Filed 8/10/10

CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

ESTATE OF DOROTHY MANUEL, Deceased. _____ TERRI WILSON, Petitioner and Respondent, v. NANCY L. BROWN, Contestant and Appellant; DAWN CLARK-JOHNSON et al., Objectors and Appellants.	B210701 c/w B215380 (Los Angeles County Super. Ct. No. BP095813)

APPEAL from an order of the Superior Court of Los Angeles County, Reva Goetz, Judge. Reversed and remanded with directions.

---

* Pursuant to California Rules of Court, rules 8.1100 and 8.1110, this opinion is certified for publication with the exception of Factual and Procedural Background, Issues on Appeal and Discussion-Parts 1 & 3.

Law Offices of Larry D. Lewellyn and Larry D. Lewellyn; Mazur & Mazur, Janice R. Mazur and William E. Mazur, Jr., for Contestant and Appellant and Objector and Appellant Larry Lewellyn.

Tredway, Lumsdaine & Doyle, Joseph A. Lumsdaine and Min N. Thai; Law Offices of Robert G. Splinter and Min N. Thai for Petitioner and Respondent.

Law Offices of Efrem A. Clark and Efrem A. Clark for Contestant and Appellant Dawn Clark-Johnson.

INTRODUCTION

Under Code of Civil Procedure section 2033.420, a party who unreasonably denies a request for admission may be required to pay the requesting party its reasonable expenses (including reasonable attorney's fees) incurred in proving the truth of the matter at trial. In this case, a will contestant, Nancy Brown, denied requests for admission which, if admitted, would have resolved the entire case in favor of the executor, Terri Wilson. When Wilson then prevailed at trial, she sought an award of costs of proof in the amount of all of her legal fees incurred after the date of the denial of the requests for admission. The trial court granted the motion, ordering Brown, and her counsel, Attorney Larry Lewellyn and Attorney Dawn Clark-Johnson, to pay Wilson the full amount of her legal fees.

In this appeal, we consider whether a costs of proof order may be directed to the denying party's counsel, as well as the denying party. We conclude that costs of proof may be imposed only against a party, not the party's counsel. We therefore reverse that portion of the trial court's order requiring Brown's attorneys to pay a share of the costs of proof in this case. In the unpublished portion of this opinion, we consider whether the trial court properly awarded costs of proof with respect to requests for admission pertaining to *every theory* on which Brown challenged the will, and, therefore, whether the trial court properly calculated the costs of proof as Wilson's entire attorney fee bill. We conclude that the trial court abused its discretion, and remand for a recalculation of the costs of proof pertaining only to those requests for admission for which Brown lacked a reasonable ground to believe that she would prevail at trial.

FACTUAL AND PROCEDURAL BACKGROUND

As the determination of whether costs of proof were appropriate involves a consideration of whether Brown had a reasonable ground to believe that she would prevail on the matters denied, we must set forth the facts of the underlying dispute in some detail. This case centers around the validity of the July 24, 2003 will of the decedent, Dorothy Manuel. In that will, the decedent left all of her property to Wilson, whom she also named as executor. The contestant of the will is Brown, who was decedent's second cousin. Wilson is married to Brown's son.[1]

Decedent died on October 14, 2005, at the age of 99. She was survived by no children, grandchildren, or siblings. Decedent's estate consisted largely of her home; the property also contained two rental units.

1. *Decedent's Stroke and 1999 Mental Examinations*

Decedent, who lived alone, suffered a stroke in 1999.[2] She was referred for a neurological evaluation. On June 10, 1999, a Mini-Mental State Examination was performed. Decedent scored 12 points out of 30.[3] Decedent could not identify the year, season, date, day, or month, apparently believing it was November of 1977. When asked to spell the word "world," backwards, she could not place any letter correctly.

---

[1] Wilson described herself as decedent's cousin-in-law, and Brown as decedent's first cousin once-removed. Whatever Brown's relationship to the decedent may be, however, it is clear that Wilson's only familial relationship with decedent is through her husband, who, in turn, is related through his mother, Brown.

[2] The date of the stroke is unclear. However, the stroke was the cause of her referral to a neurologist.

[3] Her score on this evaluation was incorrectly added to 13.

When her recall was tested, she could remember only one of three previously remembered objects. When directed to "[w]rite a sentence," she could not comply. A diagnosis of "probable Alzheimer's disease" was made.[4] Decedent returned on August 18, 1999 for a follow-up appointment. She again scored 12 out of 30 on the Mini-Mental State Examination,[5] with the exact same missed questions as before.

In November 1999, decedent suffered a seizure and was hospitalized. She was discharged from the hospital on December 3, 1999. The discharge summary indicated that decedent needed 24-hour care, and that the decedent's family was making arrangements for such care. Brown took on this task, living with decedent for at least one month, and possibly as many as four months.[6] Brown made certain that decedent was taking her medications; Brown helped with decedent's meals, and went shopping for her. It was another relative's opinion that, after Brown moved out, decedent still required assistance, but she preferred to live alone. Another relative agreed that, from the time of her stroke until her death, decedent needed to be reminded to take her medications and eat.

---

[4] At trial, Brown's expert psychiatrist, Robert Neshkes, M.D., testified that Alzheimer's disease diagnoses are routinely qualified as "probable," because the diagnosis cannot be made with certainty until a brain biopsy is conducted, which generally occurs post-mortem.

[5] Again, the score was mis-added to 13.

[6] The testimony at trial seemed agreed that Brown began living with decedent to take care of her following her *stroke*. Yet the discharge summary following the subsequent seizure indicates that decedent's need for 24-hour care was then communicated to the family, and implies that the family had not been providing such care at that time.

2. *The Campbells Take Advantage of Decedent*

Even before her stroke, decedent was not paying her bills herself. At some point, unknown individuals started taking financial advantage of decedent.[7] In October 1999, decedent quitclaimed her property to a relative, Leatrice Campbell. The reason for this was disputed. Leatrice Campbell testified that her father, Irvin Campbell, convinced decedent to transfer the property in order to keep it safe from people who were trying to take advantage of her. Wilson, however, testified that the family simply thought decedent would soon die and wanted to avoid probate.

Brown stopped living with decedent when she did because the Campbells had started to look after decedent. They assisted decedent through 2002. In 2002, Leatrice Campbell took out a $50,000 loan on the property. She used some of the money to pay back taxes and perform repairs on decedent's house, but she also used the proceeds to buy a car for herself.

3. *Wilson Becomes Involved*

In 2002 or 2003, Wilson began visiting decedent. Wilson would stop by decedent's house on her lunch break, and she would share her lunch with decedent. Wilson started noticing that decedent was not being properly cared for; for example, her toenails were uncut. Wilson realized that decedent could not cook for herself, and needed assistance in bathing. Eventually, decedent confided in Wilson that she believed the Campbells were stealing her money. Wilson opened two new bank accounts for

---

[7] None of the testimony at trial was specific as to details, but witnesses testified variously to people taking decedent to the bank and withdrawing her funds, and homeless people coming into her house and taking financial advantage.

decedent, and had decedent's regular payments transferred to the new accounts. Wilson opened the accounts in her name as well as decendent's. Wilson testified that it was not necessary for her to be on the accounts in order to protect them. Nonetheless, she thought that "it was a good idea" to be on the accounts, since she "was going to be the one helping [decedent] out."

A friend of decedent's had contacted Santa Monica Protective Services, which sent an Elder Abuse investigator, apparently with regard to decedent's allegations against the Campbells. The investigator spoke with decedent and Wilson, and instructed Wilson to hire an attorney for decedent. Wilson did so.

4. *Decedent Executes the Will in Favor of Wilson*

Wilson took decedent to meet Attorney Julius Wulfsohn, for the purpose of getting her property back from Leatrice Campbell. However, decedent had not only quitclaimed her property to Leatrice Campbell, she had also executed a will leaving her estate to the Campbells. Attorney Wulfsohn informed decedent that she should have a new will drawn up so that the Campbells would not inherit. Decedent made an appointment with Attorney Wulfsohn to have a new will drafted.

Although Wilson brought decedent to the appointment to draft her will, the evidence is undisputed that Attorney Wulfsohn met with decedent privately, as was his practice. Decedent told Attorney Wulfsohn that she wanted to leave everything to Wilson, and he drafted the will accordingly. Before decedent executed the will, on July 24, 2003, Attorney Wulfsohn again discussed the will's contents with decedent

without Wilson being present. Attorney Wulfsohn believed that decedent was mentally competent, and that Wilson was not unduly influencing her.

5. *The September 2003 Mental Evaluation of Decedent*

Once the new will had been executed, Attorney Wulfsohn discussed litigation against the Campbells to get decedent's property returned. Attorney Wulfsohn told decedent that litigation was very strenuous and that she would not be able to handle it. Decedent pointed to Wilson as her agent. At first, Attorney Wulfsohn considered obtaining a conservatorship for decedent, with Wilson as the conservator. The first step to obtaining a conservatorship would be to obtain a declaration from decedent's physician.

Elliot Felman, M.D., was decedent's primary physician. In September 2003, at Attorney Wulfsohn's request, he performed an evaluation of decedent's mental capacity. Dr. Felman concluded decedent was in great mental shape for her age "and she pretty much had all of her – all of her mental capacity."[8] Dr. Felman opined that most of decedent's problems were physical, and that she did not need help taking medications or feeding herself. He felt that she was qualified to make her own decisions and handle her own money.

---

[8] At trial, Dr. Felman was asked about the 1999 diagnosis of probable Alzheimer's disease. Dr. Felman declined to expressly contradict the neurologist, but stated that if decedent had Alzheimer's disease, "it certainly was not severe or enough to cause any significant impairment."

6. *The 2003 Suit Against the Campbells*

In the absence of a declaration of incompetence, Attorney Wulfsohn could not proceed with the planned conservatorship. Instead, the decision was made for decedent to execute a power of attorney in favor of Wilson, so that Wilson could pursue the action against the Campbells on decedent's behalf. The power of attorney was executed on September 8, 2003.

On September 25, 2003, suit was filed by decedent "by her agent" Wilson, against the Campbells; Attorney Wulfsohn was counsel for decedent. Wilson verified the complaint. In the complaint, Wilson alleged that decedent's "age and infirmities placed her in a dependent and vulnerable position, and also reduced [decedent's] ability to carry out normal activities or to protect [her] rights."

Decedent's deposition was taken in the action against the Campbells on January 27, 2004. Decedent was clearly disoriented, confused and dependent. She repeatedly stated that she did not know why she was there. She was able to identify Wilson as the person who is "looking after my business," but could not name her. At one point, she called Wilson "Mama." She did not know if Leatrice Campbell was related to her. She thought the Campbells were only her neighbors. Decedent stated that she liked Irvin Campbell, and that he did not do anything to her; decedent had to be reminded that she was suing the Campbells. Even after being reminded, she stated she did not remember this. Decedent did not know who paid her bills, who collected rent on her rental units, whether her tenants were charged rent, who buys her groceries, and how food ends up in her refrigerator. She did not remember making a will. She agreed

that she signed papers in Attorney Wulfsohn's office, but did not remember what they were. She repeated that she never made a will to anybody, but later stated she did not know what a will is.

In May 2004, Dr. Felman performed another capacity evaluation of decedent. At this point, he concluded that decedent had deteriorated substantially from his earlier evaluation in September 2003. He attributed the decline to the general aging process and "some type of dementia process," which could have been Alzheimer's disease or a series of small strokes. He was unable to determine whether decedent would have been capable of handling her affairs in May 2004.

The suit against the Campbells settled; decedent's property was quitclaimed back to her, and Irvin Campbell repaid the $50,000 loan which encumbered the property. It was also agreed that a conservatorship would be established,[9] and that an attorney would be appointed to create a new estate plan for decedent. Probate Volunteer Panel Attorney Marc Sallus was appointed to act on decedent's behalf in the conservatorship. On June 7, 2004, the court suspended the power of attorney in favor of Wilson, and authorized Attorney Sallus to prepare estate planning documents for decedent.

7. *No New Documents Are Prepared*

Attorney Sallus first met with decedent in April or May 2004. He performed an "amateur mini mental test to see if she was oriented as to time and place and would know who her relatives were and who she was." Attorney Sallus concluded that decedent's long-term memory was intact, but her short-term memory was very poor. At

---

[9] Neither of the parties to this action was appointed conservator.

that time, Attorney Sallus asked what, if anything, decedent wanted done with her estate; she could not say. Decedent said she was thinking about it, and asked if she had to decide right then; Attorney Sallus told her that she did not have to decide immediately.

After the court authorized Attorney Sallus to prepare estate planning documents for decedent, he met with her again to discuss the issue. Decedent could not identify anyone she wanted to have her estate when she died. At one point, Attorney Sallus asked, "would you mind if it's whoever [is] your last living relative?" Decedent agreed, as long as the Campbells would not inherit. Attorney Sallus prepared a trust document reflecting that disposition.

A hearing was held[10] on August 30, 2004. Immediately before the hearing, Wilson approached Attorney Sallus and told him that decedent had something to say to him. Attorney Sallus then spoke with decedent. Decedent "was very adamant that she had not made up her mind dealing with the trust document and that she did not want that trust document to be approved . . . in particular as to who was supposed to receive the estate. [¶] She wanted more time to make that decision. And she wanted [Attorney Sallus] to remove that as her attorney so she could think about it and make that decision later." Attorney Sallus believed decedent understood her decision, so he withdraw the proposed estate planning documents.[11]

---

[10] The hearing was apparently to approve the settlement in the Campbell litigation.

[11] Wilson testified that *after* the hearing, Attorney Sallus asked decedent, in front of Wilson and the conservator, what she wanted done with her estate. According to

Decedent died in October 2005. As no new will or trust had been prepared, Wilson submitted the July 2003 will to probate.

8. *Brown Contests the Will*

On February 14, 2006, Brown, represented by Attorney Dawn Clark-Johnson, filed objections to Wilson's petition for probate and a notice of contest of will. The three-page pleading alleged that decedent's mental capacity declined ever since her 1999 stroke, and that she did not have sufficient mental capacity to execute the will in 2003. It also alleged that the will makes an "unnatural distribution" of the estate to Wilson, who was related only by marriage, when decedent had numerous family members with whom she was close throughout her lifetime. Brown alleged, in four separate subparagraphs, that: (1) decedent lacked testamentary capacity; (2) the will was obtained as the result of "fraud, misrepresentation, menace, duress and/or undue influence"; (3) the will was signed by mistake; and (4) there was a lack of due execution. As the second subparagraph alleged five separate bases to attack the will, the parties characterize this pleading as raising eight different theories.

9. *The First Set of Requests for Admission are Denied*

On April 27, 2006, Wilson served her first set of requests for admission on Brown, requesting Brown to admit, among other things, that the will was not invalid on

---

Wilson, decedent stated that she wanted Wilson to have everything. Wilson thought Attorney Sallus would draw up an estate plan to that effect, but he did not do so. The conservator, who had also allegedly heard decedent express this intent, did nothing.

seven of the eight reasons raised by Wilson.[12] On June 13, 2006, Brown responded. In all relevant respects, Brown denied the requests for admission.

An unsuccessful mediation ended on November 6, 2006. At the end of the mediation, Attorney Clark-Johnson informed Wilson's counsel that she would be substituting out of the case.

On November 8, 2006, Wilson's counsel wrote Attorney Clark-Johnson, stating that, based on counsel's review of the deposition of Attorney Wulfsohn and Dr. Felman's September 2003 declaration of capacity, it appeared that "no probable cause exists for continued prosecution of your client's claims [of] lack of due execution of the will or lack of testamentary capacity of the decedent." Counsel requested dismissal of the will contest as to those two grounds, and threatened a malicious prosecution action.

On November 14, 2006, Attorney Clark-Johnson responded that these issues would be better handled by new counsel, and asked for patience while Brown obtained a new attorney. On December 18, 2006, Attorney Clark-Johnson substituted out; Attorney Larry Lewellyn became Brown's new counsel.

10. *The Second Set of Requests for Admission are Denied*

On February 7, 2007, Wilson served Brown with a second set of requests for admission. A transmittal letter again indicated counsel's belief that there was no basis for continued prosecution of the contest on the ground of lack of testamentary capacity.

---

[12] While Wilson requested Brown to admit that the will was not obtained as the result of fraud, she neglected to request Brown admit that the will was not obtained as the result of misrepresentation.

The requests for admission requested Brown to admit, among other things, that the will was not invalid on six of the eight reasons raised by Wilson.[13] The document itself, in bold, quoted Code of Civil Procedure section 2033.420's provision regarding costs of proof. On February 28, 2007, Brown denied each of these requests for admission.

11. *Brown's Deposition*

On March 1, 2007, Brown was deposed. When asked why she believed Wilson had unduly influenced decedent, Brown identified only that Wilson had talked about decedent and her property, and that Wilson had taken decedent out for meals. Brown stated, "And I just think that she influenced her."

On March 19, 2007, Wilson's counsel again wrote Attorney Lewellyn, stating, "your client has not provided any information to support her allegations of undue influence or lack of capacity. If your client continues to prosecute her meritless contest to [decedent]'s will, we will certainly seek to recover costs and fees expended at trial under C.C.P. § 2033.420(b)."

Attorney Lewellyn responded that, under his understanding of the facts, the case was highly meritorious. "However," Attorney Lewellyn added, "if you think otherwise, you should certainly, and are welcomed to file the appropriate motion."

---

[13] This time, the requests for admission did not address mistake and lack of due execution.

12. *Pre-Trial Statements*

Prior to trial, each party filed its own trial statement. Although Brown's contest had raised eight bases to challenge the will, the parties understood that only two, undue influence and lack of testamentary capacity, were truly at issue. Wilson's trial statement briefed undue influence (which incorporated incapacity) for seven pages, allocating two sentences to lack of due execution, and one sentence to mistake. The other grounds were simply not mentioned. Brown briefed only lack of capacity and undue influence; no other grounds were mentioned in her trial statement.[14]

13. *The Trial*

At the commencement of the trial, Attorney Lewellyn indicated that due execution of the will was at issue. He argued that Wilson had the burden of establishing due execution, and stated, "Once that is established by due execution, it's my burden to establish my elements which are the lack of capacity or undue influence." Wilson's counsel then established due execution by reading a few pages from Attorney Wulfsohn's deposition. The court found due execution. The entire exchange occupied no more than six pages of the reporter's transcript.

In order to establish that decedent lacked testamentary capacity at the time she executed the will, Brown introduced the testimony of an expert psychiatrist,

---

[14] Brown also argued that there was *no will at all*. Her theory was that, as part of the settlement of the suit against the Campbells, it was agreed that the will in favor of the Campbells *and the will in favor of Wilson* would both be set aside, with Attorney Sallus to create a new will. As Attorney Sallus never drafted a new will, Brown argued that decedent died intestate. While Brown lost on this basis at trial, it was not strictly pleaded in her objections to the will, and was not addressed in any of the requests for admission.

Dr. Neshkes. Dr. Neshkes reviewed decedent's medical records – including the two 1999 Mini-Mental State Examinations and the diagnosis of probable Alzheimer's disease– as well as depositions and Dr. Felman's capacity declarations. Dr. Neshkes opined that Dr. Felman's September 2003 evaluation of no mental limitations should be disregarded – both because it is simply not possible for someone at age 97 to be 100% perfect mentally, and also because it is wholly inconsistent with the diagnosis of Alzheimer's disease four years earlier. Although Alzheimer's disease patients decline at different rates, the disease is degenerative and no patients get better. Dr. Neshkes also explained that, as there was no improvement between the two 1999 mental state examinations, the chances of decedent's later improvement would be very unlikely. In short, Dr. Neshkes concluded that, in July 2003, decedent's Alzheimer's disease would have been even more advanced than it was in 1999, and that decedent would have been significantly worse, in terms of her ability to plan and think logically. He also concluded that someone in decedent's state would be especially vulnerable to fraud and undue influence.

Brown introduced the testimony of Attorney Sallus, Brown herself, and three relatives, all of whom testified to their observation of decedent's condition and limitations, painting the picture of a woman in steady mental decline from her 1999 stroke onward. There was no indication in any of their testimony that decedent had recovered her mental capacity by the time of the July 2003 will and Dr. Felman's September 2003 capacity evaluation.

On the issue of undue influence, Brown relied on the evidence of decedent's limited capacity as making her susceptible to undue influence. She also relied on the facts that the Campbells, and other individuals, had taken advantage of decedent, and Wilson's own verified pleading in the suit against the Campbells. Brown also elicited testimony from Wilson regarding her involvement in decedent's life, including that she transferred decedent's money into new accounts in the names of both Wilson and decedent.

In addition to testifying herself, Wilson introduced the testimony of Dr. Felman, and read from Attorney Wulfsohn's deposition. As witnesses had been taken out of order in the case, Wilson offered no additional evidence after Brown had rested her case.

14. *Motion for Judgment and Ruling*

At the close of Brown's case, Wilson moved for judgment. Her attorney began argument on the motion by stating, "First of all, the pleadings in this case allege basically two reasons for invalidating the will. The first is capacity and the second is undue influence." The trial court granted judgment in favor of Wilson on the remaining six grounds Brown had pleaded for invalidating the will, but specifically denied judgment on the bases of lack of capacity and undue influence.

Immediately thereafter, Wilson rested her case and the trial court heard argument.[15] Ultimately, on June 20, 2007, the trial court issued a written statement of

---

[15] The transcript of the closing arguments is not included in the record on appeal. Attorney Clark-Johnson may have intended to include the transcript in her designation

decision in favor of Wilson. As to the issue of capacity, the court concluded that there was insufficient evidence to overcome the presumption of testamentary capacity. The court was particularly persuaded by Dr. Felman's testimony in this regard. On the issue of undue influence, the court found no evidence of undue influence in the absence of a presumption of undue influence under Probate Code section 21350.[16] As to a presumption of undue influence, the court found that the presumption was not triggered because the testimony established that Wilson "only provided occasional living assistance" to decedent, and was not a "care custodian" within the meaning of the statute. Judgment was therefore entered in favor of Wilson and against Brown.

15. *Motion for Costs of Proof*

On September 7, 2007, Wilson moved for costs of proof under Code of Civil Procedure section 2033.420 against Brown, Attorney Clark-Johnson, and Attorney Lewellyn. Wilson took the position that Brown unreasonably denied each and every request for admission she propounded. Wilson argued that, as Brown should have admitted that none of her challenges to the will were meritorious, the action never should have proceeded to trial. Therefore, Wilson sought as costs of proof her *entire* attorney fee bill from the date of Brown's responses to the first set of requests for admission, amounting to $52,779.50. While the language of Code of Civil Procedure

---

of record. The trial was completed on May 14, 2007, and arguments were scheduled for the next day. Attorney Clark-Johnson designated for inclusion in the record the proceedings of May 15, 2008, rather than May 15, 2007. There were no proceedings on May 15, 2008, and no party appeared to notice the error.

[16] As we discuss below, there is a presumption of undue influence in a transfer to a care custodian of a transferor dependent adult. (Prob. Code, § 21350, subd. (a)(6).)

section 2033.420 expressly provides for costs of proof against "the party" who denied the requests for admission, Wilson argued that Brown's counsel should also be liable for the costs of proof on the basis that "any reasonable attorney" would have known that Brown's evidence was insufficient. Wilson also noted that she had specifically warned counsel that costs of proof would be sought.

A brief opposition to the motion for costs of proof was filed by Attorney Lewellyn's office[17] on behalf of Brown. The opposition argued that Brown had reasonable grounds to believe that she would prevail in the will contest. The opposition did not argue that Brown had a reasonable ground to believe that she would prevail on any specific matter denied in her responses to the requests for admission. Instead it argued, in one and one-half pages, that she had a reasonable ground to believe she would prevail in the litigation as a whole, relying solely on her evidence that decedent lacked testamentary capacity.[18] The opposition did not specifically oppose that part of the motion which sought costs of proof against Attorney Lewellyn. Attorney Clark-Johnson, who would later argue that she was not properly served with the motion, did not file any response to it.

---

[17] The opposition was actually signed by Attorney Keith Moten, who worked at Attorney Lewellyn's firm.

[18] Attorney Lewellyn would later file a declaration stating the following, "Subsequent to the trial, I assigned the remaining management of this case to Keith Moten, Esq. Mr. Moten did file an opposition to the motion for attorney's fees, however, his motion contained no supporting declarations or documentation."

A hearing on the motion was held on October 23, 2007. There was no appearance made for Brown,[19] Attorney Lewellyn, or Attorney Clark-Johnson. As such, no argument was held. The trial court stated simply, "I have read the moving papers and the opposition. I find that there is no merit in the opposition and that the request for attorney's fees is appropriate and should be granted as prayed."

Wilson's counsel served a proposed order which was ultimately signed. As the trial court had retired, a different judge signed the order. The November 27, 2007 order stated, "Objector Nancy Brown and her attorneys Dawn Clark-Johnson, Esq., and the law Offices of Larry Lewellyn are ordered to pay Respondent Terri Wilson and her attorneys Tredway, Lumsdaine & Doyle $52,779.50 within ten days of signature of this order." Notice of entry of the order was served on Brown, Attorney Clark-Johnson, and Attorney Lewellyn on November 30, 2007.

16. *Attorney Clark-Johnson Protests and a Second Hearing Is Held*

On March 4, 2008, Attorney Clark-Johnson received a notice of lien, which included an abstract of judgment in which she was identified as a judgment debtor. On March 27, 2008, Attorney Clark-Johnson filed a motion to recall and quash the writ of execution and set aside the order for costs of proof under Code of Civil Procedure section 473. She argued that she had never been served with the motion for costs of

---

[19] Attorney Lewellyn's subsequent declaration stated, "I appeared at the first court hearing on the motion, however, the matter was continued since it had to be heard by the trial judge who is currently retired. The matter was continued and [Attorney] Moten, who was scheduled to appear, failed to do so."

proof.[20] Attorney Clark-Johnson attached to her motion an opposition she would have filed to the original motion for costs of proof. This opposition raised several issues, including: (1) Code of Civil Procedure section 2033.420 does not provide for an award of costs of proof against a party's attorney; (2) as Attorney Clark-Johnson had substituted out of the case at a fairly early point in the proceedings, she could not be responsible for any failure of Brown to dismiss the case after she had ceased representing her; and (3) based on the information Attorney Clark-Johnson possessed, it appeared that Brown had probable cause to bring her will contest.[21]

The matter was now before Commissioner Reva Goetz. Commissioner Goetz ultimately denied Attorney Clark-Johnson's motion to quash.[22] There was no express order on the motion to set aside. Instead, the court's order stated, "Writ of Execution is stayed pending hearing at which the attorney fees ordered are to be allocated between [Attorney] Clark-Johnson and [Attorney] Lewellyn."

---

[20] The proof of service on the original motion for costs of proof had an incorrect zip code for Attorney Clark-Johnson.

[21] In a declaration filed by Attorney Clark-Johnson, she indicated that, in the conservatorship proceedings, Attorney Sallus had "indicated that Decedent did not have capacity to make a trust, and that it was impossible to determine who Decedent wanted to leave her assets to." This was in contrast to Attorney Sallus's testimony at trial.

[22] While Attorney Clark-Johnson claimed that she was never served with the motion for costs of proof, she agreed that, on November 1, 2007, she had been served with Wilson's proposed order in which she was named. Attorney Clark-Johnson believed she had been erroneously named in the proposed order, and telephoned and wrote to counsel for Wilson to ask that her name be deleted from the order. No response was received. The court expressed concern that Attorney Clark-Johnson had known that she was named in the proposed order on November 1, 2007, had not received any confirmation that she was removed from the order, but took no further action until March 27, 2008.

Attorney Clark-Johnson and Attorney Lewellyn each filed declarations in which they argued their allocation of the fees awarded should be zero. Both counsel argued that Brown's denials of the requests for admission, while they were counsel, were reasonable. In addition, Attorney Clark-Johnson again argued that costs of proof may not be awarded against counsel, and both argued that any award of costs of proof should be limited only to the actual costs of proof. In response, Wilson filed an opposition arguing that this hearing was not a motion for reconsideration of the earlier award of costs of proof. As to allocation, Wilson indicated that, between the time of Brown's response to the first set of requests for admission to the time Attorney Clark-Johnson substituted out of the matter, her fees incurred were $10,153.50, and the fees incurred from Attorney Lewellyn's substitution to the end of the matter were $42,626.

After a hearing, the trial court issued the following ruling in a June 27, 2008 minute order: "This matter came for hearing on June 11, 2008 regarding the allocation of attorney fees in the sum of $52,779.50 payable by Dawn Clark-Johnson and Larry D. Lewellyn pursuant to an order issued by Hon. Thomas Stoever awarding attorney fees after trial filed on November 27, 2007. That Order is now final. Judge Stoever has retired and the allocation of fees between counsel is to be decided by this court." The court then concluded that the "[f]ees attributable" to Attorney Clark-Johnson were $15,835 and the "[f]ees attributable" to Attorney Lewellyn were $36,944.50. It appears that the court simply allocated the fees 30% to Attorney Clark-Johnson and 70% to Attorney Lewellyn. A notice of ruling followed on July 7, 2008.

On September 5, 2008, Brown and Attorney Lewellyn filed their notice of appeal from the June 27, 2008 order "which order amended a previous order entered on November 27, 2007, and from all orders subsumed therein." Attorney Clark-Johnson filed a timely notice of cross-appeal.

17. *A Third Order is Obtained and Appealed*

At some point, Wilson realized that the June 27, 2008 allocation order omitted any allocation to Brown. On August 1, 2008, she applied to enter an order to amend the original November 27, 2007 order nunc pro tunc to incorporate the June 27, 2008 allocation and to make Brown and her attorneys jointly and severally liable for each attorney's share of the fees.

The court granted the motion as sought by Wilson, with the exception that the court declined to amend the November 27, 2007 order nunc pro tunc, and simply amended the order. The court ordered that the November 27, 2007 order be amended to order: (1) Brown and Attorney Clark-Johnson, jointly and severally, to pay Wilson and her counsel $15,835 within ten days of the order; and (2) Brown and Attorney Lewellyn, jointly and severally, to pay Wilson and her counsel $36,944.50 within ten days of the order. The order was signed on January 30, 2009. Brown and Attorney Lewellyn filed a timely notice of appeal from this order. We ordered the two appeals consolidated.

ISSUES ON APPEAL

On appeal, Wilson contends the notices of appeal taken from the trial court's second and third orders are untimely to the extent they purport to challenge the trial

court's initial November 27, 2007 order awarding costs of proof. We disagree. We next consider the argument of Attorney Lewellyn and Attorney Clark-Johnson that costs of proof may be imposed only against a party, not that party's counsel. We agree that costs of proof may not be imposed against counsel. Finally, we consider whether the trial court abused its discretion in concluding Brown had no reasonable ground to deny any of Wilson's requests for admission, and therefore awarding Wilson's entire attorney fee bill. We conclude that Brown had a reasonable ground to deny the requests for admission relating to lack of testamentary capacity, but lacked a reasonable basis to deny requests for admission relating to all of Brown's other challenges to the will. We therefore will remand to the trial court for a determination of the amount of Wilson's costs of proof with respect to undue influence, lack of due execution, and, to the extent there were any costs of proof, the remaining five challenges to the will.

DISCUSSION

1. *The Appeals Are Timely*

Preliminarily, Wilson argues that the November 27, 2007 order was never timely appealed, and that the notices of appeal from the subsequent June 27, 2008 and January 30, 2009 orders are untimely to the extent they seek to challenge the November 27, 2007 order. We disagree.

The November 27, 2007 order awarded costs of proof in the amount of $52,779.50 against Brown, Attorney Clark-Johnson, and Attorney Lewellyn, but made no allocation of the amount among those three individuals. The June 27, 2008 order provided an allocation of the costs of proof between Attorney Clark-Johnson and

Attorney Lewellyn, wholly omitting Brown. The January 30, 2009 order amended the November 27, 2007 order to require Brown and Attorney Clark-Johnson to jointly and severally pay $15,835, while Brown and Attorney Lewellyn were required to jointly and severally pay $36,944.50. Wilson argues that the November 27, 2007 order determining liability for costs of proof was final and appealable. The failure to timely appeal that order, she argues, prevents Brown, Attorney Clark-Johnson and Attorney Lewellyn from challenging their liability for costs of proof. We disagree.

We are guided by *CC-California Plaza Associates v. Paller & Goldstein* (1996) 51 Cal.App.4th 1042. In that case, a building owner sued a contractor, who cross-complained against a subcontractor for indemnity. The contractor settled with the owner, and assigned its indemnity rights against the subcontractor to the owner. The owner then proceeded on the indemnity claim. The subcontractor obtained a judgment of nonsuit, and the trial court entered judgment in favor of the subcontractor against the *contractor*. The contractor moved to correct the judgment to name the owner as the party against whom judgment was entered, not the contractor. The trial court agreed and entered a corrected judgment. The owner timely appealed from the corrected judgment, but not the original judgment. (*Id*. at pp. 1045-1046.) In considering the timeliness of the owner's appeal, the court stated: "The issue then becomes: When does the time for filing a notice of appeal commence to run in a case where there has been a change in the form of judgment? As might be expected, the answer depends on how material a change is involved. The rule has been accurately summarized by the leading text on such matters as follows: 'The effect of an amended judgment on the

appeal time period depends on whether the amendment substantially changes the judgment or, instead, simply corrects a clerical error: . . . When the trial court amends a nonfinal judgment in a manner amounting to a *substantial modification* of the judgment (e.g., on motion for new trial or motion to vacate and enter different judgment), the amended judgment supersedes the original and becomes the appealable judgment (there can be only one "final judgment" in an action; [citation]). Therefore, a new appeal period starts to run from notice of entry or entry of the *amended* judgment. . . . On the other hand, if the amendment merely corrects a *clerical error* and does not involve the exercise of judicial discretion, the original judgment remains effective as the only appealable final judgment; the amendment does *not* operate as a new judgment from which an appeal may be taken.' [Citations.]" (*Id*. at p. 1048.) In considering whether the corrected judgment in the case was substantial or merely clerical, the court found the issue "relatively easy; we cannot imagine a more substantial or material change in the form of a judgment than in the identity of the losing party." (*Id*. at p. 1049.) Thus, the modification was not clerical, and the amended judgment restarted the time to appeal.

In this case, the result is the same. While the first order held the three individuals responsible for costs of proof in the amount of $52,779.50, the order did not allocate the fees among them. The trial court's allocation of the fees was clearly an exercise of judicial discretion, not simply a correction of a previous error in entering the order.

Thus, the June 27, 2008 order constituted a substantial modification of the judgment.[23] Similarly, the January 30, 2009 order also constituted a substantial modification, as the June 27, 2008 order did not indicate that Brown was liable for *any* costs of proof, but the January 30, 2009 order did.[24] As the June 27, 2008 and January 30, 2009 orders constituted substantial modifications of the November 27, 2007 order, the notices of appeal from those orders constitute timely challenges to all elements of the final order imposing costs of proof.[25]

2. *Costs of Proof May Not Be Imposed Against Counsel*

Code of Civil Procedure section 2033.420, subdivision (a) provides, in pertinent part, "If a party fails to admit the . . . truth of any matter when requested to do so under this chapter, and if the party requesting that admission thereafter proves the . . . truth of that matter, the party requesting the admission may move the court for an order

---

[23] We note that when Commissioner Goetz made her June 27, 2008 allocation, she stated the November 27, 2007 order "is now final." We believe Commissioner Goetz was stating Judge Stoever's ruling on costs of proof was final and would not be reconsidered, not making a determination regarding the appealability of that order. Indeed, if the order had been truly final, Commissioner Goetz would have lacked jurisdiction to amend it on the merits. (See Wegner et al., Cal. Practice Guide: Civil Trials and Evidence (The Rutter Group 2009) ¶18:505.1, p. 18-108.) Thus, we conclude Commissioner Goetz viewed Judge Stoever's original order as finally resolving the issue of liability for costs of proof, but leaving the issue of allocation to be later decided. Thus, the order was not a final resolution of the costs of proof motion.

[24] We note here that the trial court, Judge Aviva Bobb, declined Wilson's request to amend the November 27, 2007 order nunc pro tunc, in apparent acknowledgement that the amendments were substantive and started a new time period in which to appeal.

[25] Attorney Clark-Johnson appealed from the June 27, 2008 order only, not the January 30, 2009 order. To the extent necessary, we construe Attorney Clark-Johnson's notice of appeal as a premature notice of appeal of the January 30, 2009 order, valid under California Rules of Court, rule 8.104(e)(2).

requiring the party to whom the request was directed to pay the reasonable expenses incurred in making that proof, including reasonable attorney's fees." The trial court must make the order unless, among other things, "[t]he party failing to make the admission had reasonable ground to believe that that party would prevail on the matter." (Code Civ. Proc., § 2033.420, subd. (b)(3).)

The text of the statute is unambiguous, it provides for an award of costs of proof against "the party to whom the request [for admission] was directed"; it makes no provision for an award of costs of proof against the party's attorney. Indeed, other provisions of the Civil Discovery Act demonstrate that the Legislature has expressly provided for sanctions against counsel when it chose to do so. For example, Code of Civil Procedure section 2023.030, subdivision (a) expressly allows a trial court to impose a monetary sanction against anyone "engaging in the misuse of the discovery process, or any attorney advising that conduct."[26]

Although the statutory language appears clear, we consider the history of the costs of proof provision. Costs of proof were initially added to the Code of Civil Procedure in 1957, as part of Code of Civil Procedure, former section 2034, subdivision (e). That provision similarly provided, in pertinent part, "If a party, after being served with a request . . . to admit the . . . truth of any matters of fact, serves a sworn denial thereof and if the party requesting the admissions thereafter proves the . . . truth of any

---

[26] Similarly, the Act provides monetary sanctions "against any party, person, or attorney who unsuccessfully makes or opposes a motion to compel" further responses to, for example, requests for admission, without substantial justification. (Code Civ. Proc., § 2033.290, subd. (d).)

such matter of fact, he may apply to the court in the same action for an order requiring the other party to pay him the reasonable expenses incurred in making such proof, including reasonable attorney's fees. If the court finds that there were no good reasons for the denial . . . , the order shall be made." (Stats. 1957, ch. 1904, § 3.) This language, in turn, was derived from former rule 37(c) of the Federal Rules of Civil Procedure. (*Brooks v. American Broadcasting Co.* (1986) 179 Cal.App.3d 500, 508.) "In such circumstances, it is appropriate for us to look not only at the purposes of the statutory enactment, but to also look to federal court decisions interpreting the parallel provisions of rule 37(c) . . . ." (*Ibid.*) This is especially true here, as the current language of Code of Civil Procedure section 2033.420 is similar to the current language of Federal Rules of Civil Procedure, rule 37(c)(2).[27]

Three federal circuit courts have considered the issue. Each of them came to the same conclusion: Federal Rules of Civil Procedure, rule 37(c) costs of proof may not be imposed against a party's counsel, but only the party itself. (*Grider v. Keystone Health Plan Central, Inc.* (3rd Cir. 2009) 580 F.3d 119, 141; *Insurance Benefit Administrators, Inc. v. Martin* (7th Cir. 1989) 871 F.2d 1354, 1360; *Apex Oil Co. v. Belcher Company of New York* (2d Cir. 1988) 855 F.2d 1009, 1013-1014.) In support of the conclusion that attorneys were *intentionally* not subjected to the burden of costs of proof, the federal

---

[27] The key language reads, "If a party fails to admit what is requested . . . and if the requesting party later proves . . . the matter true, the requesting party may move that the party who failed to admit pay the reasonable expenses, including attorney's fees, incurred in making that proof." (Fed. Rules Civ. Proc., rule 37(c)(2), 28 U.S.C.) The court is to make the order, unless, among other things, "the party failing to admit had a reasonable ground to believe that it might prevail on the matter." (Fed. Rules Civ. Proc., rule 37(c)(2)(C), 28 U.S.C.)

courts not only relied on the language of the rule itself, but also have pointed to the fact that discovery sanctions against counsel are available under other provisions of Federal Rules of Civil Procedure. (*Insurance Benefit Administrators, Inc. v. Martin, supra,* 871 F.2d at p. 1360; *Apex Oil Co. v. Belcher Company of New York, supra,* 855 F.2d at pp. 1014-1015.) As already noted, California law also has a separate provision allowing for discovery sanctions against counsel.[28]

The federal courts' interpretation of the provision on which Code of Civil Procedure section 2033.420 is based confirms our interpretation of the plain language of that statute. Costs of proof are available against a party only, not its counsel.

In her respondent's brief on appeal, Wilson never attempts to argue to the contrary. Instead, she suggests that the award against Attorney Lewellyn and Attorney Clark-Johnson should be upheld as a sanction for misuse of the discovery process under Code of Civil Procedure section 2023.010, et seq.[29] We disagree. Wilson's motion

---

[28] The federal provision is somewhat different, providing that any discovery response *must* be signed by counsel, and that counsel's signature constitutes a representation that counsel has reviewed the response and formed a belief that it is, among other things, not interposed for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation. (Fed. Rules Civ. Proc., rule 26(g), 28 U.S.C.) California has no parallel statute. An attorney need not sign a response to requests for admission unless the response contains an objection. (Code Civ. Proc., § 2033.240, subd. (c).) Indeed, Brown's response to the first set of requests for admission was not signed by counsel.

[29] Wilson also argues that "the responses must have been prepared on the advice of counsel." If a party's counsel advised that party to pursue a litigation strategy which resulted in the party being ordered to pay costs of proof, the party *may* have a claim for malpractice against its counsel. The adverse party, however, may not obtain costs of proof from the party's attorney on this basis.

sought costs of proof under Code of Civil Procedure section 2033.420.[30] It did not seek misuse of discovery sanctions against counsel under Code of Civil Procedure section 2023.020. Indeed, Code of Civil Procedure section 2023.010 itemizes nine types of conduct which constitute "misuses of discovery," none of which explicitly include denying a request for admission without a reasonable ground to believe the party may prevail on the matter. Wilson never identified any specific conduct as "misuse[] of discovery" under this statute, and the trial court never found that Attorney Clark-Johnson or Attorney Lewellyn misused discovery or advised that Brown do so. We therefore cannot uphold the imposition of costs of proof against Attorney Clark-Johnson or Attorney Lewellyn on any basis. The order must be reversed insofar as it imposes costs of proof against either counsel.

3. *Propriety and Amount of Costs of Proof*

While it is mandatory for the trial court to award costs of proof when the prerequisites for such an award have been established, it is within the court's discretion to determine whether those requirements have been established. (*Miller v. American Greetings Corp.* (2008) 161 Cal.App.4th 1055, 1065-1066; *Haseltine v. Haseltine* (1962) 203 Cal.App.2d 48, 60.) The main disputed issue in this case is whether Brown "had reasonable ground to believe that [she] would prevail on the matter[s denied]," (Code Civ. Proc., § 2033.420, subd. (b)(3).) This determination is "within the sound discretion of the trial court." (*Brooks v. American Broadcasting Co., supra*,

---

[30] Code of Civil Procedure section 2033.420 provides for an award of "the reasonable expenses incurred in making . . . proof." At no point in Code of Civil Procedure section 2033.420 are these "expenses" categorized as a "sanction."

179 Cal.App.3d at p. 508.) Related to this is the trial court's determination of "the reasonable expenses incurred" in proving the matters Brown denied without reasonable ground to believe she would prevail. This matter is also within the trial court's discretion. (*Ibid.*) In this case, however, the trial court awarded Wilson *all* of the attorney fees she incurred after the requests for admission were denied. Thus, if the trial court erred in determining any particular request for admission was denied without a reasonable ground, the attorney fees Wilson incurred to prove the truth of that particular matter were, of necessity, wrongfully granted. No award of costs of proof may be made for expenses unrelated to the costs of proof of the matters Brown should not have denied. (*Smith v. Circle P Ranch Co.* (1978) 87 Cal.App.3d 267, 279.)

In determining whether a party had reasonable ground to believe that it would prevail on the matter denied, courts consider whether, at the time the denial was made, the party making the denial held a "reasonably entertained good faith belief that the party would prevail on the issue at trial." (*Laabs v. City of Victorville* (2008) 163 Cal.App.4th 1242, 1276.) It is not sufficient for the issue to have been hotly contested at trial; the party making the denial must have had some reasonable basis *supported by evidence* to do so.[31] (*Brooks v. American Broadcasting Co, supra,* 179 Cal.App.3d 500, 511.) The party must attempt to contest, with admissible evidence, the facts that it refused to admit. (*Miller v. American Greetings Corp., supra,* 161 Cal.App.4th at p. 1066.)

---

[31] A party may also establish a reasonable ground to believe it would prevail at trial if the law is unsettled and the party has a good faith belief it could prevail on its legal theory. (*Miller v. American Greetings Corp, supra*, 161 Cal.App.4th at p. 1067.)

Wilson sought and obtained costs of proof based on Brown's denials that each of Brown's eight theories for contesting the will were untrue. We consider each such theory and whether Brown had a reasonable ground to believe she would prevail on it.

a. *Lack of Testamentary Capacity*

Brown denied that decedent possessed testamentary capacity at the time she executed the July 24, 2003 will. We therefore must consider whether Brown possessed a reasonable basis, supported by the evidence, to believe decedent lacked testamentary capacity.

Probate Code section 6100.5, subd (a)(1) provides that an individual lacks testamentary capacity if the "individual does not have sufficient mental capacity to be able to (A) understand the nature of the testamentary act, (B) understand and recollect the nature and situation of the individual's property, or (C) remember and understand the individual's relations to living descendants, spouse, and parents, and those whose interests are affected by the will."

"Testamentary capacity must be determined at the time of execution of the will. [Citation.] Incompetency on a given day may, however, be established by proof of incompetency at prior and subsequent times. [Citation.] Where testamentary incompetence is caused by senile dementia at one point in time, there is a strong inference, if not a legal presumption, that the incompetence continues at other times, because the mental disorder is a continuous one which becomes progressively worse. [Citation.]" (*Estate of Mann* (1986) 184 Cal.App.3d 593, 602; see also *Estate of Clegg* (1978) 87 Cal.App.3d 594, 600.) However, " '[i]t has been held over and over in this

state that old age, feebleness, forgetfulness, filthy personal habits, personal eccentricities, failure to recognize old friends or relatives, physical disability, absent-mindedness and mental confusion do not furnish grounds for holding that a testator lacked testamentary capacity.' [Citation.]" (*Estate of Mann, supra*, 184 Cal.App.3d at p. 603.)

In this case, Brown possessed substantial evidence that decedent lacked testamentary capacity. Indeed, while the trial court's determination that decedent possessed testamentary capacity is supported by substantial evidence, had the trial court reached the opposite conclusion, it would have survived a substantial evidence challenge on appeal. Brown relied on the following evidence at trial: (a) decedent's stroke in 1999; (b) the two Mini-Mental State Examinations in 1999, which showed substantial mental impairment; (c) an expert opinion that it is unlikely decedent's condition would have improved after two similar evaluations in 1999; (d) the 1999 diagnosis of probable Alzheimer's disease; (e) the testimony of relatives regarding decedent's lack of improvement; (f) the expert opinion of Dr. Neshkes; (g) Wilson's verified complaint in the Campbell action; and (h) decedent's deposition testimony six months after the will was executed, in which she *demonstrated* a lack of testamentary capacity, by her failure to remember and understand her relations to Wilson and the Campbells. This constitutes more than sufficient evidence for Brown to have denied the request to admit that decedent possessed testamentary capacity.[32] The trial court's

---

[32] In her respondent's brief on appeal, Wilson argues that Brown's only evidence of lack of capacity *during discovery* was that decedent had suffered a stroke. It is

implicit conclusion to the contrary was an abuse of discretion. Therefore, Wilson should not have been awarded any attorney fees with respect to the issue of testamentary capacity.[33]

b. *Undue Influence*

We next turn to the second main issue litigated at trial, undue influence. Brown denied that, when decedent executed the July 2003 will, she "was not under the undue influence of Terri Wilson."

"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.) "Undue influence is established when it is shown that the testamentary disposition was brought about by undue pressure, argument, entreaty or other coercive acts that destroyed the testator's freedom of choice so that it fairly can be said that he was not a free agent when he made his will [citations]; undue influence can be established by circumstantial evidence so long as the evidence raises more than a mere suspicion that undue influence was used; the circumstances proven must be inconsistent with the claim

---

apparent, however, that by the time of trial, Brown possessed substantial evidence of lack of capacity; had she admitted the request for admission, she would have prematurely yielded a theory on which she had a reasonable chance to prevail at trial. Costs of proof should not be used to encourage premature admissions and litigation decisions. (Cf. *Stull v. Sparrow* (2001) 92 Cal.App.4th 860, 868.)

[33] We note that the only witness Wilson called at trial, besides herself, was Dr. Felman. Dr. Felman testified only to the issue of testamentary capacity.

that the will was the spontaneous act of the testator." (*Ibid.*) "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." ' [Citations.]" (*Estate of Mann, supra,* 184 Cal.App.3d at p. 606.)

Perhaps in recognition of the fact that Brown possessed no direct evidence whatsoever that Wilson brought pressure to bear on decedent's testamentary act,[34] Brown sought to establish undue influence by means of a statutory presumption. A transfer made by a dependent adult[35] to a "care custodian" carries with it a presumption of undue influence, which can be overcome only by clear and convincing evidence.[36] (Prob. Code, §§ 21350, subd. (a)(6), 21351, subd. (d).) A "care custodian,"

---

[34] At oral argument on this appeal, Brown suggested that Wilson's act of taking decedent to an attorney is evidence of undue influence. " '[T]he mere fact of the beneficiary procuring an attorney to prepare the will is not sufficient "activity" to bring [a presumption of undue influence] into play . . . ; or selection of attorney and accompanying testator to his office . . . ; or mere presence in the attorney's outer office; . . . or presence at the execution of the will . . .' " (*Estate of Mann*, *supra*, 184 Cal.App.3d at p. 608.)

[35] There is no dispute that decedent was a dependent adult. (See Welf. & Inst. Code, § 15610.23.)

[36] The presumption does not apply to transferees related by blood or marriage, within the fifth degree of kinship. (Prob. Code, § 21351, subds. (a) & (g).) It is undisputed that this exemption does not apply to Wilson.

in turn, is defined by Welfare and Institutions Code section 15610.17. The statute first itemizes types of facilities the employees of which are considered "care custodians," such as home health agencies, adult day care, Alzheimer's disease day care resource centers, and the like. (Welf. & Inst. Code, § 15610.17, subds. (a) - (x).) The statute then includes a catch-all provision: "Any other protective, public, sectarian, mental health, or private assistance or advocacy agency *or person providing* health services or *social services* to elders or dependent adults." (Welf. & Inst. Code, § 15610.17, subd. (y), emphasis added.) It is the italicized portion of this statute which forms the basis of Brown's claim of undue influence. Brown argued that Wilson was a "care custodian" because she provided social services to decedent. In this case, those services consisted of helping decedent with meals, reminding her to take her medication, taking her on errands, and helping with financial matters (including becoming a co-signer on her accounts).

There have been three cases which considered whether performing these sorts of services renders one a "care custodian." In *Conservatorship of Davidson* (2003) 113 Cal.App.4th 1035, the court concluded that "cooking, gardening, driving [decedent] to the doctor, running errands, grocery shopping, purchasing clothing or medications, and assisting [decedent] with banking" are services which "simply cannot be equated with the provision of 'health services and social services' " within the meaning of the statute. (*Id*. at p. 1050.) In *Bernard v. Foley* (2006) 39 Cal.4th 794, the Supreme Court overruled *Davidson* on other grounds, but found that the individuals in the case before it had provided "health services" to the decedent, as they had " 'administered morphine to

decedent and provided wound care,' [services which were] 'a far cry from the level of care provided . . . in *Davidson*.' " (*Id*. at p. 806.) In *Estate of Odian* (2006) 145 Cal.App.4th 152, 165, the court concluded that the *Davidson* court had not *concluded* the enumerated services did not constitute "social services," but had merely questioned whether they did. (*Id*. at p. 165.) In what the court determined to be a case of first impression, the *Odian* court concluded that *a paid, live-in caregiver*, who cooked, cleaned, drove decedent as needed, took care of decedent's home, and took care of decedent had provided "social services." (*Id*. at pp. 166-167.) We need not express any opinion on whether the *Odian* court misinterpreted the *Davidson* opinion. What is apparent, however, is that *no* court which has addressed the issue has ever held that a person who does *not* live with the decedent, but simply provides occasional assistance with the day-to-day matters of life, is providing social services.[37] As such, we cannot say that the trial court abused its discretion in concluding that Brown did not possess a reasonable ground to believe she would prevail on the issue of whether Wilson was a care custodian, and, therefore, on the issue of whether Wilson unduly influenced decedent. The trial court appropriately awarded costs of proof with respect to the issue of undue influence.

---

[37] At no point does Brown suggest that she was arguing for an extension of current law regarding care custodians. Indeed, nothing in the record before us indicates that Brown argued before the trial court for an extension of current law. Moreover, in opposition to the motion for costs of proof, Brown did not argue that she had a reasonable ground to believe that she would prevail on the issue of undue influence *at all*; she argued only with respect to lack of testamentary capacity.

c. *Lack of Due Execution*

Brown denied that "there was no lack of due execution" of decedent's 2003 will. At trial, Brown specifically requested that Wilson prove this matter. Wilson did; Brown offered no evidence to the contrary. On appeal, Brown makes no attempt to identify any evidence which supported her denial. The trial court did not abuse its discretion by granting costs of proof with respect to lack of due execution. However, we note that due execution was proven by Wilson at trial in only six pages of reporter's transcript, by reading from Attorney Wulfsohn's deposition transcript. Wilson can obtain reimbursement for her expenses with respect to the brief amount of time spent proving the will was duly executed.[38]

d. *Fraud, Misrepresentation, Menace, Duress, and Mistake*

As to the five remaining challenges to the will, Brown denied requests for admission that these challenges had no merit. However, from the record provided on appeal, it appears that Wilson incurred no expense to prove, at trial, the truth of the matters she had asked Brown to admit. Both Brown's written trial statement and Attorney Lewellyn's oral statement at trial regarding the order of proof indicated that Brown was pursuing lack of capacity and undue influence, not these other five grounds. Wilson's trial statement appeared to understand this, devoting *one sentence* to mistake, and not addressing the other four grounds. At the close of Brown's case, when Wilson moved for judgment, Wilson's counsel tellingly stated, "First of all, the pleadings in this

[38] Wilson properly did not seek reimbursement for Attorney Wulfsohn's deposition, as the deposition had been taken on March 16, 2006, *prior* to the service of the first set of requests for admission.

case allege basically two reasons for invalidating the will. The first is capacity and the second is undue influence." It is apparent that the other five grounds were simply not at issue, and the parties understood this to be the case.[39] Thus, while the trial court was correct in concluding Brown should not have denied the requests for admission pertaining to these grounds, Wilson incurred no costs of proof with respect to these issues at trial. In order to recover, Wilson needs to identify specific line-items in her attorney fee statements which reflect reasonable pre-trial expenses incurred in proving these grounds were untrue.

e. *Calculation of the Amount to be Awarded on Remand*

The matter will therefore be remanded to the trial court, for a redetermination of the costs of proof to be awarded against Brown. The award should include no amounts incurred in proving decedent had testamentary capacity.

We note that, as the trial court concluded that Brown should have admitted requests for admission which would have defeated her entire contest to the will,[40] the court concluded that Wilson should recover all of her attorney fees incurred after the time Brown failed to admit her contest had no merit. Yet not all of Wilson's attorney fees were incurred *in proving the truth* of the matters which should have been admitted.

---

[39] Wilson's statement on appeal that "Brown and her counsel forced [duress, menace, fraud, misrepresentation, mistake, and lack of due execution] to trial," is true only with respect to lack of due execution.

[40] This may not be so. Brown also contested the will on the basis that it had been rendered void by the settlement of the Campbell action. As Wilson does not claim that Brown improperly denied requests for admission with respect to this theory, it does not appear that her costs of proving the will was not rendered void by the settlement can be recovered.

For example, Wilson sought, and the trial court awarded, reimbursement for attorney fees incurred in the failed mediation. A mediation is an attempt to resolve a dispute, not a proceeding in which disputed facts are proven. Wilson has failed to establish that the mediation attorney fees constitute *costs of proving* the matters which should have been admitted; this is especially true now that we have concluded that Brown had a reasonable good faith basis for one of her challenges to the validity of the will. On remand, the trial court should limit its award of costs of proof to the actual costs of proof.

DISPOSITION

The trial court's order awarding costs of proof is reversed. The matter is remanded to the trial court with directions to vacate its orders granting costs of proof and to enter a new and different order: (1) denying the motion for costs of proof against Attorney Clark-Johnson and Attorney Lewellyn; (2) denying the motion for costs of proof against Brown with respect to requests for admission pertaining to lack of capacity; and (3) granting the motion for costs of proof against Brown with respect to requests for admission pertaining to undue influence, lack of due execution, fraud, misrepresentation, menace, duress, and mistake; and (4) recalculating the award to include only the reasonable expenses incurred in proving the statements in those requests for admission true. Wilson and Brown shall bear their own costs on appeal; Attorney Lewellyn and Attorney Clark-Johnson shall recover their costs on appeal from Wilson.

CERTIFIED FOR PARTIAL PUBLICATION

CROSKEY, Acting P. J.

WE CONCUR:

KITCHING, J. ALDRICH, J.