Not Officially Published
(Cal. Rules of Court, Rules 8.1105 and 8.1110, 8.1115)
2008 WL 4383876
Only the Westlaw citation is currently available.

Court of Appeal, First District, Division 2, California.

Garrett McDONALD, et al.,
Plaintiffs and Appellants,
v.
Thomas J. CAREY, Defendant and Respondent.

No. A113265. | (San Mateo County Super. Ct. No. 437249). | Sept. 29, 2008.

Attorneys and Law Firms

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Opinion

LAMBDEN, J.

***1** Plaintiffs Garrett McDonald and William McDonald appeal from the trial court's final judgment, entered upon the court's granting of defendant Thomas J. Carey's motion for judgment. Plaintiffs argue that the lower court erred in finding that the relevant trust instruments were not procured by undue influence and fraud; erred in ruling that plaintiffs did not have standing to pursue certain claims and proposed new causes of action; abused its discretion in denying plaintiffs' motions to amend their complaint, reopen discovery, and continue the trial date; failed to properly weigh, and demonstrate its weighing of the evidence; and improperly adopted defendant's proposed statement of decision without modification or change. We affirm the judgment.

BACKGROUND

Mary Colter McDonald died unmarried in September 2003 at the age of 85, survived by her four children. In 1991, Mary, [1] as settlor, executed documents, including a declaration of trust (1991 Trust) creating the Mary Colter McDonald Trust, a revocable inter vivos trust, and a pour-over will placing her assets in that trust. Plaintiffs contend that, previously, Mary's will, executed in 1972, had left her estate to her children. [2] The parties agree that in 1980, Mary disclaimed certain properties she inherited from her parents in equal parts to her children that had an estimated value for each of approximately $117,000 in 1979 and $208,000 in 1996. The 1991 Trust, however, including as subsequently amended and restated in 1996 (1996 Amended and Restated Trust) and amended in 2001 (2001 Amendment) and 2002 (2002 Amendment) (collectively, the 2001 and 2002 Amendments), excluded her children from receiving any of the trust estate, much of which was listed on schedules attached to the trust documents. Her trust made defendant, who was her nephew via her sister Helen, a licensed real estate broker, Mary's long-time confidant and manager of her affairs, and the trustee of the trust at the time of her death, a beneficiary to approximately 60 percent of the trust estate listed in the schedules, with an estimated value of more than $8.6 million.

Specifically, when Mary died, a large part of her trust estate consisted of interests in hundreds of parcels of real property and mineral rights that were set forth in schedules denominated A, B, D, and E, which were incorporated by reference into the 1996 Amended and Restated Trust and amended by the 2001 Amendment. The only estimated gross value of these trust assets presented at trial was a 2002 appraisal estimating them at $15,758,455. [3] The trust provided that the assets listed in schedules A and D, which estimated value was $8,601,255, were to be distributed to defendant. The assets listed in schedule B, which estimated value was $1,362,200, were to be distributed to certain religious organizations, and the assets listed in schedule E, which estimated value was $5,795,000, were to be distributed to 14 persons, including Mary's sister and brother-in-law (defendant's parents), and certain religious organizations. “All the rest, residue and remainder of the trust estate” was to be distributed to defendant. In the event he predeceased Mary, the gifts to him were to be distributed to his issue instead. Mary's children were specifically excluded from receiving any of the trust estate, even in the event that Mary and all beneficiaries were deceased before full distribution of the estate occurred, in which case the trust estate was to be distributed to legal heirs of Mary other than her children.

***2** In February 2004, plaintiffs, along with a sibling who is not a party to this appeal, filed an action contesting the trust and seeking to void the 1991 Trust, the 1996 Amended and Restated Trust, the 2001 Amendment, and the 2002 Amendment. Plaintiffs alleged that Mary executed these documents as the result of the undue influence and fraud of defendant.[4] Defendant, as the trust's trustee, filed an answer denying all allegations.

The parties engaged in certain pre-trial motions relevant to this appeal. After a change in legal representation in the first half of 2005, plaintiffs moved to continue the trial date and extend discovery, which defendant opposed and the court denied. Plaintiffs also moved for leave to file a first amended complaint to add certain causes of action, which defendant also opposed, and which the court denied without prejudice.

Plaintiffs renewed their motion for leave to amend their complaint on the first day of trial, which the trial court denied without prejudice, while indicating that it would allow "wide latitude" in the evidence presented. The court denied plaintiffs' motion for leave to add a financial elder abuse claim during the trial. This court denied plaintiffs' petition for peremptory or alternative writ of mandamus and request for stay in case No. A110681 on July 12, 2005. Subsequently, in the court below, defendant filed a stipulation of non-opposition to certain amendments to the complaint and requested the court amend the complaint sua sponte, but the court took no action on this request.

During 26 days of trial, the court heard testimony from over 20 witnesses and considered over 200 documents introduced into evidence. After presenting their case in chief, plaintiffs renewed their motion for leave to file a first amended complaint, or at least to add a financial elder abuse cause of action, and defendant moved for judgment pursuant to Code of Civil Procedure section 631.8. Defendant argued that plaintiffs had not established the merits of any of their causes of action regarding the 1991 Trust or the 1996 Amended and Restated Trust and, therefore, the court should grant his motion, as well as find that plaintiffs did not have standing to pursue their other claims in light of the validity of these trust documents.

Plaintiffs argued that they had presented evidence which showed that defendant, along with his purportedly undisclosed attorney and agent Walter MacDonald (MacDonald), unduly influenced and defrauded Mary for years so that she would exclude her children from receiving trust assets and make him the major beneficiary of her estate, and so that he could gain control over the trust's assets and engage in various breaches of fiduciary duty and self-dealing for his own financial advantage, that they had standing to contest all of the trust documents, that they should be granted leave to add a cause of action for financial elder abuse, and that the 2001 and 2002 Amendments were invalid because the uncontradicted evidence showed that Mary lacked mental capacity after 1999.

***3** The court, after hearing, denied plaintiffs' motion, and granted defendant's. At the court's direction, defendant prepared and submitted a proposed 58-page statement of decision, which the court adopted without making any substantive changes.

The court entered judgment in December 2005. Plaintiffs Garrett and William subsequently filed timely appeals.

DISCUSSION[5]

I. *Evidence Regarding Undue Influence and Fraud*

Plaintiffs first argue that, contrary to the trial court's findings, Mary's execution of her trust instruments was ineffective because she did so as a result of undue influence and fraud. They also argue that they at least presented evidence sufficient to raise the presumption of undue influence. Plaintiffs are incorrect.

A. *Standard of Review*

The court granted defendant's motion for judgment pursuant to Code of Civil Procedure section 631.8. It states in relevant part: "After a party has completed his presentation of evidence in a trial by the court, the other party, without waiving his right to offer evidence in support of his defense or in rebuttal in the event the motion is not granted, may move for a judgment. The court as trier of the facts shall weigh the evidence and may render a judgment in favor of the moving party, in which case the court shall make a statement of decision as provided in Sections 632 and 634, or may decline to render any judgment until the close of all the evidence." (Code Civ. Proc., § 631.8, subd. (a).)

"The purpose of Code of Civil Procedure section 631.8 is 'to enable the court, when it finds at the completion of plaintiff's case that the evidence does not justify requiring the

defense to produce evidence, to weigh evidence and make findings of fact.' [Citation.] Under the statute, a court acting as trier of fact may enter judgment in favor of the defendant if the court concludes that the plaintiff failed to sustain its burden of proof. [Citation.] In making the ruling, the trial court assesses witness credibility and resolves conflicts in the evidence." (*People ex rel. Dept. of Motor Vehicles v. Cars 4 Causes* (2006) 139 Cal.App.4th 1006, 1012.)

"The standard of review after a trial court issues judgment pursuant to Code of Civil Procedure section 631.8 is the same as if the court had rendered judgment after a completed trial-that is, in reviewing the questions of fact decided by the trial court, the substantial evidence rule applies. An appellate court must view the evidence most favorably to the respondents and uphold the judgment if there is any substantial evidence to support it." (*Pettus v. Cole* (1996) 49 Cal.App.4th 402, 424-425; accord, *Jordan v. City of Santa Barbara* 46 Cal.App.4th 1245, 1254-1255.) Of course, we are free to draw our own conclusions regarding issues of law. (*Pettus*, at p. 425.)

Plaintiffs argue that the relevant findings of the trial court were not supported by any substantial evidence. " 'When a finding of fact is attacked on the ground that there is not any substantial evidence to sustain it, the power of an appellate court *begins* and *ends* with the determination as to whether there is any substantial evidence contradicted or uncontradicted which will support the finding of fact.' " (*Foreman & Clark Corp. v. Fallon* (1971) 3 Cal.3d 875, 881.) "Where a statement of decision sets forth the factual and legal basis for the decision, any conflict in the evidence or reasonable inferences to be drawn from the facts will be resolved in support of the determination of the trial court decision." (*In re Marriage of Hoffmeister* (1987) 191 Cal.App.3d 351, 358.) "Substantial evidence includes circumstantial evidence and the reasonable inferences flowing therefrom." (*Conservatorship of Walker* (1989) 206 Cal.App.3d 1572, 1577.) " 'The testimony of a single credible witness may constitute substantial evidence.' " (*City and County of San Francisco v. Ballard* (2006) 136 Cal.App.4th 381, 396, quoting *Marriage of Mix* (1975) 14 Cal.3d 604, 614.) With these basic rules in mind, we turn to a consideration of plaintiffs' arguments.

B. *Undue Influence*

***4** In their complaint, plaintiffs alleged that each of the trust documents executed by Mary was the result of defendant's undue influence. Plaintiffs prayed for the court to find that the "[p]urported Trust and each amendment are void due to the undue influence of the defendants."

On appeal, plaintiffs argue that "Mary's execution of the 1991 Trust and 1996 [Amended and Restated Trust] thereof, as well as the 2001 and 2002 trust amendments, were obtained by undue influence exercised by [defendant] and [MacDonald], and, further that an inference of undue influence *per se* was proved directly by the greater weight of the evidence, including circumstantial, and separately by operation of a presumption thereof upon proof by a preponderance of the evidence of the three-pronged factual elements necessary to trigger the presumption, specifically that: defendant Carey, as the proponent of the Trust and its primary beneficiary, (1) sustained a confidential relationship with Mary, as trustor; (2) actively participated, along with his attorney, in procuring execution of the trust and its amendments; and (3) unduly profited thereby. With the proof of these preliminary facts by a preponderance of the evidence, appellants contend that the burden of proof shifted to defendant Carey as a proponent of the instruments to prove the entire instrument, *and not just the disinheritance* or exclusion clause thereof, was *not* obtained or induced by *his* undue influence."

We first discuss plaintiffs' claim that they proved at trial that defendant exercised undue influence over Mary, and then that the court erred in failing to find they had proved a presumption of undue influence.

1. *Insufficient Evidence of Undue Influence*

"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.' [Citation.] 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; see also Prob.Code, §§ 6104, 8252.)[6] In other words, undue influence "consists of conduct which subjugates the will of the testator to the will of another and constrains the testator to make a disposition of his property contrary to and different from that he would have done had he been permitted to follow his own inclination or judgment." (*Estate of Franco* (1975) 50 Cal.App.3d 374, 382.) " 'It is not undue influence unless the pressure has reached a point where the mind of the person subjected to it gives way before it so that the action

of such person taken in response to the pressure does not in fact represent his conviction or desire ... but represents in truth ... the conviction or desire of another.' " (*Estate of Ventura* (1963) 217 Cal.App.2d 50, 58.)

***5** The trial court found a lack of evidence that defendant exercised any undue influence over Mary with regard to the creation of the 1991 declaration of trust and 1996 Amended and Restated Trust. [7] In its statement of decision, the court stated: "The trial testimony of witnesses, especially Mary's attorneys, Anthony J. Mercant, Richard M. Pitagora, and [MacDonald], bears out that Mary made her own decisions about the disposition of her property. Mary knew the nature and extent of her assets, and she knew who all of her family members were up until the time she died. There is no evidence, either direct or circumstantial, of coercion, threats, or duress exerted on Mary by [defendant] in an attempt to control the disposition of her property. In fact, there is not one scintilla of evidence that there was undue influence, much less a preponderance of the evidence, of any such activity by [defendant]."

The trial court concluded that plaintiffs had failed to meet their burden of proving the existence of undue influence at the time Mary executed the 1991 Trust and at the time she executed the 1996 Amended and Restated Trust, under both the preponderance of the evidence and clear and convincing evidence standards. [8] There is substantial evidence to support the trial court's determination, particularly as found in the testimony of Mercant, Pitagora, and MacDonald, and related documentary evidence. [9]

a. ***The 1991 Trust***

In March 1991, Mary executed the 1991 Trust. Mary's initials appear on every page of the 1991 Trust and of each of the schedules. The 1991 Trust provided for a number of different people, including defendant, to receive portions of Mary's interests in certain real property and mineral rights assets upon her death, which assets were divided by her percentage interests into categories A through E on attached schedules that were referenced therein. Defendant also was designated as the recipient of all the "rest residue and remainder" of Mary's trust estate. The 1991 Trust expressly excluded Mary's four children from receiving any assets, stating in Article IX, paragraph H: "Except as otherwise provided for in this instrument, the settlor has intentionally and with full knowledge failed to provide for her heirs including, but not limited to her sons MICHAEL McDONALD, GARRETT McDONALD and WILLIAM McDONALD, and to her daughter THERESA BALKO, it being settlor's determination that they have received from other inheritances a sufficient sum and that she does not desire that they receive anything further from her estate."

The 1991 Trust was drafted by attorney Mercant, a 1951 graduate of the Santa Clara University Law School, whose practice included estate planning for most of the 30 years prior to 1991. Mercant was retained as a result of a referral from MacDonald, who was a tenant of Mercant's in the building where they both practiced law. MacDonald drafted the schedules that were attached to the 1991 Trust. Both attorneys testified at trial.

i. ***Mercant's Testimony***

***6** The trial court found Mercant's testimony "to be believable and credible," and that he represented "the very best of the legal profession and what every attorney should aspire to be." His testimony indicates that Mary firmly intended from the beginning to exclude her children from receiving any of the trust estate and, conversely, to make defendant a beneficiary of a substantial portion of it.

Mercant testified that he first met with Mary in June 1990, with MacDonald and defendant also present. Mercant ran the meeting, and he and Mary did most of the talking. He could not recall defendant or MacDonald talking during the time Mary sat with him and talked about what she wanted to do. Although the parties do not raise this fact in their appellate briefing, Mercant's notes from this first meeting include the statements, "Thomas J. Carey to be the beneficiary of one-third interest in real property." Mercant's notes also state, "Specifically exclude the children. Children have their share already." Mercant testified that Mary gave as reasons for leaving nothing to the children: past litigation, that her children already had been given their share, and that she had not talked to them for a long time. [10] Mercant had defendant leave the room for 30 minutes while he discussed the gifts Mary proposed at that time to give to defendant. Mercant testified that "I asked her did [defendant] try to influence her, especially with the distribution of the estate," and that Mary indicated that defendant did not do so. His notes of the meeting state that defendant left the room while they discussed her proposed gifts to him, and that Mercant "[m]ade sure" that it was her "sole intent and not influenced by" defendant.

Mercant testified that he understood MacDonald and defendant were "pretty good friends," but he did not know that MacDonald had represented defendant. If he had known it, it might have caused him some concern that they were in "cahoots or something." Mercant sent MacDonald draft trust documents and received some feedback from MacDonald. He never heard Walter "badmouth" Mary's children. Mercant, in his contacts with defendant, never heard him promote the idea of Mary disinheriting her children.

Mercant also testified that Mary discussed her sister and brother-in-law, defendant's parents, with him. Specifically, she said "[t]hey were advising her on real estate matters, and he was very kind to her, and she was, too."

Mercant further testified that in December 1990 he received from MacDonald a 13-page letter written by Mary entitled "Details for dispersal of my estate," which was introduced into evidence at trial. In this December 1990 handwritten letter, Mary wrote that she previously had disclaimed to her four children her father's half of that portion of her parent's community property estate that she had inherited from them, giving each of her own four children 12.5 percent of the total given to her, while she kept for herself the 50 percent portion of the inheritance that came from her mother. She wrote, "so that means that the four inherited *my* interests in the real estate properties of Dad, gifted to me, by him, in probate of community properties of Thomas Callan estate." Mary also wrote, "My children have been given all their inheritance from me by this deed or action, in my lifetime. Nothing else to be given. This gift to the children is *all* their inheritance, plus all the considerations and gifts the four have already received. I know they are able to care for their own children and their own desires!" She continues, "They (My '4' children) already have all I intend them to have from me! And Nothing more, no personal property, no jewelry, no cars, no assets."

***7** Mary further stated in her December 1990 letter that the proceeds from the sales of the properties in which she held a one-third interest should go to certain persons, who appeared to be affiliated with religious organizations. She stated that these sales are a "priority."

Mary also wrote that defendant was to receive an Arizona condominium and, along with "Sarah and Michele," her personal property, stocks, and bank accounts. She stated that she had great faith and trust in defendant, naming him as a co-executor, stating that he was among her "closest confidants," and stating that he was among those authorized with the "sole discretion as to the dispersal of all matters outside of the realm of real estate properties," and "to do, act, etc. in my behalf economically-spiritually-religiously-in *all* concerning Mary Colter (Callan) McDonald."

Mary's December 1990 letter also evidences her considerable knowledge about the extent of her property holdings. She referred to properties in which she held a one-third interest, a one-fifth interest, and a one-half interest, referred to various specific properties, and made a statement not only about those properties "distributed to me from Bridgie Callan Community Properties Estate and probate of Thomas J. Callan Community Properties Estate," a plain reference to the properties she inherited from her parents, but also about "properties gifted to me during life by my parents; property gifted by deed to me in 1966 by my parents; and all properties gifted to me in my lifetimes; also purchased by me in my lifetime."

Although neither party refers to it in their appellate papers, Mercant also testified that at some point between their first meeting and the day Mary executed the 1991 Trust, he discussed with her the total value of her estate, without defendant's or MacDonald's involvement. She told him that the estate was worth $10 to $12 million. He also never heard, from Mary or anyone else, that Mary wanted to leave most or a majority or a "great deal" of her property to the Catholic Church.

While Mercant drafted the 1991 Trust, he testified that the schedules attached to the trust were prepared by MacDonald. Mercant testified that he met with Mary and MacDonald one week before Mary's execution of the 1991 Trust for "maybe an hour and a half" and discussed the contents of her December 1990 letter with her. The discussion included changes in what she wanted to do. Mercant testified that "she changed her mind" regarding the distribution of her trust estate as a result of this meeting. These changes were reflected in the final trust document.

Mercant further testified that he arranged to have Mary's execution of the 1991 Trust on March 28, 1991 videotaped because "he could see a trust contest or a will contest coming." The videotape was viewed by the trial court, which stated that it was "compelling evidence. It demonstrates that, at the time she signed the 1991 Trust, Mary had testamentary capacity and that she was not acting under undue influence." We agree. In the videotape, Mary sits in a conference room next to Mercant. Defendant and MacDonald are also sitting

at the table. Mary indicates that she has reviewed the trust agreement and schedules, that while defendant helped in the preparation of the exhibits, he had nothing to do with the preparation of the trust document itself, and that the trust document has been prepared in connection with her instructions and wishes given to Mercant. She indicates that she has deliberated over the matter of planning for a long time, and has been planning for eight and a half months. Mercant specifically asks Mary if she understands that defendant is the beneficiary of schedule A, which contains the properties in which she holds a one-third interest. Mary, who looks through the pages of the documents handed to her, answers readily and affirmatively to this and other questions about the disposition of her trust estate, concurs that she has initialed various pages before the videotape began, and initials pages of the documents on camera as well. She specifically confirms her desire to exclude her children as beneficiaries. She answers affirmatively when Mercant says, "You feel that they've been properly taken care of already as far as you're concerned and you're intentionally omitting them. Is that correct?" There is no indication on the videotape that Mary has been, or is being influenced, by defendant or MacDonald in any way. To the contrary, she pays little, if any, attention to them, and appears fully aware of the contents of the documents Mercant hands to her and of the significance of Mercant's questions.

***8** Mercant also testified that, in his opinion, as of March 28, 1991, Mary had sufficient mental capacity to understand the nature of her testamentary act, understand and recollect the nature and situation of her property, and remember and understand her relations to living descendants and those whose interests were to be affected by her trust. He stated that Mary never wavered in her decision to give nothing to her children.

ii. ***MacDonald's Testimony***

The court also found that MacDonald's testimony "was believable and credible." His testimony provides further substantial evidence for the trial court's ruling.

MacDonald testified that he met defendant in his first year in college in the early 1970's, and represented him for the first time in 1989 on "some lease or some real estate contract matter, very short term" and when defendant was deposed as a witness. He also represented defendant on a "very minor collection case" in which no action was filed in "the '90's," and formed a limited liability company for him related to defendant's development of property in Half Moon Bay. His later testimony indicated he represented defendant in certain limited liability company work starting in 1997.

MacDonald testified that he first met Mary when he painted a couple of houses for her in the late 1970's or early 1980's, and may have met her at defendant's wedding. She then retained him to prepare certain exhibits related to her real estate interests, which ultimately became schedules in Mary's trust. When they first met, defendant was present; defendant had also called MacDonald to give him a "heads-up" that his aunt was going to contact him. Mary stated that she wanted to talk to another attorney for a will or trust, work MacDonald did not do. At that time, she indicated that she wanted most of her estate to go to the church.

According to MacDonald, Mercant prepared the trust document, and MacDonald did not make any corrections in the trust or suggest corrections to Mercant so that a particular beneficiary would receive a particular exhibit. He worked on schedules A through E, describing his activities as "getting all of the schedules, legal descriptions, following Mary's directions regarding that," and himself as "just the schedule man." MacDonald also testified that he received some documents from defendant as part of his preparation of the schedules. After he prepared the schedules, he gave them to Mary and defendant for review to make sure he had everything.

MacDonald recalled that, in June or July 1990, he had a conversation with Mercant after Mercant had met privately with Mary, and discussed the fact that the properties in which Mary held a one-third interest were to go to defendant. He recalled hearing "numerous times" from Mary that she intended to give defendant the schedule A properties. He also recalled that in their very first conversation, Mary said she wanted to give a substantial portion of her estate to the church, "or church people, church charities, things like that," and may have said this later as well.

***9** MacDonald testified that Mary gave him two documents prior to her execution of the 1991 Trust. A few days before December 10, 1990, Mary appeared at his office unannounced and alone, and gave him her December 1990 letter. He looked at it quickly, dictated a memo, and had both sent to Mercant.

In January 1991, Mary gave him some revisions she had made to a draft will or a draft trust from Mercant. She indicated in her own handwriting certain changes in the schedules, that the properties in schedule A were to go to defendant upon her

death, and that the properties in schedule D were to go to her sister, Helen Carey, who was defendant's mother. MacDonald gave the document to Mercant and did not keep a copy. No such document was introduced into evidence at trial.

MacDonald's testified that he "revised the final of the schedules" on the day Mary executed the 1991 Trust. He met with Mary and defendant to go over the schedules and "make sure they were accurate." Mary made a couple of changes because of recent property sales. He recalled that Mary also spoke alone with Mercant. MacDonald did not help create the outline of questions used by Mercant in the videotape.

He recalled Mary saying at some point in 1990 that her estate was worth in excess of $1 million or $1.5 million, but he did not know the values of the items listed in the schedule or of the residuary.

b. ***The 1996 Amended and Restated Trust***

In December 1996, Mary executed the 1996 Amended and Restated Trust, as well as another will, and a uniform statutory form giving defendant power of attorney for asset management. Prior to preparation and execution of the 1996 Amended and Restated Trust, Mary and her children had engaged in a "swap" of the properties in which they shared interests, resulting in each of them owning 100 percent of specific properties. [11] The schedules A through E attached to the 1996 Amended and Restated Trust reflect the changes in Mary's ownership interests as a result of these swaps.

The 1996 Amended and Restated Trust also indicates a different plan of trust estate distribution from the 1991 Trust. Defendant was to receive the real property listed in schedules A *and* D, certain stock, and the rest, residue, and remainder of the trust estate not distributed through schedules B, C and E.

Once more, Mary excluded her children. Section 7.03 of the 1996 Amended and Restated Trust states: "If at any time before full distribution of the Trust Estate the Settlor is deceased and the residuary beneficiaries are deceased and no other disposition of the property is directed by this instrument, the remaining portion of the trust shall then be distributed to the legal heirs ... to be determined in all respects as though the death of the Settlor had occurred immediately following the event requiring distribution, and shall be determined according to the laws of succession of the State of California in effect on the date of execution of this instrument relating to separate property not acquired from a parent, grandparent or previously deceased spouse. *In no event, however, shall any distribution be made to the following persons: MICHAEL McDONALD, GARRETT McDONALD, WILLIAM McDONALD and THERESA BALKO.*" (Italics added.)

***10** Furthermore, section 14.05 of the 1996 Amended and Restated Trust states in relevant part: "Except as otherwise provided for in this instrument, the Settlor has intentionally and with full knowledge failed to provide for her heirs including, but not limited to her sons MICHAEL McDONALD, GARRETT McDONALD, and WILLIAM McDONALD, and to her daughter, THERESA BALKO." [12]

The 1996 Amended and Restated Trust was drafted by another attorney, Pitagora, who MacDonald was referred to by a secretary who knew them both. [13] Pitagora had practiced law since 1963, and his practice included estate planning, which comprised as much as 90 percent of his practice. The schedules attached to the 1996 Amended and Restated Trust were again prepared by MacDonald. Each page of the 1996 Amended and Restated Trust is initialed by Mary, but the schedules are not.

i. ***Pitagora's Testimony***

The trial court also found Pitagora's testimony to be believable and credible, stating that it found Pitagora, "very much like Mr. Mercant, to be the very best example of professionalism as an attorney and what every attorney would aspire to become."

Pitagora testified that he first met with MacDonald, who gave him background on Mary's family, the 1991 Trust, and Mary's wishes. MacDonald told him that defendant was a realtor who took care of Mary's affairs, and that MacDonald and defendant were friends. MacDonald did not tell him that defendant was a client of his. At trial, he agreed that "if an attorney who was representing the settlor of the trust and bringing them to a third attorney to work on that trust also represented a beneficiary, a major beneficiary to that trust, that that might be sort of a red flag that you would indicate could be a potential for undue influence."

Pitagora met twice with Mary, first in August 1996, along with MacDonald and another attorney, and then in December 1996 with no one else present, when she executed the documents. She was very specific about her desire to leave nothing to her children. She said that the children had already

received enough from her, and that she did not get along with her sons. Based on his review of his August 1996 meeting notes, Pitagora thought that he had discussed with Mary the possibility that she leave something to her children so as to "put some teeth" into the trust's no contest clause; his recollection was that "she was very adamant about not giving them anything else."

Pitagora indicated that he was the drafter of the 1996 Amended and Restated Trust. Pitagora understood from MacDonald before meeting with Mary that he should make the "disinheritance" language in the 1991 Trust stronger. The 1996 Amended and Restated Trust clauses regarding the exclusion of Mary's children do not include the reference that they had received "enough" that was in the 1991 Trust.

Pitagora testified that MacDonald did not draft any of the 1996 Amended and Restated Trust, but did prepare the schedules. MacDonald also gave input about the contents of the trust. He indicated in writing to Pitagora and Mary in December 1996 that certain revisions were necessary based on Mary's previously expressed intentions, including that the trust should indicate that defendant was to become the recipient of the schedule D properties and certain stock. Pitagora made the changes, and sent a revised trust document to Mary about 10 days before she executed the 1996 Amended and Restated Trust.

***11** Pitagora testified that he never met defendant, and had no direct communication with him. Pitagora did receive a facsimile from defendant in August 1996, in which defendant provided background information that Pitagora would need to prepare the documentation for the trust. Mary indicated to Pitagora that she had absolute trust in defendant.

Pitagora also testified that he met with Mary on the day that she executed the 1996 Amended and Restated Trust, for about 35 minutes. His recollection was somewhat limited. Although he did not recall whether or not MacDonald was present, Pitagora believed he was not because Pitagora would have had him witness the will for him, and he did not witness it. Pitagora said he would have gone over certain trust provisions with Mary; specifically, he "would have gone through the areas that had to deal with distributions and so on." It would have been his custom and practice to review the "disinheritance" provisions he had drafted with Mary before she executed them. Although he could not recall whether or not he had the schedules there, he testified that it was his custom to not proceed with execution of such a document unless the schedules were there, and so he "must have reviewed some of the schedules" with Mary. He stated that when she executed the 1996 Amended and Restated Trust, she understood the document. He said, "She understood the major portions of it. She understood what she wanted to do, which was to divide her property in a certain way and to exclude her children."

At the time he prepared the 1996 Amended and Restated Trust, Pitagora thought that Mary had gifted to her children 50 percent of her total estate, valued at $1.5 million dollars. He indicated in his testimony that he did not know the value of properties listed in schedule D.

Pitagora, when asked about Mary's "mental attributes," testified that he "had no problems with her," and that she "seemed to be a very sharp woman." Pitagora, who had witnessed symptoms of dementia in his sister and mother-in-law, such as forgetfulness, said he did not witness these symptoms in Mary. After Pitagora reminded her that she might have to declare her 1996 "gifts" to her children, Mary wrote in some detail to point out that she had not "gifted" her children, but had previously disclaimed certain property to them from her inheritance. [14]

ii. *MacDonald's Testimony*

MacDonald recalled meeting with Mary, or talking with her over the phone, absent defendant, before they both met with Pitagora in 1996 regarding her trust. He was not representing defendant in real estate matters at the time. He met with Pitagora before Pitagora met Mary and told him about the changes Mary wanted to make in distribution, that MacDonald was going to do all the schedules, and about Mary's history. MacDonald stated that he met with defendant once prior to meeting with Pitagora "regarding schedules, regarding which had been sold and purchased and things like that. He delivered those."

***12** Macdonald testified that among the major changes in the 1996 Amended and Restated Trust were those that needed to be made as a result of Mary's "swaps" with her children, that schedule D property would go to defendant rather than Helen Carey, and the removal of some beneficiaries of the property listed in schedule E.

MacDonald recalled that at one time during the preparation of the 1996 Amended and Restated Trust, Mary stated in a conference with attorneys that her real property was worth

"three and a half million dollars or $3 million or something like that[.]" MacDonald testified that he did not know the total value of Mary's estate, or the value of what any of the beneficiaries would receive, at the time Mary executed the 1996 Amended and Restated Trust.

MacDonald further testified that defendant was not involved with any meetings with Pitagora at any time. MacDonald spoke to defendant about schedule revisions, but not designation revisions, which he discussed with Mary. MacDonald recalled that defendant told him that Mary "wanted to change schedule D to him because she didn't want to ... burden [defendant's] mother with dealing with her four children in the future." Mary told MacDonald that as well. MacDonald instructed Pitagora about this change, and Pitagora confirmed it with Mary. MacDonald recalled in the course of reviewing his notes that Mary told him during a meeting that defendant was to get all properties in which Mary held a one-third interest.

The testimony of Mercant, MacDonald and Pitagora, Mary's December 1990 letter, and the 1991 videotape provide substantial evidence that Mary firmly, clearly, and repeatedly, without any evidence that she was influenced by anyone or suffered any "weakened" mental condition, expressed the intent to exclude her children from receiving any part of her trust estate, doing so in 1990, 1991, and 1996, with ample time to consider her decision and the documents drafted based upon them. Mary repeatedly made representations and communicated decisions regarding her distribution of her trust estate directly to her attorneys. This evidence also indicates that defendant did not attempt to influence her decisions regarding her exclusion of her children or her distribution of her estate. While he helped gather information for the schedules, the attorneys assisting Mary worked directly with her, without input from defendant, on these issues. In short, there is substantial evidence supporting the trial court's finding that plaintiffs failed to establish by a preponderance of the evidence that Mary was unduly influenced with regard to the 1991 Trust or 1996 Amended and Restated Trust.

c. *Plaintiffs' Contentions*

Plaintiffs almost entirely ignore the substantial evidence we discuss herein. This alone is a sufficient ground to reject their contentions. As defendant suggests in his reply brief, " '[i]t is well established that a reviewing court starts with the presumption that the record contains evidence to sustain every finding of fact.' " (*Foreman & Clark Corp. v. Fallon*, *supra,* 3 Cal.3d at p. 881.) When a party contends there is no substantial evidence to support the challenged findings, its recitation of only its own evidence "is not the 'demonstration' contemplated...." (*Ibid* .) If a party contends that " 'some particular issue of fact is not sustained, they are required to set forth in their brief *all* the material evidence on the point and *not merely their own evidence.* Unless this is done the error is waived.' " (*Ibid.,* followed in *Benson v. Kwikset Corp.* (2007) 152 Cal.App.4th 1254, 1273, and *Fassberg Construction Co. v. Housing Authority of the City of Los Angeles* (2007) 152 Cal.App.4th 720, 755.) Furthermore, "the burden to provide a fair summary of the evidence 'grows with the complexity of the record.' " (*Boeken v. Philip Morris, Inc.* (2005) 127 Cal.App.4th 1640, 1658.) Thus, an appellant will not prevail by filing a brief that is a " 'mere challenge to respondent[ ] to prove that the court was right.' " (*Paterno v. State of California* (1999) 74 Cal.App.4th 68, 102.)

***13** Regardless of the inappropriate one-sidedness of plaintiffs' briefing, their numerous contentions lack merit. "We are bound by the trial court's determinations of fact unless they are unsupported by substantial evidence. We do not reweigh the evidence, and we resolve all conflicts in the evidence in favor of the judgment." (*Tesco Controls, Inc. v. Monterey Mechanical Co.* (2004) 124 Cal .App.4th 780, 789.) Plaintiffs argue that they established undue influence for a variety of reasons. These include that the trust provisions were "unnatural," since they cut off Mary's own children and provided so much to defendant; that these provisions were at variance with her intentions as expressed in her 1972 will, in which she left equal shares of her estate to her children, and by her in the years after, until MacDonald's purported "intermeddling" at defendant's behest began; that the provisions were inconsistent with her express wishes to leave most of her properties to the Catholic Church, or one of its orders or individual clerics, as indicated in her December 1990 letter; that she never expressed a desire to leave "the bulk of her estate" to defendant; that defendant's confidential, fiduciary relationship with Mary afforded him the opportunity to control her testamentary acts; that defendant purportedly used his "undisclosed attorney and agent," MacDonald, to "control the when, where, and circumstances of the dispositive provisions of Mary's trust instruments"; that MacDonald "preconditioned" "controllable attorneys who would act as scriveners," which included Mercant and Pitagora; that MacDonald, "[p]osing as the 'schedule man,' " purportedly conferred with defendant in the preparation of the schedules and identification of the beneficiaries to whom properties were to be distributed; that when Mary executed

the 1991 Trust and 1996 Amended and Restated Trust, her mental condition supposedly was weakened such as to permit the suppression of her freedom of will; and that Mary was led to believe by defendant (and MacDonald) that the value of the property she had previously disclaimed to her children was sufficient in amount to warrant their exclusion from future inheritance, although defendant knew, unlike Mary, that her estate included hundreds of parcels of real property that she had received as gifts from her parents during her lifetime, while she had disclaimed to her children only 50 percent of the properties she had inherited from her parents, and concealed his knowledge from her. Plaintiffs state:

"In short, Mary's mental acuity was weakened substantially by *the lie*, by the *subtle* pressure exerted against her to change her plan, by her acceptability of the fact engendered by her nephew that, indeed, her children had already received enough, and then by her confusion when confronted with the enormity of it all. Finally, the concealment of the value of her properties and the failure of her fiduciary to correct her mistaken belief were part of the pressure constituting the undue influence. [Citation.] [¶] In this sense, Mary's freedom of will to give her property to her children was overcome, and she became permanently *susceptible* to the fact that they had 'already' received their inheritance."

***14** Plaintiffs' contentions fail under our substantial evidence standard of review for two reasons. First, the trial court determined that Mercant, Pitagora, and MacDonald provided credible, believable testimony. Generally, " '[c]onflicts and even testimony which is subject to justifiable suspicion do not justify the reversal of a judgment, for it is the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts upon which a determination depends .' " (*People v. Guerra* (2006) 37 Cal.4th 1067, 1141, disapproved on another ground in *People v. Rundle* (2008) 43 Cal.4th 76, 151; see also *People v. Ramos* (2004) 34 Cal.4th 494, 505.) Plaintiffs argue that MacDonald's testimony was inherently incredible, correctly noting that some appellate courts have found witness testimony so inherently improbable as to require interference with this exclusive province. (See, e.g., *Wilson v. State Personnel Bd.* (1976) 58 Cal.App.3d 865, 887.) We conclude based on our review of MacDonald's entire testimony that we have no reason to disturb the trial court's determination regarding his credibility.

Plaintiffs contend that defendant unduly influenced Mary in part because he concealed from her the value of her estate. According to plaintiffs, "Mary was not aware of the extent and value of her properties, especially those deeded to her by her parents during their lifetimes." Furthermore, "Mary believed, mistakenly, that a 50-50 division with her children of the property inherited from her parents would result in equal division of her *entire* estate. She did not appreciate that other properties deeded to her by her parents by inter vivos transfer were part of her estate or that they had value many times greater than that which she shared with her children. Despite her known ignorance, [defendant] never did anything to disavow her of her mistaken beliefs." Plaintiffs' contentions cannot overcome the substantial evidence that Mary had an extensive understanding of her assets that was greater than that contended by plaintiffs. This includes Mary's review of each of the schedules when she executed the 1991 Trust, as shown by the March 1991 videotape, and her initialing of each page of these schedules, which list many properties that she received outside of her inheritance from her parents, as well as her December 1990 letter, in which she discussed her holdings in significant detail and referred specifically to properties she received from her parents during their lifetime. It also ignores Mercant's testimony that Mary told him her estate was worth $10 to $12 million prior to her execution of the 1991 Trust, and MacDonald's recollection that Mary stated the value of her estate to be $3 to $3.5 million at some point during the preparation of the 1996 Amended and Restated Trust. Plaintiffs also fail to establish that defendant, prior to Mary's execution of the 1996 Amended and Restated Trust, had knowledge, or concealed from Mary, that, as they contend, the properties deeded to Mary from her parents "were of great value." Other than their speculation that defendant's knowledge as a San Mateo realtor somehow enabled him to know the value of these properties better than Mary, they rely largely on the 2002 appraisal for their contention, which was, of course, not available when the 1991 Trust and 1996 Amended and Restated Trust were prepared and executed.

***15** Furthermore, we emphasize that Mercant and Pitagora testified that Mary was very clear about her intention to exclude her children, and appeared aware of what she was doing. These attorneys had very little contact with defendant in the course of creating the trust documents, and their testimony indicates he did not attempt to influence their work. Both also testified that they had private discussions with Mary, during which she maintained her intentions. Both attorneys were experienced practitioners who took steps to assure themselves that Mary understood the documents they prepared for her, which included providing her with time

to review the documents before her execution of them and reviewing the documents with her.

Plaintiffs contend that defendant manipulated Mercant and Pitagora through his undisclosed attorney and "agent" MacDonald to create trust documents that favored defendant. Plaintiffs did not present any evidence showing this agency or attorney-client relationship, or that defendant and MacDonald worked together to influence Mary's disposition of her assets. To the contrary, MacDonald's testimony indicated that he was not representing defendant at the time he represented Mary regarding the 1991 Trust and 1996 Amended and Restated Trust, that he did not communicate extensively with defendant regarding the content of these documents, that Mary asserted directly to him her intention to exclude her children, and directly provided him with instructions about the distribution of her estate. The testimony we have summarized indicates that defendant and MacDonald were friends, that prior to the execution of the 1996 Amended and Restated Trust, MacDonald had represented defendant in a few minor legal matters, that defendant was at times present in certain meetings with Mercant and/or MacDonald and Mary, that he had some knowledge about Mary's determinations regarding the distribution of her assets and of the draft trust documents, and that defendant provided materials that were used to prepare the schedules and checked them with Mary for accuracy in 1991. Plaintiffs do not point to any evidence that MacDonald was retained by, or acted on behalf of, defendant as his attorney or agent with regard to Mary's trust, that the two worked together in any way to influence Mary's disposition of her trust assets or exclusion of her children, or that MacDonald attempted to unduly influence Mary about the disposition of her trust assets, the exclusion of her children, or any other aspect of the 1991 Trust or the 1996 Amended and Restated Trust. Plaintiffs' contentions that defendant committed wrongdoing through MacDonald's agency amount to speculation.

Plaintiffs also contend that defendant received an "unnatural" bounty that should naturally have gone to Mary's children. This is undermined by substantial evidence of Mary's close relationship with defendant. Furthermore, there was substantial evidence that Mary had hard feelings about her children, such as Mercant's testimony that she referred to litigation as a reason for her decision to exclude them, and Pitagora's testimony that she said she did not get along with her sons. Mary also repeatedly indicated that she believed that she had already provided enough for them, with the knowledge that the extent of her estate reached well beyond her inheritance from her parents. Therefore, we reject plaintiffs' contention that Mary's distribution of her estate as between defendant and her children was "unnatural."

***16** We also note that plaintiffs sometimes make factual contentions without providing relevant citations to the record. [15] We have no obligation to rely on such contentions. " ' "It is the duty of the party to support the arguments in its briefs by appropriate reference to the record, which includes providing exact page citations." ' " [Citation.] Because '[t]here is no duty on this court to search the record for evidence' [citation], an appellate court *may* disregard any factual contention not supported by a proper citation to the record [citation]." (*Grant-Burton v. Covenant Care, Inc.* (2002) 99 Cal.App.4th 1361, 1379, see also *Nwosu v. Uba* (2004) 122 Cal.App.4th 1229, 1246 [noting that the Rules of Court require factual assertions to be supported by citations to the record].)

Thus, plaintiffs' argument that we must reverse the trial court's judgment because they established undue influence lacks merit.

2. *Presumption of Undue Influence*

Plaintiffs also contend that they presented evidence sufficient to create a presumption of undue influence. This is incorrect as well.

" '[U]nder certain narrow circumstances, a presumption of undue influence may arise, shifting to the proponent of the disposition the burden of proving by a preponderance of the evidence that the donative instrument was *not* procured by undue influence.' " (*David v. Hermann* (2005) 129 Cal.App.4th 672, 684.) The presumption of undue influence arises if the challenger shows "that (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* (2002) 28 Cal.4th 89, 97.) The challenger must prove this presumption by a preponderance of the evidence in order to shift the burden of proof. (*Estate of Gelonese* (1974) 36 Cal.App.3d 854, 863.)

"For the trier of fact to decide what influence was 'undue' clearly entails a qualitative assessment of the relationship between the decedent and the beneficiary; to know what influence was 'undue' requires knowledge of what influence,

if any, would qualify for a more benign interpretation. '[I]nfluence which reaches the stage of being undue influence is not at all the same in every case. In one case it takes but little to unduly influence a person; in another case much more.... Accordingly, every case must be viewed in its own particular setting.' " (*Estate of Sarabia* (1990) 221 Cal.App.3d 599, 607.)

The trial court found that "[p]laintiffs failed to prove, by a preponderance of the evidence, that [defendant] actively participated in procuring the execution of the 1991 Trust or 1996 Restated Trust. Plaintiffs also failed to prove, by a preponderance of the evidence, that [defendant] unduly profited from the 1991 Trust and/or the 1996 Restated Trust.... Therefore, the burden of proof did not shift to [defendant], and he did not have the burden of proving that the 1991 Trust and the 1996 Restated Trust were not induced by undue influence."

***17** As we have discussed, and as plaintiffs acknowledge in their opening appellate brief, we review the trial court's findings pursuant to a substantial evidence standard of review. We focus on the trial court's finding that plaintiffs did not prove, by a preponderance of the evidence, that defendant unduly profited from Mary's execution of the 1991 Trust and 1996 Amended and Restated Trust.

a. *Undue Benefit*

In evaluating undue benefit, we bear in mind the analysis stated in *Estate of Sarabia:* "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. [Citations.] That evidence may include dispositional provisions in previous wills executed by the decedent [citation], or past expressions of the decedent's testamentary intentions. [Citation.] It may also encompass a showing of the extent to which the proponent would benefit in the absence of the challenged will. [Citation.] If these factors are proper for consideration, it is therefore patently simplistic to say that the issue of undue profit is to be 'solved by the terms of the will itself.' " (*Estate of Sarabia, supra,* 221 Cal.App.3d at pp. 607-608.)

We also note that "[w]hether between relatives, or between friends and relatives, numerous cases have held that a will is not unnatural where it provides for one who has had a particularly close relationship with, or cared for the testator[.]" (*Estate of Mann, supra,* 184 Cal.App.3d at p. 607.)

The court made certain findings about Mary's dealings with her children that explain her decision to leave nothing more to them. The court found that Mary, during her lifetime, gave her children in the aggregate a 50 percent interest in 137 parcels of real property and in 11 mineral rights, as well as a 10 percent interest in seven parcels, and in three mineral rights. The trial court also stated that "[u]ndoubtedly, Mary's decision to disinherit her children was motivated, in part, by the history of litigation between Mary and her children." The court found that "[t]he fact that Mary endured litigation with three (3) of her four (4) children explains, in part her decision to provide no benefit to them other than the gifts resulting from her January 3, 1980 disclaimer." Plaintiffs do not challenge that the court's findings about what Mary's children had previously received and this past litigation were supported by substantial evidence.

Also, as we have already discussed, Mary repeatedly and firmly indicated the intention to exclude her children from receiving any part of her trust estate, from which she never wavered. Even in her December 1990 letter, which plaintiffs contend showed she did not intend to give defendant substantial assets, Mary made clear that she was excluding her four children. She stated in her own handwriting that there was "[n]othing else to be given" to them.

***18** The trial court concluded that there was no evidence that defendant unduly profited by virtue of Mary's trust. The court found that defendant was Mary's nephew, and that the two shared a special relationship in the Catholic Church as godson and godmother, an important life-long relationship for Mary in light of her devout Catholicism. Evidence in the record supports the court's conclusion. The parties do not dispute that defendant was Mary's godson, or that Mary followed a devout Catholicism. Mary also made clear in her December 1990 letter that she considered her relationship with defendant to be special, naming him as a co-executor, stating that he was among her "closest confidants," and authorizing him, among others, to act on her behalf with regard to "all matters outside the realm of real estate properties." She told Pitagora that she had "absolute trust" in defendant.

In addition, there was substantial evidence that Mary contemplated giving defendant substantial trust assets throughout her discussions with her attorneys. Mercant's notes show that she was considering leaving defendant the real properties in which she owned a one-third interest as early as June 1990. Although she ultimately gave defendant significantly more than she designated in her December 1990 letter, that letter shows her intention to give him substantial assets nonetheless. Along with a condominium in Arizona, she left to defendant (as well as to Sarah and Michele) all of her personal property, cars, jewelry, furniture, stocks portfolio, a court case award, as well as "[e]verything that is considered belonging to me, owned by me, used by me, as personal belongings may be dispersed as you wish; kept as you wish."

Finally, MacDonald testified that both Mary and defendant told him in 1996 that Mary wanted to change distribution of the properties listed in schedule D from her sister Helen to defendant "because she didn't want to ... burden [defendant's] mother with dealing with her four children in the future." This further supports the trial court's determination that defendant did not unduly profit from Mary's trust, as it suggests Mary's intention to leave him assets because he was a trusted member of her sister's family, for whom Mary had fond feelings.

The court also found that the dispositional provisions of Mary's trust were not "unnatural," in that Mary left her estate not just to defendant, but also to her sister, brother-in-law, and Catholic charities, leaving approximately $7 million to Catholic charities and persons other than defendant. The trust documents and the 2002 appraisal provide substantial evidence for this finding.

Plaintiffs' contentions of trial court error largely ignore this substantial evidence. Instead, plaintiffs claim, incorrectly in light of our discussion above, that they proved defendant unduly profited "by substantial, uncontradicted evidence." They refer to Mary's 1972 will, which made Mary's children the sole and equal beneficiaries of her estate; that defendant was a mere nephew; [16] that he cannot legitimately contend that Mary's children had previously received enough from her in light of what he had received from his own mother, in addition to what he claims to be "due" from Mary; that "[t]he only favorable references to Tom were in documents in which he or his attorney, [MacDonald] had a hand" (which is plainly contradicted by her December 1990 letter, for example); and that Mary had not previously expressed a desire to leave the "bulk" of her estate to defendant. They further contend, with limited citations to the record, that "[i]t cannot be argued with a straight face" that Mary favored defendant because of gratitude, affection and love shown by him because he supposedly did not pay any attention to Mary "other than as a property owner and potential donor," and had supposedly defrauded her about the true value of her properties and concealed the role of "his attorney" MacDonald in the preparation of the testamentary instruments; that defendant, "as the godson, never showed any empathy for Mary as a person," or help or socialize with her other than to meet with her with regard to her properties; that plaintiff Garrett McDonald visited with Mary and spent part of the holidays with her; and that, unlike defendant, Mary's son, plaintiff William McDonald, her son Michael, and her daughter Theresa (a plaintiff below), were in need of financial help.

***19** These contentions are not persuasive, and their consideration requires that we reweigh the evidence. Accordingly, we find the trial court did not err in its determination that plaintiffs did not prove defendant received an undue benefit from the 1991 Trust and 1996 Amended and Restated Trust. Therefore, plaintiffs failed to establish a presumption of undue influence. In light of this ruling, we need not discuss the parties' debate over another element that must be proven for the presumption to arise, that being whether or not defendant actively participated in procuring either of these trust documents. (See, e.g., *Estate of Lingenfelter* (1952) 38 Cal.2d 571, 585-586 [finding undue influence in the absence of evidence of one of the three elements being met].) [17]

b. *Plaintiffs' "Substantial Evidence" Contentions*

Plaintiffs include in their opening brief a section entitled, "As Substantial Evidence of the existence of Undue Influence." After acknowledging our substantial evidence standard of review, [18] plaintiffs contend that a number of the trial court's statement of decision findings regarding the absence of undue influence were not supported by *any* evidence, since "[t]he following uncontradicted facts drawn from the record prove the existence of the facts which are the subject of the negative findings of the non-existence of the facts under review." They then list seven pages of factual contentions, many of which are repeated from elsewhere in their briefing, some of which are not accompanied by citations to the record.

Despite plaintiffs' acknowledgment of our substantial evidence standard of review, this section, along with much of their extensive briefing, is a misguided effort to retry

their case before this court. We have examined plaintiffs' contentions and record citations. Many of them are based upon speculation about circumstantial evidence that can easily be seen as benign or irrelevant, rather than sinister. Again, plaintiffs ignore the existence of contrary evidence, including, but not limited to, the substantial evidence that we have discussed herein. [19] We find nothing in plaintiffs' lists of supposedly undisputed "facts" which undermines the trial court's rulings pursuant to our substantial evidence standard of review.

C. *Fraud*

Plaintiffs next argue that defendant's conduct constituted "active fraud-or concealment," and constructive fraud as Mary's fiduciary. Plaintiffs' summary arguments are unpersuasive.

In their proposed first amended complaint, plaintiffs sought the invalidation and rescission of "decedent's estate plan," which included the 1991 Trust and 1996 Amended and Restated Trust, because of defendant's actual fraud. They alleged that defendant told Mary that plaintiffs had been well provided for and that defendant failed "to advise [Mary] of the total value of her property or estate, or what would be subject to [Mary's] purported estate plan, or of the value of the various gifts made by [Mary] thereunder." According to plaintiffs, defendant did so "with the intent to induce [Mary] to act as she did, and in particular to leave increasing portions of her estate to [defendant]," and that Mary reasonably relied on defendant's fraud and, if she had known the true facts, would not have executed her purported estate plan. Plaintiffs also sought the invalidation and rescission of "decedent's estate plan" under a theory of constructive fraud, based on defendant's "confidential and fiduciary relationship" with Mary.

***20** Although the trial court did not allow plaintiffs to amend their complaint, its statement of decision indicates that the issues of whether the 1991 Trust and the 1996 Amended and Restated Trust were procured by defendant's actual or constructive fraud, as framed in defendant's proposed first amended complaint, were "actually litigated in the trial of this matter," and the court made findings on these issues. It found that plaintiffs failed to prove by a preponderance of the evidence that defendant, either directly or through any agent, made the statements plaintiffs alleged as constituting actual or constructive fraud; that defendant had any obligation to advise Mary of, or that he failed to advise Mary of, the total value of her property or estate, what would be subject to the 1991 Trust or 1996 Amended and Restated Trust, or the value of any gifts made by Mary pursuant to these documents; or that he breached any duty to Mary or her trust, gained any advantage by misleading Mary to her prejudice, or committed any act or omission which the law specially declares to be fraud.

Plaintiffs argue in summary fashion that the trial court's ruling was wrong because of uncontradicted evidence, which they do not specify in this section of their argument, that defendant suppressed the true value of Mary's property "under circumstances where he as a person in a confidential relationship had an affirmative duty to disclose it." Plaintiffs further argue that "as a real estate broker dealing with Mary's properties, [defendant] owed a fiduciary duty of disclosure to her [citation], especially when he knew that disclosure would correct Mary's mistaken belief as to value." They also contend that defendant somehow committed fraud by his supposed hiding from her and her attorneys, Mercant and Pitagora, his attorney-client relationship with MacDonald.

Plaintiffs again choose to ignore the substantial evidence presented that contradicts their contentions, much of which we have already discussed. This includes that Mary, as indicated by her December 1990 letter and the 1991 videotape, was clearly aware that her holdings extended beyond the inherited real property that she divided between herself and her children, her statements about her assets in 1991 and 1996 that indicated she knew she held assets in the millions, and her clearly and consistently expressed intent to leave nothing more to her children, which substantial evidence indicates was at least in part because of disappointments and past legal conflicts with them. Plaintiffs also do not establish that defendant was obligated to, or did not, disclose a pertinent attorney-client relationship with MacDonald to anyone.

Furthermore, plaintiffs do not point to any evidence of purported misrepresentations by defendant, or that establishes that defendant failed to meet any legal obligation of disclosure based on a confidential or fiduciary relationship with Mary, or that establishes that Mary relied, or would have relied, on any such misrepresentations or omissions. Also, they do not establish defendant's duties of disclosure and correction as argued, providing only summary legal citations with little, if any, explanation of their relevance to these circumstances. As a result, plaintiffs fail to meet their appellate burden. " 'A judgment or order of the lower court is *presumed*

correct. All intendments and presumptions are indulged to support it on matters as to which the record is silent, and error must be affirmatively shown.' " (*Denham v. Superior Court* (1970) 2 Cal.3d 557, 564.) Appellant has the burden to establish the existence of prejudicial error affecting the merits of his appeal. (*Century Surety Co. v. Polisso* (2006) 139 Cal.App.4th 922, 963.) Accordingly, plaintiffs' arguments regarding the trial court's fraud rulings are without merit.

II. *Standing*

***21** Plaintiffs argue the trial court erred in finding that they did not have standing to contest the 2001 and 2002 Amendments, or pursue their claim for financial elder abuse. This is incorrect.

Many of plaintiffs' contentions of wrongdoing by defendant relate to events that purportedly occurred after Mary's execution of the 1991 Trust and 1996 Amended and Restated Trust. Plaintiffs contend that defendant schemed with MacDonald for many years to improperly increase his share of Mary's estate, including such post-1996 activities as purportedly purchasing schedule E real properties from Mary's trust with unsecured promissory notes and developing them for his own profit, with MacDonald's legal assistance, then repaying the notes into the trust's residuary for his own eventual benefit; improperly causing Mary to execute the 2001 Amendment, which transferred four increasingly valuable properties from schedule B to schedule A, to which he was the beneficiary, at a time when Mary was not competent; concealing from adult protective services a caretaker's defrauding of Mary of $138,000 so that their own bad acts would not be discovered; improperly causing Mary to execute the 2002 Amendment, in which defendant replaced Mary as the trustee; forging Mary's name to numerous deed documents in 2003 in order to transfer real properties to limited liability companies under his control and perpetuate a fraud on the IRS; and, within weeks of Mary's death, purchasing an expensive condominium near the San Francisco Giants' ball park for his own use. Although a substantial amount of the trial and defendant's appeal relates to these supposed activities, we do not discuss them in further detail, or reach conclusions about the merits of these contentions, because we agree with the trial court's ruling regarding standing.

The trial court made several factual findings relevant to standing. It found that plaintiffs did not have an interest in the devolution of Mary's trust estate because they had been specifically disinherited in the trust, were neither representatives nor trustees to her trust, and were not her personal representatives. Furthermore, they were not heirs at law, or beneficiaries under a different will or trust, who would take any of Mary's property as a result of a successful contest of the 2001 Amendment or 2002 Amendment. The court concluded that, in light of the validity of the 1991 Trust and 1996 Amended and Restated Trust, "none of the plaintiffs have an expectancy or contingency interest in Mary's estate or trust estate."

In its legal analysis, the trial court determined that, in light of the validity of the 1991 Trust and 1996 Amended and Restated Trust, plaintiffs were in neither of the "two categories of interested persons who may contest a trust: (i) those persons who are heirs at law of the decedent and who, as a result of a successful trust contest, would take decedent's property by laws of intestacy; and (ii) persons who allege that they are beneficiaries under a different testamentary document executed by the decedent, either prior or subsequent to execution of the trust being contested ." The trial court concluded:

***22** "Plaintiffs are not heirs who, as a result of a successful contest of the [2001] Amendment or [2002] Amendment, would take Mary's property by intestate succession. Plaintiffs are not beneficiaries under a different will or trust who, by a successful contest of the [2001] Amendment or [2002] Amendment, would take Mary's property. Plaintiffs will not be benefited by setting aside the [2001] Amendment. Likewise, plaintiffs will not be benefited by setting aside the [2002] Amendment. Moreover, plaintiffs will not be benefited by disinheriting [defendant]. If [defendant] is deemed to have predeceased Mary, plaintiffs still would not be entitled to succeed to any of Mary's Trust estate because (i) they have been specifically disinherited, and (ii) there are other beneficiaries who would succeed to Mary's estate."

A. *Standing Regarding the 2001 and 2002 Amendments*

In support of the trial court's ruling regarding plaintiffs' lack of standing to pursue their claims about the 2001 and 2002 Amendments, defendant, relying on *Estate of Molera* (1972) 23 Cal .App.3d 993, 1001-1002 (*Molera*), argues that "the claim of undue influence goes only to [defendant], therefore (i) prevailing in the contest would not affect the gifts to other trust beneficiaries and (ii) in any event, if the challenged devises to [defendant] were declared invalid, those devises would go into the residue and the contestants would not share

therein. [Plaintiffs], as heirs under the intestacy laws, would not be entitled to any part of such lapsed or void devise." Defendant is conceptually correct. As stated in the case he relies on, "[i]t is the general rule that if the whole will is the result of the presence of undue influence, the will is totally invalidated; but if only a part of the will was thus procured, that part may be rejected as void, but the remainder, which is the outcome of the testator's free will, is valid if it is not inconsistent with and can be separated from the part which is invalid." (*Id.* at p. 1001.) Invalidation of the 2001 and 2002 Amendments, which are relatively minor and discrete in their effects on the trust, would not affect the validity of the 1991 Trust and the 1996 Amended and Restated Trust. Therefore, their invalidation would not prevent the distribution of the trust estate or exclusion of plaintiffs as outlined in the 1996 Amended and Restated Trust.

Plaintiffs argue that the 1991 Trust, the 1996 Amended and Restated Trust, and the 2001 and 2002 Amendments constitute "an *integrated* document which appellants have standing to contest as a single, whole document as intestate heirs." They provide little, if any, explanation for the relevance of this issue to the court's ruling, however. They cite cases, such as *Olson v. Toy* (1996) 46 Cal.App.4th 818, 823-824, and *Estate of Robinson* (1963) 211 Cal.App.2d 556, 558, with little if any explanation of their relevance. The cases have little bearing on the matter at hand because they do not involve parties contesting a trust instrument comprised of several documents, where those documents which established the trust are found to be valid. We fail to see why, when a trust instrument is comprised of different documents executed at different times, and the documents establishing the trust and excluding certain parties are valid, a party necessarily has standing to challenge all the documents as one, whether or not they together comprise an integrated, single trust instrument.

***23** Plaintiffs also argue that defendant "schemed" to have residuary and remainder clauses placed in the 1996 Amended and Restated Trust so that his issue or his mother would receive trust assets in the event he did not. In their reply brief, plaintiffs argue the residuary clause is invalid because it was procured by undue influence, because the provision for his issue "is infected by [defendant's] wrongs imputed to them who cannot benefit therefrom," because defendant did not predecease his issue by 30 days as required by the clause, and because it is an invalid "substitutional or alternative gift precluding intestacy and contestants' participation as heirs in Mary's estate." Plaintiffs argue that the remainder clause is invalid for similar reasons. They contend that their status as intestate heirs, and as beneficiaries under Mary's earlier 1972 will, constitute sufficient interests to allow them standing to contest the 2001 and 2002 Amendments. All of these arguments are predicated on plaintiffs' undue influence and fraud claims somehow invalidating the 1991 Trust and 1996 Amended and Restated Trust, however. They do not. Again, we have no reason to reverse the trial court's rejection of these claims. [20]

Plaintiffs also argue that they have standing to contest the 2001 and 2002 amendments separate from their contest of the earlier trust documents "because the trial court's decision is *not* a final determination of [plaintiffs'] grounds of contest." Plaintiffs, relying on *Molera, supra,* 23 Cal.App.3d at page 998, argue that as intestate heirs they "would benefit were the 2001 and 2002 instruments denied probate or determined to be invalid even though they may be required to contest anew the 1991 and 1996 instruments and even though those instruments contained no provisions for them, and, in fact, specifically disinherited them before they would be entitled to succeed to Mary's estate." We fail to see how appellants could "challenge anew" the 1991 Trust and 1996 Amended and Restated Trust in light of the obvious res judicata effect of the trial court's judgment regarding their validity and our affirmance of that ruling. The appellate court in *Molera* did note that a judgment is not final until its final determination on appeal, but that court was referring to the existence of another separate appeal of a summary judgment ruling by the trial court that was pending at the time the appellate court issued its own opinion regarding two decrees of preliminary distribution in the same case. (*Id.* at pp. 997-998.) Furthermore, the appellate court determined that the contesting intestate heirs had sufficient interest to contest the will in dispute even though there were seven prior wills that also excluded them, because the contesting parties could successfully contest each of these wills if they were offered for probate *in the future.* (*Id.* at p. 999.) The issues of whether or not those seven prior wills were valid had not yet become ripe because they had not yet been offered in probate. Here, the validity of the 1991 Trust and 1996 Amended and Restated Trust has been resolved. Therefore, *Molera* does not support plaintiffs' argument. [21]

***24** In short, we conclude that the trial court's ruling is correct, if only because even if plaintiffs were to successfully challenge the 2001 and 2002 Amendments, Mary's trust estate still would be distributed pursuant to the 1996 Amended and Restated Trust. It provides for distribution of her entire trust estate to defendant and other beneficiaries, that any of the rest,

remainder or residuary of the estate is to go to defendant, and excludes the children from receiving any portion of the estate.

B. ***Standing Regarding a Financial Elder Abuse Claim***

Plaintiffs also argue the trial court erred in finding that they did not have standing to pursue the financial elder abuse cause of action contained in their proposed first amended complaint. This also is incorrect.

At the time of trial, Welfare and Institutions Code section 15657 .3, subdivision (d), provided that, after the death of an elder, the right to maintain an action shall be transferred to "the personal representative of the decedent, or if none, to the person or persons entitled to succeed to the decedent's estate." (Historical and Statutory Notes, 77 West's Ann. Welf. & Inst.Code, (2008 Supp.) foll. § 15657.3, p. 46.) In their proposed first amended complaint, plaintiffs alleged a cause of action for "damages for financial elder abuse" based on their allegations regarding the 1991 Trust and 1996 Amended and Restated Trust, and allegations of other wrongdoing from the end of 1996 to 2003. The trial court rejected the 1991 Trust and 1996 Amended and Restated Trust allegations and, to the extent plaintiffs have appealed from these rulings, we have affirmed them. Therefore, we evaluate plaintiffs' standing to bring a financial elder abuse claim based on their allegations of wrongdoing from the end of 1996 to 2003.

Plaintiffs point out correctly that we must determine whether or not they would be persons entitled to succeed to Mary's estate by examining the circumstances that would exist if they were to prevail in their financial elder abuse claim. (*Estate of Lowrie* (2004) 118 Cal.App.4th 220, 230.)[22] Plaintiffs further theorize that if they were to prevail, defendant would be disinherited pursuant to Probate Code section 259, which, plaintiffs contend, authorizes a court to find that a person guilty of financial elder abuse has been disinherited.

Defendant argues in support of the trial court's ruling that since plaintiffs' "contest of the 1991 Trust and 1996 [Amended and] Restated Trust failed, and as a consequence they were disinherited, they were no longer 'persons entitled to succeed to the decedent's estate.' Therefore, [plaintiffs] had no standing to maintain an elder financial abuse action or to amend their complaint to state such a cause of action." Defendant argues that even if he were found to predecease Mary, plaintiffs would not be entitled to succeed to Mary's trust estate because they were specifically disinherited by the trust's terms, and because there are other beneficiaries who would succeed to Mary's estate. According to defendant, because of the terms of the trust, even if he were found to predecease Mary, none of Mary's trust would pass by intestacy.

***25** Defendant, and the trial court, are correct for several reasons. First, putting aside the impact of Probate Code section 259 for the moment, plaintiffs, even if they prevailed in a financial elder abuse claim, would not be entitled to succeed to decedent's estate because of the already adjudicated validity of the 1991 Trust and 1996 Amended and Restated Trust, and the factual findings that Mary acted competently and free of undue influence or fraud that are related to this adjudication. Plaintiffs' financial elder abuse claim would not affect the validity of these instruments.

As for Probate Code section 259, it deals with the restrictions on the receipt of certain estate property by a person liable for abuse of an elder decedent, and may apply in a financial elder abuse action in which standing is found brought pursuant to Welfare and Institutions Code section 15657.3. (See *Estate of Lowrie, supra,* 118 Cal.App.4th at p. 228.) The trial court did not, and the parties on appeal do not, discuss its specific provisions in any detail. Nonetheless, the trial court's analysis, and defendant's on appeal, is supported by a significant limitation contained in the statute's "deemed predeceased" provision. Probate Code section 259, subdivision (a), provides that "[a]ny person shall be deemed to have predeceased a decedent *to the extent provided in subdivision (c) "* where it has been proven that a person has been liable for the fiduciary abuse of a decedent who was an elder adult, has acted in bad faith, has been reckless, oppressive, fraudulent, or malicious in the commission of the bad acts, and the decedent at the time the acts occurred and thereafter until the time of their death was substantially unable to manage their financial resources or to resist fraud or undue influence. (Prob.Code, § 259, subd. (a), italics added.) Probate Code section 259, subdivision (c), states in relevant part that "[a]ny person found liable under subdivision (a) ... shall not ... receive any property, damages, or costs that are awarded to the decedent's estate in an action described in subdivision (a) ..., whether that person's entitlement is under a will, a trust, or the laws of intestacy [.]" In other words, the application of Probate Code section 259 "deemed predeceased" provision is limited to the property, damages, or costs awarded as a result of the bad acts of the person found liable of financial elder abuse. As we have already indicated, this would not extend to the property Mary left to defendant pursuant to the 1996 Amended and Restated

Trust. Therefore, Probate Code section 259 would not enable plaintiffs to succeed to any portion of plaintiffs' trust estate either.

Furthermore, sections 7.02(A)(1) and (A)(5) of the 1996 Amended and Restated Trust expressly provide that in the event defendant does not survive Mary, all of the gifts left to him, including the "rest, residue, and remainder" of the trust estate, are to be given instead to the issue of defendant who survive Mary by 30 days. Plaintiffs fail to establish that defendant has no such issue; to the contrary, they concede in their reply brief that "his issue as residuary beneficiaries did not predecease Mary." While plaintiffs insist that defendant's issue takes only as a result of his undue influence and fraud, we have already rejected this contention. Therefore, we have no reason to interfere with the trial court's determination that other beneficiaries would receive those portions of the trust estate left to defendant in the event that he were deemed to have predeceased Mary. Accordingly, plaintiffs do not establish that they arguably could have an interest in some aspect of Mary's estate by intestate succession, should they prevail in a financial elder abuse claim. Their claim of standing to bring such a claim fails for this independent reason as well.

***26** Plaintiffs also argue that the provisions of the 1991 Trust and 1996 Amended and Restated Trust that specifically disinherit them cannot alter their right to take as intestate heirs because such provisions "did not and cannot operate to prevent [plaintiffs] as heirs from taking under the statutory rules of inheritance were Mary to die intestate as to *any* or all of her property." We are not persuaded by this argument in light of the fact that the 1996 Amended and Restated Trust accounts for distribution of her property in all circumstances. In particular, section 7.03 of the trust provides that if Mary and the residuary beneficiaries are deceased prior to the full distribution of the trust estate, the remaining portion of the trust shall then be distributed to certain "legal heirs" pursuant to California's laws of succession, but that "[i]n no event ... shall distribution be made" to Mary's children. We are not persuaded that the cases plaintiffs cite in their opening brief in support of their argument undermine the application of section 7.03 of the trust because they only involve circumstances where the deceased did *not* account for the distribution of property. (*Estate of Barnes* (1965) 63 Cal.2d 580, 583 [will did not provide for disposition of property in the event that the decedent's husband predeceased her]; *Estate of Dunn* (1953) 120 Cal.App.2d 294, 295-296 [will left the residue of the estate undisposed of in the event, which occurred, that the devisee predeceased the testatrix]; *Estate of Heney* (1944) 66 Cal.App.2d 867, 869 [decedent died intestate as to a portion of his estate].) Plaintiffs further argue in their reply brief that section 7.03 of the trust cannot prevent them from exercising their intestate rights, relying on these and other similar cases,[23] that the "no-contest" clauses in the 1991 Trust and 1996 Amended and Restated Trust have no meaningful effect on their standing claims because such clauses cannot affect their intestate rights, and that the language excluding them could be construed as an explanation of why Mary left them nothing, rather than as a disinheritance of them, allowing them to share in Mary's intestate estate. However, as stated in one of the cases they cite, "[b]efore a disinheritance clause in a will becomes effective the testator must make a valid disposition of his property; it is not sufficient that he merely evince an intention to disinherit certain heirs." (*Estate of Heney*, *supra*, at p. 869.) Plaintiffs do not sufficiently explain why the 1996 Amended and Restated Trust does not make a valid disposition of Mary's property in all relevant circumstances, particularly in light of section 7.03 of the trust, thereby preventing them from pressing any intestate claim. Nonetheless, given that plaintiffs' standing arguments fail for the other reasons stated herein, we need not address these issues further.

III. *Court's Denial of Plaintiffs' Motions*

***27** Plaintiffs argue that the trial court abused its discretion in denying their motions to amend their complaint, reopen discovery, and continue the trial date. This too is incorrect.

Plaintiffs contend that after the case had been at issue for about a year, plaintiffs' counsel, including one who had recently entered the case, discovered evidence of defendant's breaches of fiduciary duty, financial elder abuse, and "unchecked self-dealing in Mary's trust properties." Plaintiffs contend that "[b]ecause of the delay of defendant's counsel in providing discovery and concealing evidence of wrongdoing," plaintiffs' counsel needed a continuance of the trial to obtain the necessary discovery to support their amended pleading. They argue that the court's denial of their motion to amend their complaint "caused [plaintiffs] extreme prejudice, and the judgment should be reversed for abuse of the trial court's decision, and [plaintiffs] allowed to plead and prove their claims."

Despite their extensive discussion of the purported merits of their proposed new causes of action, plaintiffs do not

address how the trial court abused its discretion in denying their motions. Furthermore, in its statement of decision, the trial court denied plaintiffs' motion to amend their complaint as futile in light of the validity of the 1991 Trust and 1996 Amended and Restated Trust, relying on *Angie M. v. Superior Court* (1995) 37 Cal.App.4th 1217, 1227, and *Berkeley Police Assn. v. City of Berkeley* (1977) 76 Cal.App.3d 931, 942-943. Plaintiffs do not explain why this ruling was incorrect. Accordingly, they fail to meet their appellate burden regarding these issues. (*Denham v. Superior Court, supra,* 2 Cal.3d at p. 564; *Century Surety Co. v. Polisso, supra,* 139 Cal.App.4th at p. 963.)

IV. *The Trial Court's Weighing of the Evidence*

Plaintiffs argue that the trial court committed reversible error by failing to demonstrate that it weighed the evidence as required by Code of Civil Procedure section 631.8, "especially as it related to the question of whether or not the evidence presented by [defendants] on the issue of undue influence preponderated so as to trigger the presumption shifting the burden of proof" to defendant. Plaintiff provides no further analysis or record citations in support of its argument, thereby failing to meet their appellate burden regarding this issue. (*Denham v. Superior Court, supra,* 2 Cal.3d at p. 564; *Century Surety Co. v. Polisso, supra,* 139 Cal.App.4th at p. 963.)

Furthermore, as defendant points out, the record shows that the trial court properly weighed the evidence. For example, the trial court stated on the last day of trial that it had spent a great deal of time the night before reviewing the testimony and then engaged in an extensive discussion with counsel about the evidence that had been presented, its statement of decision includes an extensive discussion of the facts and a thorough analysis of the legal issues, and the court's judgment states that the court had "weighed the evidence." The court's six-page order adopting defendant's proposed statement of decision further establishes the court's careful consideration of the issues. Plaintiffs' argument lacks merit.

V. *The Trial Court's Adoption of Defendant's Proposed Statement of Decision*

***28** Plaintiffs argue that the trial court improperly adopted defendant's proposed statement of decision "without any change thereto or modification thereof, and without any weighing of the evidence, and without explaining its reasoning and the factual and legal basis for its decision as to *each* of the principal controverted issues at trial." In their opening brief, plaintiffs contend that the court failed to make findings on their claims of undue influence and lack of capacity regarding the 2001 and 2002 amendments, although these issues were joined and presented at trial, and that this deprived them of a fair trial and constituted prejudicial error because a different result would have been probable had such error not occurred. Plaintiffs also contend that the trial court's "rubber stamping" of defendant's proposed statement of decision led to "shocking findings," such as "[defendant] proved the absence of undue influence by clear and convincing evidence." [24]

Plaintiffs' arguments lack merit. The trial court did nothing improper by adopting defendant's proposed statement of decision without changes. " 'The preparation of a statement of decision should place no extra burden on the trial courts. A party may be, and often should be, required to prepare the statement.' [Citation.] A trial court may then select which findings it agrees with as supported by the evidence and adopt them, rather than having to prepare a statement of decision from scratch. That a court does so creates no inference that it has failed to engage in a thoughtful weighing of the evidence, and does not license us to ignore its findings of fact." (*J.H. McKnight Ranch, Inc. v. Franchise Tax Bd.* (2003) 110 Cal.App.4th 978, 984 [in which the trial court "adopted virtually all" of the proposed statement of decision].) We have already discussed that the record shows the trial court thoughtfully weighed the evidence and issues. [25]

Furthermore, plaintiffs do not meet their appellate burden of explaining what prejudice they have suffered. (*Denham v. Superior Court, supra,* 2 Cal.3d at p. 564; *Century Surety Co. v. Polisso, supra,* 139 Cal.App.4th at p. 963.) Also, plaintiffs could not have been prejudiced by the court's lack of findings on the factual issues they raised about the 2001 and 2002 Amendments in light of their lack of standing to contest these amendments. Accordingly, plaintiffs' arguments lack merit.

VI. *Plaintiffs' Reply Brief Issues*

In their reply brief, plaintiffs list numerous issues for our consideration for the first time. "It is elementary that points raised for the first time in a reply brief are not considered by the court." (*Levin v. Ligon, supra,* 140 Cal.App.4th 1456, 1486.) Therefore, we will not consider these issues.

As we have already indicated, in their opening brief, plaintiffs argue that the trial court's statement of decision was deficient because the court failed to make findings on their claims of undue influence and lack of capacity regarding the 2001 and 2002 amendments. Nonetheless, in their reply brief, plaintiffs contend the trial court's statement of decision was deficient in a number of other respects. Plaintiffs list seven purportedly "principal controverted issues" that the trial court did not address. Plaintiffs make the convoluted argument, based on *appellate* standards of review, that "the trial court erred in failing to apply the law to determine whether the historical facts were *sufficient* as a *matter of law* to satisfy the legal standard as to what constitutes 'undue' profit or 'active participation.' " Plaintiffs also argue that "[t]here are many controverted facts and issues too numerous to state here that were omitted or ignored by the [statement of decision]" and, therefore, "it cannot be inferred on appeal (under the substantial evidence test) that the trial court decided in favor of the prevailing party as to those facts or on that issue." Plaintiffs fail to argue these points in their opening brief; therefore, we will not address them further. [26]

***29** Elsewhere in their reply brief, plaintiffs argue for the first time that the trial court made multiple errors which cumulatively resulted in a miscarriage of justice that affected their rights, causing them substantial injury, and that a different result would have been probable absent the errors. Plaintiffs then list 14 purported errors in support of their arguments. To the extent plaintiffs have raised these purported errors in their opening brief, we have already addressed them. Plaintiffs' "cumulative error" analysis is raised for the first time in the reply brief and, accordingly, we will not further consider it.

DISPOSITION

The judgment is affirmed. Defendant is awarded costs of the appeal.

We concur: HAERLE, Acting P.J., and RICHMAN, J.

Footnotes

1 Mary Colter McDonald is referred to as "Mary" to avoid confusion. No disrespect is intended by this reference.

2 Plaintiffs refer us to trial exhibit No. 186, entitled "Last Will of Mary McDonald," which is unsigned.

3 Plaintiffs contend Mary's estate should be "estimated to be worth tens of millions of dollars" without further evidentiary support, claiming that they were unable to obtain discovery that would help them to determine its true value.

4 Plaintiffs below also alleged as a separate ground in their complaint that Mary lacked sufficient mental capacity at the time she executed the trust documents. The trial court rejected this ground as to the 1991 Trust and 1996 Amended and Restated Trust, which ruling plaintiffs do not directly challenge on appeal. The trial court also rejected for lack of evidence, a claim of "mistake of fact" as to the 1991 Trust and 1996 Amended and Restated Trust that plaintiffs alleged in their proposed first amended complaint, which ruling plaintiffs also do not directly challenge on appeal.

5 Plaintiffs' briefing to this court includes extended and repeated presentations of their factual and legal theories, much of which relies upon events other than those relating to the preparation and execution of the 1991 Trust and 1996 Amended and Restated Trust. As we discuss herein, we affirm the trial court's ruling that the trust is valid based upon these two instruments and, because these instruments exclude plaintiffs from receiving any of the trust estate, that plaintiffs lack standing to pursue their other claims. We do not reweigh the evidence pursuant to a substantial evidence standard of review. Therefore, we have no need to discuss a good deal of plaintiffs' theories and contentions in order to resolve the appellate issues properly before us. Whether or not we discuss a particular theory or contention, we have conducted a comprehensive review of the parties' briefing and the record, and our determinations are based upon this review.

6 The law regarding undue influence that applies in the context of wills is equally applicable in the context of estate plans formalized by an inter vivos trust and pour-over will. (*Hagen v. Hickenbottom* (1995) 41 Cal.App.4th 168, 182.)

7 In one portion of its statement of decision, the court states that in order to prove undue influence, the contesting party must prove three factors, they being the existence of a confidential relationship between the settlor and beneficiary, activity or participation in the procurement and execution of the trust, and an undue or unnatural benefit given to the beneficiary, relying on *Estate of Niquette* (1968) 264 Cal.App.2d 976, 982. That case discusses these factors in evaluating whether a *presumption* of undue influence had arisen, thereby shifting the burden of proof. (*Ibid.*) While these factors are indicia of undue influence (see, e.g., *Estate of Yale* (1931) 214 Cal. 115, 122 [referring to several circumstances as "indicia" of undue influence, which existence raise the presumption]), that does not mean that a party must prove all of these factors in all instances. For example, it is not necessarily relevant whether

a confidential relationship existed if a contesting party otherwise proves undue influence by clear and convincing evidence. (See Civ.Code, § 1575; *Buchmayer v. Buchmayer* (1945) 68 Cal.App.2d 462, 467 [a confidential relationship is not always necessary to establish undue influence].) Regardless, plaintiffs, do not raise this issue with regard to the trial court's ruling. (Plaintiffs argue on reply that the elements do not have to be proven to show undue influence in response to defendant's argument.) Even if they had, and if we had found error, we would have found it was not prejudicial in light of the trial court's finding that there was no evidence of undue influence. (See *Cassim v. Allstate Ins. Co.* (2004) 33 Cal.4th 780, 800-802 [noting the application for civil trial errors of *People v. Watson* (1956) 46 Cal.2d 818, 836].)

8 Some courts have held that the person contesting a trust must prove undue influence by clear and convincing evidence. (See *Conservatorship of Davidson* (2003) 113 Cal.App.4th 1035, 1059, overruled on another ground as stated in *Bernard v. Foley* (2006) 39 Cal.4th 794, 816; accord, *Estate of Truckenmiller* (1979) 97 Cal.App.3d 326, 334.) In its statement of decision, the trial court applied a “preponderance of the evidence” standard of proof regarding plaintiffs' undue influence claim, apparently as a result of a stipulation between the parties.

9 Other substantial evidence, such as defendant's testimony, supports the trial court's findings as well. It is neither necessary nor productive for us to discuss all of the substantial evidence, however, in light of the volume of this appeal, which includes over 250 pages of briefing, over 6,700 pages of clerk and reporter transcripts, and over 200 trial exhibits. Our silence as to certain evidence does not mean, however, that we have concluded it is not substantial evidence that supports the trial court's ruling. Instead, we focus on the attorney testimony and certain documentary evidence, as the trial court did.

10 Mercant also testified that one of the reasons why Mary wanted to leave her children out was that they were constantly confronting her, although it is unclear from his testimony when he learned this.

11 Plaintiffs contend that defendant engineered these swaps in order to later buy certain properties from the trust and develop them for his own profit.

12 The remainder of section 14.05 of the trust, which follows this quoted provision, states: “In the event any beneficiary under this Trust, or any child, issue or legal heir of Settlor or any person claiming under any of them either singly or in conjunction with any other person or persons, shall contest this Declaration of Trust (‘Trust’) or the deceased's Last Will (‘Will’), or shall seek to obtain an adjudication in any proceeding in any court that this Trust or any of its provisions or that such Will or any of its provisions is void, or shall seek to impair, invalidate or otherwise void, nullify, or set aside any of the provisions of this Trust or the Will, or any of its provisions, or shall conspire with or voluntarily assist anyone attempting to do any of these things, then in that event, the deceased Settlor specifically disinherits such contesting person, and all interests given to such contesting person under this Trust and the Will shall be revoked and shall be disposed of in the same manner provided in both the Trust and the Will as if that Trustee is hereby authorized to defend, at the expense of the Trust estate, any contest or other attack of any nature on this Trust or any of its provisions.”

13 Plaintiffs do not contest that Mercant was no longer working on legal matters, as indicated in the statement of decision.

14 Plaintiffs point out that Mary also stated in the letter that “we are not millionaires” to support their theory that she was unaware of the extent of her assets. This brief reference is not conclusive of her knowledge. Regardless, pursuant to our substantial evidence standard of review, it cannot prevail over the substantial evidence of Mary's extensive knowledge of her assets that we discuss herein.

15 We find this after reviewing plaintiffs' 15-page “Notice of Errata,” which contains additional record citations for some of the contentions in their opening brief.

16 Plaintiffs also argue that as a legal matter, a nephew is not the natural object of an aunt's bounty. We have examined the cases they cite. (See *Estate of Mann, supra,* 184 Cal.App.3d at p. 606; and the cases cited therein, and *Estate of Nolan* (1938) 25 Cal.App.2d 738.) While some case law indicates that a nephew is not *necessarily* a natural object of an aunt's bounty, none of these cases stand for the proposition plaintiffs assert. Under the qualitative test stated in *Estate of Sarabia, supra,* 221 Cal.App .3d at page 607, nothing prevents a court from concluding that a nephew is the natural object of an aunt's bounty under the right circumstances.

17 We also reject plaintiffs' footnote argument that no proof of undue benefit was required in this case because MacDonald's purported breach of his fiduciary duties to Mary as her attorney should be imputed to defendant. Plaintiffs rely on *Estate of Auen* (1994) 30 Cal.App.4th 300, 309, which held that when an attorney received a benefit from a testamentary instrument he or she actively participates in preparing, a presumption of undue influence arises without the need to separately show receipt of an undue benefit. (*Ibid.*) Plaintiffs argue that we should impute MacDonald's purported breach of fiduciary duties to defendant pursuant to a combination of *Auen* and *Estate of Trefren* (1948) 86 Cal.App.2d 139, but we have no basis for doing so. Defendants have not established that MacDonald was representing defendant at the time he worked on Mary's behalf, **or** that MacDonald breached any fiduciary duty to Mary that should be imputed to defendant, given the lack of evidence that the two worked together to influence Mary in her disposition of her trust estate or exclusion of her children.

At oral argument, plaintiffs argued that the presumption test for attorney fiduciaries articulated in *Estate of Auen, supra,* 30 Cal.App.4th 300, should be applied directly to *defendant,* who is not an attorney, because he was already acting as Mary's fiduciary when she executed the 1991 Trust and 1996 Amended and Restated Trust. This flies in the face of long-established law. “ ‘For the

presumption of undue influence to arise, it is not enough that a confidential or fiduciary relationship shall have existed between the testator and the person alleged to have exerted undue influence. There must have been, in addition, some sort of activity or participation in the execution or preparation of the will, as well as undue benefit given to the same or another person by the will thus procured.' " (*Estate of Nelson* (1964) 227 Cal.App.2d 42, 57; see also *Estate of Baker* (1982) 131 Cal.App.3d 471, 480; *Estate of Clegg* (1978) 87 Cal.App.3d 594, 603; *Estate of Gelonese*, *supra*, 36 Cal.App.3d at pp. 861-862 [all referring to the existence of a "confidential or fiduciary relationship" as one of three elements that must be proven for the presumption to arise].) Regardless, plaintiffs do not argue in their papers that such a relationship was itself sufficient to establish undue benefit pursuant to *Auen.* We decline to further consider the argument pursuant to "the general rule that '[a]n appellate court is not required to consider any point made for the first time at oral argument, and it will be deemed waived.' " (*People v. Pena* (2004) 32 Cal.4th 389, 403.)

Furthermore, plaintiffs have not stated, and we have not found, where in the record it shows that they raised either of these arguments before the trial court. As a general rule, issues not raised in trial court cannot be raised for the first time on appeal. (*Lambert v. Carneghi* (2008) 158 Cal.App.4th 1120, 1129.)

18 Plaintiffs suggest for the first time in their reply brief that we should apply a different standard of review, contending "that the trial court erred in failing to apply the law to determine whether the historical facts were *sufficient* as a *matter of law* to satisfy the legal standard as to what constitutes 'undue' profit or 'active participation.' " At oral argument, plaintiffs expanded on this argument, contending that we are required to apply a standard of review other than one based on substantial evidence. We do not agree with plaintiffs; the standard of appellate review of a trial court's ruling on a motion made pursuant to Code of Civil Procedure section 631.8 is very clear. (See *Pettus v. Cole*, *supra*, 49 Cal.App.4th at pp. 424-425.) More fundamentally, however, "[i]t is elementary that points raised for the first time in a reply brief are not considered by the court." (*Levin v. Ligon* (2006) 140 Cal.App.4th 1456, 1486.) Therefore, we do not further consider their argument.

19 Plaintiffs implicitly acknowledge the damage caused by MacDonald's testimony in contending that his testimony "is inherently incredible," a contention with which we do not agree.

20 In light of our conclusion, we do not need to discuss further in this section the issues debated between the parties about the impact of the 1996 Amended and Restated Trust's clauses regarding "remainder," "disinheritance" and "no contest" on plaintiffs' rights to pursue claims as intestate heirs.

21 In fact, as defendant points out, *Molera* actually contains analysis favorable to his position, in that the court determined that the contesting parties did not have a direct pecuniary contingent interest in the devolution of the subject estate with regard to the preliminary distributions because if the contested devise, affecting only a portion of the will, were found to be the result of undue influence, the portion of the estate involved would still fall into a valid residuary, to which the contesting parties were not entitled. (*Molera*, *supra*, 23 Cal.App.3d at pp. 1001-1002.)

22 However, in *Estate of Lowrie*, *supra*, 118 Cal.App.4th 220, the appellate court held that the contestant had standing to pursue her elder abuse action because she was the successor representative of the subject estate and, therefore, held a contingency interest. (Id. at pp. 230-231.) As we discuss herein, plaintiffs have no contingency interest. Plaintiffs also argue, based on *Estate of Lowrie*, that the Legislature intended that there be a broad definition of standing in the context of elder abuse cases. While this may be the case (see *id.* at p. 227), it does not overcome the fact that plaintiffs have *no* possible future interest and, therefore, no standing.

23 It is unclear if plaintiffs make these arguments in their reply brief in support of all or only some of the claims for which they were denied standing.

24 The trial court acknowledged that defendant did not in fact have this burden of proof.

25 Nonetheless, it is poor practice for the trial court to adopt without changes a lengthy statement of decision written by one of the parties, if only because it is more likely to lead to unnecessary "red herrings" on appeal, whether or not such a proposed statement of decision is sufficient.

26 Plaintiffs also spent a good deal of time at oral argument arguing one or another of these points, despite failing to first raise them in their opening brief. Again, we will not consider such tardy arguments.

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