26, 1992, at the age of 85; his wife, Alberta "Ticky" Otis, had died in 1979. Otis had no children and no heirs; Ticky's two sisters, Agnello and Shutt, contestants herein, claim to be Otis's heirs–at–law. Otis last saw Shutt in 1979, although up to the time of his death, they spoke on the telephone several times a year and corresponded on an irregular basis. Between 1979 and 1992, Agnello spoke on the telephone with Otis at least once a month and saw him about 14 times. Although Otis had little formal education, he had good business sense and was very intelligent; he had been a racetrack announcer, professional newspaper man and turf writer and editor for various newspapers; he and Ticky would travel from one horseracing track to another during racing season; in his later years, he wrote books on horseracing and his autobiography. Otis **[*3]** also became a Shakespeare scholar and read about quantum physics. Otis was well–read and formed strong opinions; it was not easy to get him to change his opinions; he was stubborn.

Otis first met Dee in 1977, when Otis and his wife retained Dee and the law firm of Thorpe, Sullivan and Workman to handle a real estate litigation matter for them; Dee practiced primarily in the area of real estate and eminent domain. In 1977, Otis and his wife asked Dee to perform some estate planning work for them; Dee referred them to his partner, Henry Workman (Workman), who drafted the Otis Family Revocable Trust (Trust), which Otis and his wife executed in December 1977. In 1977, Workman had also prepared pour–over wills for Otis and his wife.

Otis and his wife were named as the original co–trustees of the Trust; the Trust provided that upon the death of Ticky, the Trust would be irrevocable and Otis would cease to act as co–trustee; the Otises told Workman that they wanted these provisions to prevent Otis from disposing of the trust assets on women. Upon Ticky's

death, the co–trustees were then to be Dee, Sandy Buffaloe (Buffaloe), and a bank, which was later eliminated as co–trustee, **[*4]** leaving as co–trustees Dee and Buffaloe. Otis and Ticky had known Buffaloe's parents before she was born; her family was active in the horseracing business and her family also traveled from track to track during the racing season; Buffaloe was a friend of both Otis and Ticky.

The Trust further provided that upon the death of one of the spouses, the survivor was entitled to receive the entire net Trust income and the trustees were given liberal discretion to invade the Trust principal for the surviving spouse's comfort, enjoyment and welfare. Upon the death of the surviving spouse, Buffaloe and her husband were to receive the trust income, and upon the death of both of them, the Trust was to terminate with the assets distributed to charity. The Trust did not provide any bequest to any family members of Otis or his wife.

After Ticky's death in 1979, Otis was somewhat lonely. Otis asked Buffaloe to keep his financial records for him and she and her husband moved into a property owned by the Trust, which was across the street from Otis's residence. After Ticky's death, Otis lived frugally, drawing substantially less than all of the income from the Trust.

Prior to Ticky's death, **[*5]** Dee's relationship with Otis was only professional; they would see each other socially about four to six times a year, at holiday parties and birthdays; Otis admired and respected Dee and sought him out for advice. After Ticky's death, Otis would call Dee, drop by his office for lunch, watch Dee in trial, or invite him to the racetrack; Dee began to see more of Otis, so that in the last few years of his life, they saw each other about once a month. Otis attended the funerals of Dee's parents; Dee believed that he and Otis became close personal friends. Dee did not ask for any fees for acting as co–trustee of the Trust, and did not receive any fees. According to Workman, Dee became like a son that Otis never had.

In February 1982, Ramona Gutierrez (Gutierrez) began working for Otis as a live–in housekeeper, fixing his meals, caring for the house, and driving Otis to the doctor and other appointments. At one time, Otis talked about marrying Gutierrez, but Buffaloe stepped in and told Gutierrez to back off. In 1983 the real estate lawsuit initiated by Dee in 1977 was settled, with Otis receiving about $42,000, which he invested to create his own estate, outside the Trust. **[*6]**

On July 19, 1984, Otis executed a new will drafted by Workman. In the will, Otis gave his entire estate in trust to Helen Ewing (Ewing), as trustee for Gutierrez (Otis identified Ewing as his friend and bookkeeper); upon the death of Gutierrez, Ewing would receive the entire estate; if Ewing did not survive Gutierrez, the estate would go to Gutierrez's daughter, Josephine Gutierrez. Dee was named executor of the 1984 will.

In May 1985, Otis wrote a letter to Dee expressing displeasure with Buffaloe, and telling him that Ewing was now assisting him with his personal financial records. In late 1985, Otis also requested that he begin receiving all of the net income generated by the Trust, which was about $6,000 per month. Otis also wanted all of the unpaid and accumulated income from the Trust to which he was entitled, and asked Dee, Buffaloe and his accountant, Jeff Seaton (Seaton), to figure out what that sum was. According to Workman, Seaton was "terrible," and "dilatory and extreme," taking over a year to determine that Otis was entitled to approximately $370,000 in accumulated income from the Trust. This accumulated income was distributed to Otis in late 1986 and 1987, **[*7]** with not all distributions being made in cash.

In July 1985, Otis executed a new will which deleted Josephine Gutierrez as a contingent beneficiary and instead provided that Ewing's daughter was to be the contingent beneficiary. In December 1985, Otis executed a new will with no changes other than to add a provision for burial arrangements.

On April 25, 1986, Otis executed a new will, prepared by Workman, which had substantially different provisions than previous wills. Ewing was not mentioned. Dee was given a bequest of $100,000, the will stating that Dee was a close friend and that Otis hoped that Dee would continue to serve as co–trustee of the Trust for the rest of his life. Dee was also to be the trustee of a testamentary trust for the benefit of Gutierrez; the testamentary trust was to be funded with 60 California general obligation bonds, each in the amount of $1,000, which would generate a monthly income for Gutierrez; upon the death of Gutierrez, the remaining trust corpus as well as the residue was to be divided equally between Dee and Jane Dempsey (Dempsey). If neither Dee nor Dempsey survived, the residue would go to Dee's children. Dempsey's parents were also **[*8]** in the racing business and had also been good friends with Otis and Ticky; Dempsey grew up with Buffaloe; Dempsey and Otis had lunch together once a week from the 1970's to 1990.

According to Dee, sometime in early 1986, Otis told him that Ewing was no longer doing his bookkeeping; Dempsey was going to be doing his personal bookkeeping. According to Dempsey, she kept Otis's books for less than six months. Otis showed Dempsey his April 1986 will and told her that he did not make her or Buffaloe his executrix because he felt Gutierrez would be resentful.

According to Workman, Otis told him at various times that Ewing, Buffaloe, and then Dempsey were "money hungry" and after his money. At one time, Otis also told Dee that he (Otis) was suspicious of Buffaloe and wanted Dee to keep an eye on the Trust. In July 1987, Otis accused Buffaloe of cheating him, and that he did not like the way she was keeping the trust books; Dee did not believe that Buffaloe was cheating Otis, but Dee admitted that he did not tell Otis that his suspicions about Buffaloe were unfounded. According to Workman, Otis wanted Dee to stay on as trustee of the Trust because Otis was concerned about Buffaloe **[*9]** and what she might do to Gutierrez.

After executing the April 1986 will, Otis telephoned Dee to tell him about the new will; Dee told Otis that he did not want Otis to give him any money in the will; he should follow his wishes as set out in the Trust to give the money to charity after the death of the Buffaloes. Otis told Dee it was his money and he could do what he wanted with it.

On December 8, 1986, Otis executed his second–to–last will, which is the will at issue in this appeal. The will was prepared by Workman, and witnessed by Workman and Lupe M. Enriquez, an employee of the firm of Sullivan, Workman, & Dee. The will made the same bequests as the April 1986 will, with the exception that now Dee received the remaining corpus of the testamentary trust upon Gutierrez's death; the residue of the estate was still split between Dee and Dempsey, with Dee's children as the contingent beneficiaries of the residue.

On September 10, 1987, Otis executed his last will. The will was prepared by Workman and witnessed by Workman and attorney Richard Llewellyn. In that will, a testamentary trust was established for the benefit of Gutierrez, with Dee as trustee of that trust; Gutierrez **[*10]** was given Otis's residence to live in rent free for life, as well as sufficient bonds to provide her with an income of $200 per week; upon Gutierrez's death, the trust corpus was devised to Dee if he survived Gutierrez and to Dee's children if he did not. The will devised the residue to Dee, if he survived Otis, or to Dee's children if he did not.

The will of September 10, 1987, was the subject of a prior will contest and appeal with an unpublished opinion filed July 15, 1997 (*Estate of Otis* (B087540)). The 1987 will was admitted to probate and letters were issued to Dee as executor of the will in May 1992. Petitions to revoke probate of that will were filed by Dempsey, Shutt and Agnello. The two petitions were consolidated for a June 1994 trial; after trial, the court rendered judgment granting the petition and revoked the letters testamentary on the ground that the will was the result of undue influence on Otis by Dee. Dee appealed from the judgment, which was modified and affirmed on appeal. The Court of Appeal held that "the judgment should be affirmed as modified so that the portions of the 1987 Will leaving any bequest to Dee should not be probated, but those portions leaving **[*11]** bequests to Gutierrez should be probated." The record of the evidence at that first trial and appeal is not part of our record herein.

In October 1998, Dee filed a petition for probate of the will of December 8, 1986. Shutt and Agnello filed a will contest and opposition to Dee's petition, based on Dee's alleged undue influence. The parties filed a joint statement of undisputed facts, stipulating to many of the background facts. The parties disputed two issues: whether the bequests in the December 8, 1986, will to Dee are the product of undue influence, and whether the bequests in the foregoing will were revoked by the will of September 10, 1987. Dee's trial brief also argued that the contestants lacked standing because they were not persons interested in the estate of Otis.

At the trial in April 2000, Workman testified that Otis was fond of Dee and his family; Dee was like a son to Otis. According to Dee, a few years after the death of Otis's wife, he and Otis became close personal friends. Otis would tell him (Dee) of changes he was making in his wills, but Otis never asked Dee for advice or suggestions as to what provisions Otis should include. Dee never offered any **[*12]** suggestion about any will to Otis, except that he did tell Otis that Dee was concerned that Otis was changing his wills periodically and naming different lady friends as beneficiaries, so someone may say he was erratic. Dee never discussed the contents of any of Otis's wills with Workman prior to their execution.

The first time Otis told Dee he had made a provision for him was in an April 1986 letter; Otis wrote many letters to Dee, keeping him informed of Trust and other financial matters. According to Workman, Otis was the sole source of information for the contents of the wills he drafted for him; Workman never discussed the content of any will with Dee before its execution, and Dee never asked him what the wills were going to contain before their execution. Otis told Workman that he (Otis) was the one who made the decisions as to how the Trust funds were to be invested; Otis liked tax–free state general obligation bonds and did very well for the Trust with those investments. Workman testified that in December 1986, Otis's condition and appearance had not changed significantly from prior years; his mental acuity and personality were the same.

Richard Llewellyn testified **[*13]** that he met Otis in September 1987; Otis was "exceptionally sharp," and very bright with a sense of humor. Dempsey testified that

Otis showed her both his April and December 1986 wills after they were executed; they went over the wills line by line; Otis gave her specific reasons for the provisions in the December 8, 1986, will; that will reflected what Otis told her his wishes were. The daughter of Gutierrez, Josephine Gutierrez, testified that she did Otis's personal record keeping for a while; Otis gave her copies of his wills from 1985 to 1987 and discussed them with her; she was aware of the bequests to Dee; the wills were consistent with Otis's wishes. Otis spoke highly of Dee; Otis liked, respected, and loved Dee. Workman testified that he saw Otis a month before he died; his mental capacity was fine at that time.

In its June 16, 2000, statement of decision, the trial court noted that the contestants had "questionable legal standing" to bring the contest, since they presented no evidence that the provisions of the will benefiting Dempsey were the result of undue influence, and if the gifts to Dee under the December 8, 1986, will were invalidated by reason of Dee's **[*14]** alleged undue influence, the estate would go with the entire residue to Dempsey and there would be no intestacy. The court, however, did not base its decision on the issue of standing, stating that "it is unnecessary to decide the issue of standing because of the clear, convincing and overwhelming evidence that there was no undue influence by Dee."

The statement of decision continued: "Contestants produced no independent evidence whatsoever on the issue of undue influence and relied solely on the presumption that arises in the case of an attorney–beneficiary upon proof that the person alleged to have exerted undue influence (1) had an attorney–client relationship with the testator at the time the will was prepared, (2) actively participated in the preparation or execution of the will, and (3) benefited thereby. The evidence presented by Dee overwhelms the presumption far beyond the clear and convincing standard." The court then summarized the evidence it found significant: at the time of the execution of the December 8, 1986, will, Otis was a widower with no children or close family; Otis and his predeceased wife never named contestants in their estate plans or in their **[*15]** mutual wills, and Otis never named them in any of the wills made after his wife's death; Otis wrote many letters to Dee both before and after December 1986; the letters show that Otis was a man who thought for himself; Otis expressed his own reasons for doing what he wanted to do; Dee did not tell Otis what to do, although Otis sometimes told Dee what he planned to do; the letters "are eloquent testimony to Otis's high regard for Dee."

The trial court found one letter from Otis to Dee to be particularly revealing: In that letter, with no date, but clearly written sometime between execution of the April and December 1986 wills, Otis writes: "My whole course of action has been, until lately, been guided by the fact that I had nothing to leave anybody — but things have changed, thanks to you and your legal expertise, so that now I have [an estate of] just about a half a million. . . . [P] Off hand, . . . the one or two possibilities I might consider willing anything to, bar Ramona, are well off and don't need any added money. [P] But you are solely responsible for me going [from] zero (of which Mr. Tempkin kindly provided the first $21,000)[**n1**] [to] whatever **[*16]** I have today. That, and wiggling from the trust money that was rightfully mine. I like you and trust you, you've made it for me, and I am quite happy to make such an arrangement come possible. Besides, I can assure you under oath there is no one else in the world to whom I really feel I owe a 'debt of honor,' so to speak."

> **n1** This is apparently a reference to the 1983 settlement funds from the real estate litigation which Dee had handled for Otis.

The statement of decision provided that "'Debt of honor' is not a phrase to be taken lightly. In the sense that Otis used the term, it is clear he felt morally obligated to Dee for what Dee had come to mean in his life. It was not made in the sense that he owed him a debt. . . . To suggest, as contestants do, that Otis felt he owed Dee for acting as trustee in the trust set up by the will is absurd. Dee's firm billed Otis for the legal work they did. The fact that Dee elected not to charge Otis for acting as trustee with its modest requirements is not **[*17]** relevant to show undue influence."

The court also noted that Otis's strong will and active mind were demonstrated not only in his letters, but by the uncontradicted testimony of numerous witnesses. "The evidence is uncontradicted that Otis was a man quite capable of determining what he wanted to do and could be bullheaded once he made up his mind on a subject. From this evidence it is abundantly clear that Otis did what he wanted to do, of his own free will, without undue influence from John Dee or anyone else." With respect to contestants' argument that the partially invalidated September 10, 1987, will revoked the December 8, 1986, will, the court stated that in California, the argument is without merit due to the doctrine of dependent relative revocation. "Under that doctrine, to the extent the 1987 will was 'ineffective,' Otis would be presumed to have intended the December 1986 will to stand. [P] In this case there is no 'probable' about Otis's intent. It is certain. It would do grave injustice to Otis's intent not to have Dee receive the benefits of the December 8, 1986 will by not applying the doctrine of dependent relative revocation."

Judgment was entered ordering **[*18]** the December 8, 1986, will be admitted to probate and that Dee be appointed executor of the will with letters testamentary, with authorization to administer under the Independent Administration of Estates Act. Shutt and Agnello filed timely notice of appeal from the judgment.

DISCUSSION

A. Law of the Case Doctrine.

Appellants contend that because of the prior appellate judgment regarding the September 1987 will, the doctrine of law of the case compels a finding of undue influence as to the December 8, 1986, will.

We question whether this issue has been waived for failure to properly raise it below. The issue was not expressly raised below in appellants' trial brief or in their request for a statement of decision. The statement of decision fails to mention the doctrine.

Appellants' counsel raised the issue orally near the outset of trial in connection with appellants' request that the trial court take judicial notice of the prior appellate opinion. The trial court stated that "none of that is binding on this court," and appellants' counsel agreed, "No. I understand that." The trial court expressly rejected the theory that the prior appellate opinion was **[*19]** law of the case as to certain factual issues, stating "So we are trying this case on a different will situation entirely. So this case must rest on its own facts and the law applicable thereto." Appellants' counsel responded, "Yes." Moreover, in closing argument, Dee's counsel pointed out that most of the decedent's letters which were admitted in evidence at the instant trial, were not offered into evidence at the prior trial, counsel having "tried this differently than the case [that] was tried before."

Assuming the issue has been preserved, we conclude in any event that it is without merit. The law of the case doctrine states that when, in deciding an appeal, an appellate court states in its opinion a principle or rule of law necessary to the decision, that principle or rule becomes the law of the case and must be adhered to throughout its subsequent progress in both the lower and upon subsequent appeal, even though the court may be of the opinion that the former decision is erroneous. (*Kowis v. Howard (1992) 3 Cal.4th 888, 892–893, 838 P.2d 250.)* The primary purpose for application of the doctrine is one of judicial economy. (*People v. Mitchell (2000) 81 Cal.App.4th 132, 153.)* **[*20]** Moreover, the doctrine has been recognized as being harsh; it is merely a rule of procedure and does not go to the power of the court; and it will not be adhered to where its application will result in an unjust decision. (*Clemente v. State of California (1985) 40 Cal.3d 202, 212, 219 Cal. Rptr. 445, 707 P.2d 818.)* It has been acknowledged also that earlier adjudications of an appellate court are not controlling when the facts and circumstances on successive appeals are substantially different. (See *Wells v. Lloyd (1942) 21 Cal.2d 452, 456, 132 P.2d 471.)*

In the instant case, we can infer that the trial court impliedly determined that the facts and circumstances were substantially different from the facts and circumstances on the prior appeal, and that it would be inappropriate and unjust to apply the law of the case doctrine here. Dee's counsel admitted that he tried the case differently than the prior case, and that many of Otis's letters admitted at the instant trial had not been admitted at the previous one. We also note that the legal issue decided on the prior appeal pertained to a different will executed almost a year later than **[*21]** the will at issue here. For all of the foregoing reasons, substantial evidence in our record supports the implied ruling of the trial court declining to apply the law of the case doctrine. Appellants fail to establish that such implied finding is erroneous under the foregoing principles governing application of the doctrine of law of the case.

B. Sufficiency of the Evidence. **n2**

n2 Appellants did not contend below, and do not contend here, that the transfers to Dee are void under *Probate Code section 21350*, which was enacted in 1993, after Otis's death. Section 21350 provides in pertinent part: "(a) 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: (1) The person who drafted the instrument. . . . (3) Any partner or shareholder of any law partnership or law corporation in which the person described in paragraph (1) has an ownership interest, and any employee of any such law partnership or law corporation."

Probate Code section 21351 lists exceptions to section 21350. One such exception is set out in section 21351, subdivision (d): "The court determines, upon clear and convincing evidence, excluding the testimony of any person described in subdivision (a) of Section 21350, that the transfer was not the product of fraud, menace, duress, or undue influence. . . ."

Probate Code section 21355 provides in pertinent part: "This part shall apply to instruments that become irrevocable on or after September 1, 1993."

[*22]

Appellants contend that Dee failed to rebut the presumption of undue influence which applies to an attorney–beneficiary of a client; that the evidence showed that Workman exercised little care to insure that Otis was not being unduly influenced by Dee, and neither Dee nor Workman advised Otis that it was unnecessary to leave money by will to Dee in order for him to continue to act as trustee, as trustees are entitled to compensation. Appellants suggest that Dee unduly influenced Otis by failing to fully inform him as to certain legal matters regarding his estate and the Otis Family Trust.

"Generally, the contestants of a will have the burden of proving undue influence. [Citation.] If a presumption of undue influence applies, however, the burden of proof shifts to the proponent to show the absence of undue influence." (*Estate of Auen (1994) 30 Cal.App.4th 300, 308.)* Transactions between attorneys and their clients are subject to the strictest scrutiny. (*Id. at p. 310.)* "[A] presumption of undue influence arises upon proof that the person alleged to have exerted undue influence (1) had an attorney–client relationship with the testator **[*23]** at the time the will was prepared, (2) actively participated in preparation or execution of the will, and (3) benefited thereby." (*Id. at p. 311.)*

With respect to the element of active participation, it has been held that mere existence of opportunity and motive to procure is insufficient to give rise to the presumption; physical presence of the beneficiary at the execution of the will is also insufficient. (*Estate of Straisinger (1967) 247 Cal. App. 2d 574, 586, 55 Cal. Rptr. 750.)* There must be activity on the part of a beneficiary in the matter of the actual preparation of the will. (*Ibid*.)

It is for the trier of fact to determine whether the presumption will apply and whether the burden of rebutting it has been satisfied. (*Estate of Auen, supra, 30 Cal.App.4th at p. 312.)* Every case must be viewed in its own particular setting. (*Id. at p. 311.)* We review the trial court's finding under the substantial evidence rule, like any other issue of fact. (*Id. at p. 313.)* We view factual matters most favorably to the prevailing party and in support of the judgment; we defer issues **[*24]** of credibility to the trier of fact. (*Id. at p. 311.)*

In this case, the trial court reasonably could have inferred that Otis was bright enough to understand, and did understand, that trustees were entitled to compensation and that he was not required to make an additional bequest to Dee to insure that he remain a co–trustee of the Trust. Thus, appellants' suggestion that Dee was able to unduly influence Otis by failing to inform him as to certain matters is contrary to reasonable inferences from the evidence and the implied findings supporting the judgment. Our record also reveals that Otis's bequests to Dee were motivated by more than just attempting to insure that Dee remain as co–trustee; Otis clearly had respect and affection for Dee, who had become his loyal friend in the years after his wife's death. Even though Dee told Otis that Dee did not want Otis to leave him anything in his will, Otis was stubborn enough to follow his own wishes in the matter. Substantial evidence in the record thus supports the trial court's determination that Otis was not unduly influenced by Dee or anyone else. Appellants' arguments amount to nothing more than an invitation **[*25]** for us to apply an inappropriate standard of review by redetermining credibility and making inferences from the evidence contrary to the reasonable ones made by the trial court.

Because we uphold the judgment on the merits, which judgment is favorable to Dee, we need not address Dee's contention that the appeal should be dismissed on the ground that appellants lack standing to contest the will.

DISPOSITION

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

LILLIE, P.J.

We concur:

WOODS, J.

PERLUSS, J.