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CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

STEPHEN ANDERSEN et al., Plaintiffs and Respondents, v. PAULINE HUNT, Individually and as Trustee etc., Defendant and Appellant.	B221077 (Los Angeles County Super. Ct. No. BP099392)

APPEAL from a judgment of the Superior Court of Los Angeles County, Kenji Machida, Judge. Affirmed in part; reversed in part.

Law Offices of Marc B. Hankin and Marc B. Hankin; and Law Offices of Richard Pech and Richard Pech for Defendant and Appellant.

Law Offices of John A. Belcher and John A. Belcher for Plaintiffs and Respondents.

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* Under California Rules of Court, rules 8.1105 and 8.1110, only the Introduction, parts III, IIIA, B, C of the Discussion, and the Disposition are certified for publication.

INTRODUCTION

Plaintiffs and respondents Stephen Andersen (Stephen) and Kathleen Brandt (Kathleen) are the children of decedent Wayne Andersen (Wayne), who died April 28, 2006.[1] Plaintiff John Andersen (John), not a party to this appeal, is Stephen's son and Wayne's grandson. Appellant Pauline Hunt (Pauline) was Wayne's long-term romantic partner. Taylor Profita (Taylor) is Pauline's grandson.

In 1992, Wayne and his wife established a family trust that named Stephen and Kathleen the sole beneficiaries after their parents' deaths. Wayne's wife died in 1993. In 2003, after suffering a stroke, Wayne amended his trust to leave a 60 percent portion of his estate to Pauline, with the remainder going to Stephen, Kathleen, and John. He made subsequent amendments later in 2003 and in 2004, but retained the provision leaving 60 percent of his estate to Pauline.

After Wayne's death in 2006, Stephen and Kathleen brought the present action to, among other things, invalidate the 2003 and 2004 trust amendments and recover funds placed in accounts held jointly by Wayne and Pauline. The probate court found that Wayne lacked capacity to execute the trust amendments, transfer funds from the trust to joint tenancy accounts, and change the beneficiary of his life insurance policy, and that Pauline exerted undue influence with respect to the amendments and transfers.

In the published part of the opinion, we conclude the probate court erred when it evaluated Wayne's capacity to execute the trust amendments by the general standard of capacity set out in Probate Code sections 810 to 812, instead of the standard of testamentary capacity set out in Probate Code section 6100.5.[2] In the unpublished part, we find there is no substantial evidence that Wayne lacked testamentary capacity to execute the 2003 and 2004 trust amendments or that the amendments were the product of

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[1] Throughout this opinion, we sometimes refer to Stephen and Kathleen collectively as "petitioners."

[2] All further undesignated statutory references are to the Probate Code.

Pauline's undue influence. We also determine there is substantial evidence that Wayne lacked capacity to open joint tenancy accounts and to change the beneficiary of his life insurance policy. Thus, we reverse the part of the judgment invalidating the trust amendments and affirm in all other respects.

STATEMENT OF FACTS AND OF THE CASE

I. The Andersen Family Trust

Wayne and his wife, Harriett Andersen (Harriett),[3] created the Andersen Family Trust (the trust) in 1992. Attorney Eva Jeffers (Jeffers) drafted the trust document and acted as attorney for Wayne and Harriett in connection with the trust and related pour-over wills. Wayne and Harriett were the named trustees and, during their lifetimes, the sole trust beneficiaries.

The trust provided that should Wayne and Harriett become incapacitated or upon their deaths, their children, Stephen and Kathleen, would become trustees. After the deaths of both Wayne and Harriett, the trust assets would be distributed to Stephen and Kathleen in equal shares.

Harriett died on November 26, 1993.

Prior to Harriett's death, Wayne and Pauline had become involved in a close personal relationship that continued until Wayne's death. On October 17, 1996, Wayne executed an amendment to the trust providing that should he become incapacitated or upon his death, Pauline would act as successor trustee.

II. Wayne's 2003 and 2006 Strokes

Wayne suffered a stroke on May 11, 2003. About three months later, he moved into Pauline's home in Granada Hills, where he lived until his death, except for hospital and nursing home stays.

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[3] The parties variously spell Wayne's wife's name "Harriett" and "Harriet." When quoting from the record, we have left the parties' spellings of the name unchanged.

The state of Wayne's health and mental function after the 2003 stroke was the subject of sharp dispute at trial, as discussed more fully below.

Wayne suffered a second major stroke on February 7, 2006. He died on April 28, 2006.

III. The Four Contested Trust Amendments

Following his May 2003 stroke, Wayne executed four amendments to the trust, the validity of which are at issue in this appeal. They are as follows:

(1) May 28, 2003 amendment: "Trustor does hereby change the distribution of the trust assets upon his death as follows: [¶] 60% of the residue of the trust estate shall be distributed to Pauline S. Hunt, a very dear friend of trustor. [¶] The remaining 40% of the residue of the trust estate shall be distributed in three equal shares, one for Stephen E. Andersen, Kathleen L. Brandt, and John Andersen, trustor's children and grandson."

(2) November 18, 2003 amendment: "The trustor shall distribute the trust assets, after payment of just debts and funeral expenses of trustor, as follows: [¶] Sixty percent (60%) of the residue of trust assets to Pauline S. Hunt. [¶] Forty percent (40%) of the residue of the trust assets to Stephen E. Andersen, Kathleen L. Brandt, and John Andersen, trustor's children and grandson, to share equally. [¶] Should Pauline Hunt predecease trustor, then the trust assets shall be distributed as follows: [¶] Twenty-five percent (25%) to Taylor Profita[] of the residue of the trust assets[;] [¶] Seventy-five percent (75%) of the residue of the trust assets shall be distributed to Stephen E. Andersen, Kathleen L. Brandt and John Andersen to share and share alike."

"Trustor hereby directs that none of trustor's children or grandson have any involvement with the handling of said trust assets. Further the trustee is directed to sell the residence and in no way shall trustor's son, Stephen[,] or his daughter, Kathleen[,] or his grandson, John, be allowed to purchase the residence, either directly or indirectly."

(3) January 24, 2004 amendment: crossed out the first four paragraphs of the May 28, 2003 amendment and stated, in a handwritten note: "Already superseded by Amendment dated 11/18/03."

(4) July 6, 2004 amendment: "Trustor deletes his grandson from receiving a part of the assets of the trust, and instead, the percentage going to trustor's son, daughter and grandson, shall now only go to trustor's son and daughter, so Steve will have the portion that had been set aside for his son."

IV. The Contested Asset Transfers

UBS Paine Webber account. Wayne and Pauline jointly opened an account at UBS Paine Webber in August 1991. On March 3, 2006, Pauline requested that the account be closed, and UBS Paine Webber issued a check payable to Pauline and Wayne for $7,264.22. That check was deposited into a joint Washington Mutual bank account on March 8, 2006. The next day, Pauline withdrew the $7,264 by writing a check to "Cash" that cleared the account.

Washington Mutual account 5808. On May 19, 2003, Wayne opened Washington Mutual account 5808 in joint tenancy with Pauline by transferring $30,000 from the trust. On October 5, 2005, $5,000 was deposited into the account from the trust. On May 15 and July 14, 2006, $17,000 and $5,000, respectively, were transferred from the trust into the account. On December 27, 2006, the unused balance of $4,294.39 was transferred back to the trust and the account was closed. A referee appointed in this case concluded that with the exception of several expenditures for which there was no documentation, all disbursements from this account were valid.

Washington Mutual account 7328. On August 29, 2003, Wayne opened Washington Mutual account 7328 in joint tenancy with Pauline with two transfer deposits: $22,000 from account 5808, and $7,691 from the trust. On November 14, 2003 and July 20, 2004, Wayne deposited the proceeds from seven Government E bonds ($20,816.25) into account 7328. On September 1, 2004, February 18, 2005, and June 27, 2006, $2,500, $10,000, and $5,000, respectively, were transferred into the account from the trust, and on October 5, 2005, $5,000 was transferred into the account from Washington Mutual account 5808. At the date of Wayne's death, the account balance was $21,673.58.

Life insurance. On October 11, 2003, Wayne executed a change of beneficiary form for two New York Life whole-life insurance policies. The change of beneficiary form named Pauline as first beneficiary, and Stephen and Kathleen as second and third beneficiaries.

Citibank accounts. Wayne opened Citibank account 2956 in his name only in 1999. His Social Security income was regularly deposited into this account. On February 28, 2005, the entire balance of the account, $20,312.25, was transferred to new Citibank account 9250, which Wayne held jointly with Pauline. After February 28, 2005, until Wayne's death, a total of $12,306.30 in Social Security benefits and interest was deposited into account 9250. The balance in this account on the date of Wayne's death was $12,678.54, which Pauline subsequently withdrew.

Lily Streater inheritance/Countrywide account. Wayne's aunt, Lily Streater, died on March 29, 2005, leaving half of her estate to Wayne. He received a check dated September 6, 2005, in the amount of $208,632.24. On September 30, 2005, the check was deposited in a new joint money market checking account (no. 8256) at Countrywide Bank in the names of Wayne and Pauline. No other deposits were made to this account other than interest earned on the inheritance. On February 11, 2006, Pauline instructed Countrywide Bank to close the account and send a check payable to her for the balance of the account. Countrywide issued a check payable to Wayne Andersen or Pauline Hunt dated February 21, 2006, for $211,893.68. Pauline endorsed the check and subsequently controlled the funds, $50,000 of which she deposited into the trust.

Proceeds from sale of Wayne's house. The net proceeds of $1,605,053.26 from the sale of Wayne's house were deposited into the trust account on July 21, 2006. On January 18, 2007, $1,600,000 was withdrawn and invested in a JP Morgan Federal Money Market fund. These funds remain in that account.

V. Stephen and Kathleen's Initiation of the Present Action to Recover Trust Property and to Enforce the Terms of the Trust

On July 11, 2006, Stephen and Kathleen filed the present action. The operative third amended petition (petition) alleges that upon Harriett's death, Wayne was required by the original terms of the trust to place Harriett's possessions and interest in the family residence into an irrevocable "B" trust for the benefit of Stephen and Kathleen. Wayne refused to do so, instead converting "to his own use and control assets which should have been held in trust for Petitioners Stephen Andersen and Kathleen Brandt under the 'B' trust provisions." The petition further alleged that prior to his death, Wayne suffered from dementia and alcoholism and displayed obvious signs of physical and mental impairment. While Wayne was so impaired, Pauline caused Wayne to amend the trust to name herself and her grandson as trust beneficiaries and to divert trust assets for their benefit. The petition sought, as against Pauline individually and as trustee of the trust and personal representative of Wayne's estate, an accounting, damages, and declarations that (1) any purported amendments to the trust were void as the product of undue influence, lack of testamentary capacity, and elder abuse, and (2) the entirety of the estates of Harriett and Wayne Andersen were held in trust for the benefit of Stephen and Kathleen.

On October 11, 2007, Pauline, as trustee, filed a petition for construction and reformation of the trust.

The court bifurcated the issues to be tried. The phase I (Phase I) trial addressed construction, interpretation, and reformation of the trust; the phase II (Phase II) trial addressed petitioners' claims of lack of capacity, undue influence, and elder abuse, their request to remove Pauline as trustee, and their objections to Pauline's first accounting.

VI. Phase I Trial and Decision

The probate court tried the Phase I issues over nine days in October and December 2007 and February and March 2008. It issued a statement of decision (Phase I Trial) on July 29, 2008.

Procedurally, the court found that Stephen and Kathleen had delayed unduly in asserting their claims. It explained: "Petitioners did not assert their claims as to the irrevocability of the Trust, Wayne's violations of the Trust provisions and breach of his fiduciary duties until after Wayne's death in 2006, almost three years after knowledge of the relevant facts. Petitioners obviously waited until after Wayne's death to assert these claims. Nevertheless, as to the issue of interpretation of the Trust instrument, petitioners' contentions as to proper interpretation of the instrument are not so barred (although their affirmative claims as to breaches of the Trust may be)."

On the merits, the court rejected Stephen's and Kathleen's claims that Wayne and Harriett intended the trust to be irrevocable upon Harriett's death. "Upon weighing the evidence, the Court finds that it was clearly the intent of Wayne and Harriet to create a Trust that remained revocable unless the survivor elected to take advantage of the Trust B option by funding Trust B. The Court finds the testimony of Jeffers (who drafted the document and was the only percipient witness to the discussions with Wayne and Harriet and the execution of the document) persuasive as to the intent of Wayne and Harriet being consistent with Jeffers's own understanding and intent in drafting the language used in the Trust. Jeffers testified extensively regarding her intent and understanding that the provisions gave the survivor discretion as to whether to fund Trust B and so communicated her understanding to Wayne and Harriet as evidenced by exhibit 514 (her 'script' explanation of the meaning of the Trust instrument). Wayne explicitly reaffirmed his understanding and intent in his May 19, 2005 'To Whom It May Concern' declaration (exhibit 518).

"The Court found Jeffers to be credible and straightforward in her testimony. The conduct of both Wayne and Jeffers in the 12 years following Harriet's death was consistent with their understanding that Wayne had no obligation to fund Trust B and was

free to continue to treat the Trust as a modifiable, revocable Trust, and the Court finds such conduct was consistent with the intent and meaning of the Trust. There was no evidence that Wayne or Harriet desired or had any reason to want an irrevocable Trust or the tax benefits incident thereto. Clearly, to the extent that the Trust language might support petitioners' arguments, there was a drafting error or omission on Jeffers' part in not explicitly stating that the survivor had discretion as to whether or not to fund Trust B. In fact, the concepts of irrevocability and mandatory funding of Trust B with 100% of the community property, including Wayne's share, seem inconsistent with all the extrinsic evidence of the parties' intent.

"Wayne had a strained relationship with [Stephen] Andersen and [Kathleen] Brandt (per their deposition testimony read into the record). Conversely, he had a very warm and close relationship with [Pauline] Hunt, which even predated the Trust. It is highly unlikely that Wayne would have intended to limit his financial control of assets and irrevocably commit himself to pass all assets to Andersen and Brandt upon his death. The evidence indicated that Wayne was a strong-willed, ex-fighter pilot for whom personal and financial independence was important and who expressed his desire to control his own assets. There was no credible evidence of any contrary intent on the part of Harriett.

"The Court's finding that Wayne's original intent and understanding in executing the Trust was that the survivor have the option to fund Trust B is further substantiated by: (1) his statement of understanding that he had such discretion in the January 29, 2004 Trust addendum (exh. 513); (2) the June 2, 2003 tape recorded statements (exh. 509); (3) his several amendments of the Trust indicating his belief that the Trust was not irrevocable or unmodifiable and that he had the power to so amend it; (4) his naming Hunt as successor trustee (exh. 506); (5) amending the Trust to name Hunt as a beneficiary on May 28, 2003; and (6) his statements in his May 19, 2005 'To Whom It May Concern' declaration (exh. 518)."

VII. John Andersen's Petition

On April 18, 2008, Stephen's nine-year-old son, John, filed a petition seeking a declaration of rights under section 17200 and alleging breach of fiduciary duty, misappropriation of trust assets, and financial elder abuse. John's petition sought to invalidate the fourth amendment to the trust, dated July 6, 2004, which purported to remove him as a beneficiary, on the grounds that it was "made at a time when Wayne Andersen had already been diagnosed with dementia and lacked the mental capacity to make sound decisions regarding his trust and financial affairs" and was subject to Pauline's control and undue influence. John's petition also alleged that Pauline wrongfully diverted money from Wayne's custody and control.

On May 18, 2009, the parties stipulated that John's case would be consolidated with the main action. The parties agreed that John would not seek to introduce any additional evidence, but could file a written closing argument and would be bound by the decision in the main action.

VIII. Phase II Trial

A. The Evidence

1. Attorney Testimony

Eva Jeffers drafted the original trust document and all trust amendments. She testified that Wayne contacted her in 2003 to make an appointment to discuss his trust. At that meeting, he told her he wanted to change his trust to leave a percentage to his dear friend Pauline Hunt. She drafted the amendment and Wayne returned to her office on May 28, 2003, to sign it.

Jeffers met with Wayne several more times in 2003 and 2004. He came to her office alone on each occasion. He never indicated that he did not know what assets were in the trust, who his children or grandson were, or what he was signing. He never appeared to have been drinking, and he never seemed confused about who he was or where he was. Wayne's answers to Jeffers's questions were appropriate and he never

seemed at a loss for words. Jeffers believed that there were no occasions on which Wayne lacked testamentary capacity.

2. Percipient Witness Testimony

Pauline testified that through the end of 2005, Wayne continued to read biographies, history, and fiction and to do crossword puzzles. He cooked for himself, did his own laundry, took care of his personal hygiene, and went through his own mail. Pauline and Wayne generally ran errands and paid bills together. Wayne hated paying bills and often asked Pauline to write and sign his checks. He continued leading docent tours at the Gene Autry Museum through 2004.

Pauline acknowledged that Wayne became forgetful, but she did not believe that he had dementia. She said that there was never a time that Wayne appeared confused or not to understand what she told him. He never engaged in bizarre behavior.

Pauline testified that when Wayne's aunt died in 2005, Wayne inherited $200,000. He deposited the check into the joint account he opened with Pauline. When she asked him why he put the money in a joint account, he said, "We might need medical. . . . If we want to take a trip or fix our houses, however we want to use it, that's what we'll do." She said Wayne didn't deposit the check into the trust because "[h]e was very very upset with both of his kids at that time because Ste[ph]en kept asking to have his house. He wanted him to give him his house, and he wasn't about to do that. And he said no, he wasn't going to give it, and Ste[ph]en would call and take him for lunch and harass him about his trust, and Wayne would come home furious, and then, when we went out to Monterey and he wanted to stop at Kathleen's and she wouldn't let him come, he was not happy, and on the way home he said, 'I'm not going to leave those kids anything.'"

Stephen testified that before his father's 2006 stroke, Wayne always recognized Stephen and knew who Kathleen was. However, when Stephen would ask his father how he spent his time, Wayne would say, "I don't remember." Wayne was never able to tell Stephen what medication he was taking or who his doctors were. "You would ask him a straightforward question. He had no ability to tell you what he had been doing the day

before or what his medical conditions were. There was no ability for him to communicate what was really going on in his life."

Kathleen testified that about two weeks after his 2003 stroke, Wayne had difficulty eating and asked where the bathroom in Pauline's house was. During 2003, when she spoke to Wayne, he would ask how Stephen and his family were and they would discuss family history and genealogy. Wayne would ask for Stephen's phone number, but he did not seem able to write the number down. Between 2003 and 2005, Kathleen repeatedly asked her father why he changed his trust, and each time he said, "I didn't do it." Kathleen believed that her father did not remember having changed the trust. She assumed that Pauline had encouraged him to amend the trust.

Donald Olsen, a friend of Wayne's, testified that he met with Wayne hundreds of times, including at least monthly in 2004 and 2005. The visits were typically an hour to an hour and a half. Wayne and Olsen generally discussed engineering, religion, and philosophy: "[t]he nature of God, the nature of sin, who Christ was, agency and determinism, some of the philosophical issues of Kant." Until Wayne's 2006 stroke, there was never a time that Wayne could not discuss these issues with Olsen, although on some days he answered questions more slowly than others. Olsen never believed that Wayne was incompetent or had dementia. Olsen observed Wayne's memory getting worse, but Wayne was never confused or inappropriate in his responses.

Dan Stage, another friend of Wayne's, testified that he met Wayne in about 2000. Between about 2002 and 2004, Dan visited Wayne and Pauline approximately monthly. When asked whether Wayne seemed to be able to carry on a conversation with him, Stage answered, "Goodness, yes. Most definitely." Stage never noticed a decline in Wayne's cognitive abilities.

Taylor Profita, Pauline's grandson, testified that he lived with Pauline and Wayne during school breaks in the years 2003 to 2005. During those years, Wayne never needed assistance bathing, dressing, grooming, cooking, or using the telephone. Wayne did his own food and clothes shopping. He managed his own financial affairs. Between 2003 and 2005, there was never a time that Wayne did not know the names of his children or

grandson or seemed not to know what assets he had. During these years, he regularly read and did crossword puzzles. Towards the end of 2005, Wayne's memory was not as sharp as it had been, but he was always able to have an appropriate conversation.

3. Medical Records

Wayne's medical records for 2003 and 2004 indicated as follows:

3/11/2003: "His female companion is also wanting that he get[] started on some memory pills; and in the past several visits, I have noticed that the patient does have some changes in his cognition in terms of forgetting things and repeating things. He has to write everything down. He also forgets all the medications that he is on."

5/1/2003: "[Wayne] is also showing some mental slowing down. [¶] . . . Polly says that he does stay[] with her most of the time; but yesterday going to her house, he forg[o]t the directions to her house." "A mini mental[4] was administered where he scored 29 points [out of a possible 30 points] on the mini-mental, so there is no early memory loss on him, but I think his memory is decreased because of alcohol."

5/11/03: Wayne suffers a stroke.

6/13/2003: Wayne "is alert." "He remembers 0/3 things in five minutes. He is able to do serial sevens relatively well, but then when distracted is unable to pick up where he was going before. He spells the word 'world' backward without problem. Curiously, his phraseology is slow. His mentation is slow. He is quite obsessive." The

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[4] A Folstein "mini mental status exam" or MMSE is a "30-item brief screening of multiple different cognitive functions" that is "widely used in the field." According to Dr. Spar, Pauline's expert, "[E]ight are orientation items. You ask the individual the date, the month, the day of the week, the year, the season, where they are, and then what city, county, and state they are in. There are six items dedicated to testing . . . immediate recall. It's really new learning ability. . . . You tell them three words, then you do some other items, and you go back and ask them to recall the three words. That's a pretty good test for their ability to register and recall new information. There is a[n] item requiring . . . to copy a figure. There's an item requiring them to read a sentence and do what it says. They are asked to write a sentence. They are given a three-step command and asked to carry it out. They are asked to name a couple of common objects and to repeat [a] kind of tricky sentence."

report concluded: "I suspect that he was formerly extremely highly intelligent and that the Folstein Mini Mental Status examination performed by Dr. Sabir and the testing today, albeit worse than that performed by Dr. Sabir, do not adequately reflect the degree of intellectual decline he has experienced."

7/18/03: Wayne is admitted to a hospital emergency room for alcohol abuse. "He admitted to drinking earlier today, was unsure of how much he drank. His blood alcohol level in the Emergency Room is 0.12. He ate a meal while in the Emergency Room."

8/2/03: Wayne is admitted to Remy's Garden, a custodial care facility. Intake form indicates that he is confused/disoriented, unable to follow directions, depressed, unable to communicate own needs, and unable to leave the facility unassisted.

8/22/03: Dr. Stern: "It appears . . . at present that the patient is quiet during the day; however, he goes 'crazy' late in the day. He will begin to hallucinate. He saw people who were going to drive his car. He demands legal action because he states they are holding him there against his will. He wanders. He bangs on doors. He goes into other people's rooms. He has no memory of this at all. According to the people here with him today, he has been failing for one to two years; however, there has been rapid progression and rapid deterioration in the past three months." "MMSE is 16/30. Note, however, that he was drowsy during the course of the examination." "Memory loss and fear of dementia. Depression is noted. Insomnia is noted." "Cognitive function: Interpretation of pronouns is intact. Insight: difficult to be certain. He has no memory for the events that occur each afternoon. Judgment intact with regard to questions asked this day." "I do believe that the cognitive impairment reflects the damage performed by chronic alcoholism. Perhaps there are other problems. Perhaps Alzheimer's disease is present, as well. Certainly he has had vascular insult. He has had a stroke and transient ischemic attacks."

8/29/03: "Unfortunately his behavior remains unacceptable. He does not sleep at night. He is lethargic during the daytime. In the late afternoon and evening he becomes aggressive. He feels that he has to leave. He has broken furniture. He has pounded on

doors and walls." "I do believe that the insomnia and the aggressive behavior are all related to the underlying dementia."

9/10/2003: "Affect and mood are normal. Thought processes are consistent with dementia. Patient is conscious. Language is fluent. Memory is poor, however the patient is able to remember commands and follow them. He was not able to repeat a complex sentence that I gave him. Spatial relationships were not tested, however patient was unable to do serial 7's or spell WORLD backwards. He was not oriented to date, time or city."

10/30/2003: "Mr. Anders[e]n appears more alert and more oriented than he has [been in] the past."

12/17/2003: Wayne is now living with Pauline. "The patient is much improved. His ability to function, his behavior, his socialization, cognition, all much improved. Remembering of names and events and ability keeping time however, is unchanged."

1/7/2004 letter from Dr. Stern to Internal Revenue Service: "It has been determined that Mr. Andersen is not able to handle his own financial affairs. This would explain missing any and all financial deadlines. Arrangements have been made for his finances to be handled by others."

1/28/2004 note: "Mr. Andersen is well groomed. He is in a jacket and tie. He is much improved as compared with any of the previous visits. I repeated [his] MMSE, mini mental screening examination. In the past on August 22, 2003, his score was 16/30. Score today 26/30. Orientation which was only 1/10 is now 9/10. He is indeed much improved."

2/6/2004: Wayne achieved a score in the "High Average to Superior range" on a vocabulary test; demonstrated "intact immediate attention and concentration," and "slowed cognitive processing speed and poor visual processing skills." His "conversational speech was fluent with normal rate and tone." "On a verbal fluency test requiring him to generate words beginning with a particular letter Mr. Anders[e]n produced many words, and he achieved a score in the Average to High Average range (76^{th}%ile). A score in the Average range (68^{th}%ile) was documented on a confrontational

naming test. . . . The patient had considerable difficulty on a semantic fluency test, though, requiring him to generate words of a particular semantic category." "Generally poor scores were documented on tests of Mr. Anders[e]n's verbal and nonverbal learning and memory abilities. He showed superficial processing of new material, and he had difficulty acquiring new noncontextual information." "Variable scores were attained on tests of Mr. Anders[e]n's executive functioning and frontal systems skills. Results demonstrated poor cognitive flexibility, impaired multi-tasking skills, and preserved reasoning abilities."

5/7/2004: "Since last visit, the patient was admitted to Aegis alcohol rehabilitation facility. He was there for four days but [could] not stand it. He was then at a second place in LaCanada but could not tolerate that as well." "Cognitive impairment and depression are issues."

6/17/2004: "Based on current caregiver report, the patient has improved."

9/15/2004: "The patient was fully alert and appropriately dressed. . . . [¶] His speech was fluent, without paraphasic errors. He was inclined to be somewhat circumstantial and vague. He had no difficulty in naming body parts and in carrying out a few simple commands and repeating a test sentence. [¶] . . . [¶] His memory for remote events was somewhat spotty. . . . [H]is memory for recent events was [also] extremely poor."

9/30/2004: "According to Pauline Hunt, Mr. Anders[e]n's ability to function has improved, his socialization has improved, and his cognition has improved."

4. Expert Medical Testimony

Dr. Wayne Chen, respondents' geriatric medicine expert, opined that as of May 2003, Wayne suffered from alcoholism and "most likely the component of dementia." From that time, Wayne was not competent to make his own medical decisions because he suffered from dementia and chronic alcoholism: "He did not have the appropriate judgments or the memory recall to appropriately administer his medications. Dr. Chen further opined that in August 2003, Wayne was subject to delirium and delusions.

However, Dr. Chen conceded that he was not aware of any medical evidence suggesting that before December 31, 2005, Wayne did not know who his children and grandson were or what property he owned.

Dr. Chen noted that in August 2003, Wayne scored "16 out of 30" on a "mini mental status exam," a screening test that tests multiple cognitive fields. He testified that "16 out of 30" "signifies there's significant multiple cognitive field deficits which most likely would involve memory, judgment, retention, visual/spatial orientation, and also perhaps language deficiencies, reading versus speaking and understanding."

Dr. James Spar, a geriatric psychiatrist, testified as a defense expert. He testified that Wayne suffered from vascular dementia. Wayne's cognitive function fluctuated: At his worst, Wayne was in the moderately impaired range; at his best, he was in the mildly impaired range. At no point, however, could it reliably have been said that Wayne lacked testamentary capacity. Dr. Spar noted that it was important to distinguish between Wayne's capacity to manage a single decision and his capacity to reliably manage his financial or business affairs over a period of time. He explained that because of Wayne's fluctuating memory and cognition, he would have been reluctant to let Wayne manage his finances over time. Nevertheless, Dr. Spar was confident that Wayne "retained the ability to make single decisions right up to the end of his life."

B. March 25 Oral Statement of Decision

The court delivered an oral tentative statement of decision on March 25, 2009. It found that Wayne had testamentary capacity and was not unduly influenced by Pauline when he executed the trust amendments: "[P]ursuant to the testimony of Dr. Spar, [Pauline's] geriatric expert, as well as Eva Jeffers, the court finds that despite the numerous findings of mental impairment and d[e]mentia in the medical records and testimony, the evidence fails to convince the court that Wayne lacked testamentary capacity or that Hunt exercised undue influence in connection with the four trust amendments. Accordingly, the court finds all four trust amendments were valid expressions of Wayne's testamentary wishes."

The court reached a different result as to Wayne's capacity to carry out transfers of his assets: "[A]s to financial capacity, the court finds that Wayne lacked financial capacity since at least January 2004, and lacked the capacity to understand or appreciate the significance or ramifications of placing personal assets in joint tenancy accounts with Hunt. Therefore, the court finds that the establishment of those joint tenancy accounts at Countrywide, Citibank and WaMu are held to be void ab initio."

Finally, the court found that Wayne's New York Life insurance policy was never an asset of the trust and Pauline's collection of the proceeds as the named beneficiary was proper, and that the joint UBS Paine Webber account established in 1991 with joint contributions by Wayne and Pauline was a valid joint tenancy account, the contents of which became Pauline's sole property after Wayne's death.

C. April 15 Successor Trustee Order

On April 15, 2009, the court issued an order removing Pauline as trustee and appointing a successor trustee. The court also approved and adopted the report and recommendations of Referee Terry Hargrave and ordered Hargrave to proceed with a supplemental accounting.

Pauline filed a notice of appeal from the April 15 order on April 24, 2009. On November 24, 2009, that appeal was dismissed for lack of prosecution.

D. August 12 Tentative Statement of Decision

On August 12, 2009, the court issued a written tentative statement of decision that differed in important ways from the March oral tentative. Significantly, the August 12 decision found that Wayne lacked capacity to execute the trust amendments, to make any of the challenged transfers of funds, and to designate Pauline as the beneficiary of his New York Life insurance policy. With regard to these issues, the court found as follows.

Trust amendments: "The critical legal issue as to [the] validity of the contested Trust amendments is whether Wayne's mental capacity to execute the amendments to this

inter-vivos trust is determined by reference to Probate Code 6100.5 ('testamentary capacity') or Probate Code 810-812 (contractual capacity).

"Probate Code 6100.5 refers only to the capacity of a person to make a will. It does not provide a blanket statement regarding the capacity to execute a 'testamentary instrument.' 'Testamentary capacity' refers specifically to the ability to execute a valid will. This suggests that the criteria to be used to determine whether a Trustor had the requisite capacity to execute an inter-vivos trust is something different from that described in section 6100.5. The test for capacity to execute a will is whether the Testator understands the effect of the testamentary act, has the ability to recognize the nature and extent of his property, and understand[s] his relations to his living relatives and descendants. This standard is fairly low; if the person understands what property he has, who his friends and relatives are, and what the effect of the Will will be, he has capacity to execute a will.

"Probate Code 810-812 describe the criteria to be used to determine whether a person has the capacity to make a variety of decisions, which include entering into contracts and executing wills or trusts. The creation of a trust or trust amendment would seem more akin to entering into a contract or other type of business transaction, which would require a higher level of mental function than the execution of the will pursuant to 6100.5. In this context, the court may look to a variety of factors to establish whether or not the person had the capacity to perform the act in question. Section 812(a) states that a determination of lack of capacity to perform an act may be made if supported by evidence that the person has a deficit in only one of the mental functions listed therein, as long as that deficit significantly impairs the person's ability to appreciate the consequences of his action. Walton v. Bank of California (1963) 218 Cal.App.2d 527 states that 'A person lacking in capacity to make an ordinary transfer of property has no capacity to create an *inter vivos* trust (citations omitted). Incapacity, as in the case of contracts generally, may arise from intoxication of such a degree as to deprive a person of reason and understanding.' ([C]itations omitted[.])

"The standard in Probate Code 811 and 812 is actually a higher standard of capacity than that set forth in 6100.5 for the execution of wills. The Court finds . . . Probate Code 810-812, rather than Probate Code 6100.5, to be the standard applicable to determine Wayne's capacity to execute the subject trust amendments.

"Section 811(c) instructs that 'the mere diagnosis of a mental or physical disorder shall not be sufficient in and of itself to support a determination that a person is of unsound mind or lacks the capacity to do a certain act.' In this case, however, as more fully discussed below, the consistent, overwhelming evidence of Wayne's mental deficits, chronic alcoholism, dementia, short-term memory loss, etc, leads the Court to the finding that after the May 11, 2003 stroke, Wayne lacked the capacity to manage his financial affairs, to execute amendments to his trust, or to open joint tenancy bank accounts.

". . . . . .

"Wayne trusted and was dependent upon Hunt and Hunt was well aware of his impairments and dependence. As Wayne's agent and caregiver (even if not a statutory 'care custodian'), Hunt was his fiduciary who took unfair advantage and unquestionably benefitted unduly by the post-May 11, 2003 Trust amendments, raising the presumption of undue influence. Hunt failed to present clear and convincing evidence that the amendments were not the result of such undue influence. Estate of Sarabia, 221 Cal.App.3d 599 (1990).

"Specifically, as to the issue of Wayne's mental capacity to execute the disputed trust amendments, given the numerous, consistent findings of chronic alcoholism, mental impairment and dementia in the medical records and testimony, the Court finds that Wayne lacked the requisite mental capacity and/or that Hunt exercised undue influence in connection with the disputed trust amendments. Accordingly, all four (4) post-May 11, 2003 amendments were invalid and are declared void ab initio."

Laches. "Notwithstanding the Court's findings of Wayne's incompetency and lack of capacity as to the disputed trust amendments, Stephen and Kathleen would be estopped to challenge the validity of the amendments because of laches (as discussed in

the Court's Phase 1 Statement of Decision of May 28, 2008, pg. 3). They knew of Wayne's medical conditions and mental state after the May 11, 2003 stroke and his dependence on Hunt. They suspected and accused Hunt of undue influence after learning of the May 28, 2003 Trust Addenda giving Hunt a 60% beneficial interest. Yet they waited until after Wayne died almost 3 years later to file their action.

"John, a minor born April 12, 1999, was not similarly guilty of laches and therefore, is not so estopped. Unlike John's position as to the Phase 1 issues of interpretation of the trust instrument language, John is not bound by the representation of his interests under the 'virtual representation' doctrine. [Fn. omitted.] As to the trust amendments, Stephen and Kathleen's interests and John's interests presented an irreconcilable conflict of interest since it was in their interests to avoid the May 28, 2003 amendment initially naming John as a beneficiary of the Trust.

"John places in issue Wayne's capacity to execute the May 28, 2003 and July 6, 2004 amendments. John claims that Wayne lacked mental capacity on July 6, 2004 and thus the amendment deleting John as a beneficiary is void. But John claims that Wayne had the capacity to execute the May 28, 2003 amendment giving John one-third of 40% beneficial interest. The Court, however, finds that Wayne lacked capacity at all times after the May 11, 2003 stroke and that all of the Trust amendments executed thereafter were void. Thus, on Wayne's death on April 28, 2006, the only trust beneficiaries were Stephen and Kathleen as provided in the original Trust instrument."

Financial capacity/opening of joint tenancy accounts. "As to financial or contractual capacity, the court finds Wayne lacked financial capacity since at least his May 2003 stroke [fn. omitted], and lacked the capacity to understand or appreciate the significance or ramifications of placing personal assets in joint tenancy accounts with Hunt. [Fn. omitted.] Therefore, the Court finds that the establishment of the joint tenancy accounts at Countrywide (No. 211836, opened September 30, 2005), Citibank (No. 9250, opened February 28, 2005) and WaMu (No. 5808 opened May 19, 2003 and No. 7328, opened August 29, 2003) were void *ab initio*. As between Hunt and Wayne,

all funds deposited in these accounts were originally the sole property of Wayne and remain so.

"The Court further finds that at all times from at least May 11, 2003, Wayne suffered from dementia, including the deficits listed in Probate Code 811, and lacked the capacity to make more than rudimentary, if any, financial decisions. See Probate Code 812. The Probate Code 810 presumption that all persons have the capacity to make decisions was rebutted overwhelmingly by the evidence in this case. . . . The Court also finds that at all times herein relevant, Wayne suffered from dementia as defined in the Diagnostic and Statistical Manual of Mental Disorders ('DSM') and should have been under conservatorship pursuant to Probate Code 2356.5(a).

"The Court further finds that Hunt was aware of Wayne's dependency on Hunt, and knew of Wayne's lack of financial capacity at all times after May 2003. [Fn. omitted.] As his trusted confidante in whom Wayne placed his trust and confidence, Hunt had a fiduciary obligation not to seek personal financial advantage over Wayne's assets. The source of funding for the joint tenancy accounts was solely Wayne's assets. Hunt participated actively in establishing the joint accounts [fn. omitted] and benefitted unduly by the establishment of those accounts, exercised undue influence over Wayne in establishing those joint tenancy accounts, and took unfair advantage of Wayne's impairment. Civil Code 1575.

"After his May 11, 2003 stroke, Hunt managed Wayne's financial affairs including writing and signing checks for him. [Fn. omitted.] Given her role in his financial affairs, while Wayne undoubtedly wanted Hunt to have signature authority on the joint tenancy accounts, there was no credible evidence that he intended to give Hunt 50% ownership or gift the accounts to Hunt on death. Given his condition after the 2003 stroke, Wayne could not have understood that he need not make Hunt an undivided 50% joint tenant owner of the funds in order to make the accounts accessible to her. It should be noted that there were no substantial gifts by Wayne to Hunt prior to the 2003 stroke, no joint tenancy accounts established, and no change in Wayne's will (Ex. 2, in which he expressed his desire and intention that all assets be placed in the Trust). Further, there

was no change in Wayne's Will to give Hunt any non-trust assets and no evidence of Wayne's desire or intent to give Hunt any more than the 60% Trust interest (except Hunt's self-serving testimony).

"But for Wayne's mental impairment and Hunt's undue influence, the Court believes that Wayne would have placed the joint tenancy assets in the Andersen Family Trust as expressed in his Last Will and Testament, or would have, at worst, retained his sole ownership of those funds which would have poured over into the Trust after his death."

Life insurance. "The Court finds that the New York Life policy was not an asset of the [trust]. However, Wayne lacked capacity when he executed the change of beneficiary form on October 11, 2003 naming Hunt as primary beneficiary. (Ex. 23) [Fn. omitted.] Therefore, the change of beneficiary was void and the prior named beneficiaries, Stephen and Kathleen, are the parties to whom the proceeds of the policies should have been paid. Accordingly, Hunt holds said policy proceeds in constructive trust for the benefit of Stephen and Kathleen and Hunt is ordered to provide an accounting of the policy proceeds to Hargrave.

UBS Paine Webber account. "Unlike the post-May 2003 joint tenancy accounts, the UBS Paine Webber account was established in 1991 with contributions by both Wayne and Hunt, and was a valid joint tenancy account. While Hunt's closing of the account and forging Wayne's endorsement on the closing check was a breach of her fiduciary duties, the funds did become her sole property legally after Wayne's death in any event."

Pauline's credibility. "With regard to Hunt's credibility, the Court finds that Hunt's credibility with regard to the trust interpretation issues in Phase 1, as opposed to Wayne's financial or contractual capacity issues in Phase 2, were very different in terms of their believability. . . . [¶] . . . Unlike her Phase 1 testimony dealing with testamentary intent of Wayne, when dealing with the issues involving her personal financial interests in Phase 2, she lacked candor and credibility. Significantly, her statement that after his final incapacitating stroke, Wayne said it was okay to move the Countrywide joint funds

(though he was incapacitated and unable to speak) [fn. omitted], and then Hunt moving these monies to a personal CD to which Wayne had no legal access, was unbelievable and the Court finds to have been an outright fabrication. . . . As the court found in the Phase 1 trial, Ms. Hunt has a good memory. She is sharp regarding helpful recollections but feeble and vague as to unhelpful recollections.

"At this point, the Court is unable to find that Hunt's transfers of these assets, forgeries, false reimbursement claims, and concealment rise to the level of bad faith or intent to defraud the trustor, Wayne, and his heirs. It is at least possible that she had a mistaken understanding of her responsibilities, but the Court is not by any means sure of that at his point."

Judgment was entered on October 15, 2009, and Pauline timely appealed on December 11, 2009.

DISCUSSION

Pauline contends: (1) Stephen and Kathleen are barred by laches from pursuing their claims, and John's petition does not resurrect the barred claims; (2) Wayne's ability to amend the trust should be measured by the standard of testamentary capacity, not contractual capacity; (3) there is no substantial evidence that Wayne lacked testamentary capacity to execute the trust amendments; (4) there is no substantial evidence that the trust amendments were the result of undue influence; (5) there is no substantial evidence that the asset transfers or life insurance change of beneficiary requests were the results of undue influence or lack of capacity; and (6) the trial court erred in removing Pauline as trustee.

Stephen and Kathleen contend: (1) the dismissal of Pauline's prior appeal operates as res judicata with regard to the issues of lack of capacity and undue influence; (2) Stephen's and Kathleen's claims are not barred by laches and, in any event, John's petition placed Wayne's capacity and Pauline's undue influence at issue; (3) the trial court properly evaluated Wayne's capacity to amend the trust by the standard of

contractual capacity, not testamentary capacity; (4) the court's finding of lack of contractual capacity is supported by substantial evidence; (5) the trial court's finding of undue influence is supported by substantial evidence and is a separate, independent basis for affirming the judgment; and (6) the removal order was the subject of an earlier appeal and cannot be raised in the present appeal.

I. Res Judicata Does Not Bar the Present Appeal

As indicated above, on April 15, 2009, the court issued an order removing Pauline as trustee and appointing a successor trustee. Pauline filed a notice of appeal from that order, but she did not file an appellant's opening brief. We dismissed the appeal for lack of prosecution on November 24, 2009.

Stephen and Kathleen contend that our dismissal of Pauline's earlier appeal operates as res judicata here. They urge: "The instant appeal was filed on December 11, 2009, challenging the very findings of lack of capacity and undue influence from Phase Two of the trial that were at issue in the first appeal, as well as the same Removal Order. . . . [¶] . . . [¶] The Removal Order is final and binding on Hunt on this appeal, as are the findings which support that order." Pauline disagrees, contending that res judicata applies only to a former judgment in a *different action*, not an interlocutory order in the same action.

We agree with Stephen and Kathleen that Pauline cannot now seek reversal of the order removing her as trustee. Pursuant to section 1300, subdivision (g), an appeal may be taken from an order "[s]urcharging, removing, or discharging a fiduciary." The removal order, therefore, is not interlocutory, as Pauline contends. Further, under Code of Civil Procedure, section 913, the dismissal of an appeal is "with prejudice to the right to file another appeal within the time permitted, unless the dismissal is expressly made without prejudice to another appeal." The dismissal of Pauline's earlier appeal was not "expressly made without prejudice to another appeal," and thus it precludes her from now seeking to reverse the removal order.

We reach a different result with regard to the remainder of Pauline's appellate contentions. "The doctrine of res judicata, or claim preclusion, bars parties from relitigating the *same cause of action* in a subsequent action." (*Malkoskie v. Option One Mortgage Corp*. (2010) 188 Cal.App.4th 968, 973, fn. 4.) In other words, res judicata bars relitigation of *causes of action*, not issues. Pauline's present appeal indisputably addresses causes of action not addressed in the prior appeal, including conversion, breach of fiduciary duty, constructive trust, and declaratory relief. As such, Pauline's appeal as it related to these causes of action is not barred by res judicata.

Pauline's appeal also is not barred by collateral estoppel. "'Collateral estoppel, or issue preclusion, "precludes relitigation of issues argued and decided in prior proceedings."' (*Mycogen Corp. v. Monsanto Co*. (2002) 28 Cal.4th 888, 896.)" (*Johnson v. GlaxoSmithKline, Inc*. (2008) 166 Cal.App.4th 1497, 1507.) "A prior decision precludes relitigation of an issue under the doctrine of collateral estoppel only if five threshold requirements are satisfied: 'First, the issue sought to be precluded from relitigation must be identical to that decided in a former proceeding. Second, this issue must have been actually litigated in the former proceeding. Third, it must have been necessarily decided in the former proceeding. Fourth, the decision in the former proceeding must be final and on the merits. Finally, the party against whom preclusion is sought must be the same as, or in privity with, the party to the former proceeding.' (*Lucido v. Superior Court* [(1990)] 51 Cal.3d [335,] 341.)" (*Johnson, supra,* 166 Cal.App.4th at pp. 1507-1508.) Moreover, even if the minimal requirements for application of collateral estoppel are satisfied, "courts will not apply the doctrine if considerations of policy or fairness outweigh the doctrine's purposes as applied in a particular case [citation], or if the party to be estopped had no full and fair opportunity to litigate the issue in the prior proceeding. [Citations.]" (*Zevnik v. Superior Court* (2008) 159 Cal.App.4th 76, 82.)

The elements necessary for the application of collateral estoppel are not satisfied here. The removal order was based on the probate court's findings that Pauline had "breached her fiduciary duties specifically in connection with the closing of the

Count[r]ywide account and transfer of funds . . . from the Countrywide account, forgery of the WaMu account change order putting her as signatory on the trust account and closing of the Citibank accounts and forging of Wayne's endorsement on the remittance check all before Wayne's death and in her capacity as defacto successor trustee." It also was based on Pauline's "[poor] eyesight and frail physical condition . . . [and] obvious dependence on Mr. Profita and her attorneys." The removal order did not address Wayne's alleged lack of capacity, Pauline's asserted undue influence, or the trust amendments. Accordingly, the issues to be decided here are not "identical" to those decided in the removal order.

Moreover, because the removal order was based alternatively on Pauline's breach of fiduciary duty and frail physical condition, the breach of fiduciary duty finding was not "necessary" to the decision. Accordingly, the removal order was not conclusive as to breach of fiduciary duty. (Rest.2d Judgments, § 27, com. I ["If a judgment of a court of first instance is based on determinations of two issues, either of which standing independently would be sufficient to support the result, the judgment is not conclusive with respect to either issue standing alone."].)

Finally, fairness considerations dictate against applying collateral estoppel to the present appeal. The removal order did not cause Pauline any tangible harm, but merely substituted a successor trustee to act in her place. Pauline thus had no real incentive to appeal it. (See, e.g., *Long Beach Grand Prix Assn. v. Hunt* (1994) 25 Cal.App.4th 1195, 1202-1203, italics added ["As the cases and Restatement sections cited above make clear, due process requires that before an issue can be held established as to a party based on a previous determination in the action as to other parties, the party to be bound must have been afforded notice and an opportunity to contest the previous determination *and an incentive to do so*."].)

City of Santa Paula v. Narula (2003) 114 Cal.App.4th 485, on which petitioners rely, does not compel a different result. There, the city filed a postjudgment motion for attorney fees after successfully pursuing a real property lien enforcement action. The court awarded the city the requested fees and the property owners appealed. On appeal,

they urged that the city was not entitled to attorney fees because the judgment in the prior action was void. The appellate court rejected these contentions, noting that the property owners "may not pursue their claims through a collateral attack." (*Id*. at p. 491.)

Pauline's appellate contentions, unlike those of appellants in *City of Santa Paula*, are not based on a collateral attack of a prior judgment or order because they do not depend on undermining that order. The principles expressed in *City of Santa Paula*, thus, are not relevant here.

II. Stephen's and Kathleen's Underlying Claims Are Not Barred by Laches

In its Phase II statement of decision, the probate court found that Stephen and Kathleen "would be" barred by laches from challenging the validity of the trust amendments because they waited nearly three years to challenge them. However, Stephen's and Kathleen's claims were saved by John's petition because John, "a minor born April 12, 1999, was not similarly guilty of laches and therefore, is not so estopped." Accordingly, the court concluded that it could reach the questions of Wayne's capacity to execute the May 28, 2003 and July 6, 2004 amendments because John placed those questions at issue.

Pauline urges that the probate court erred in failing to find Stephen's and Kathleen's claims barred by laches. She contends that the court's conclusion that Stephen's and Kathleen's claims are saved by John's petition is erroneous because John explicitly sought to invalidate only the July 6, 2004 amendment that eliminated him as a beneficiary, *not* the early amendments that named him a beneficiary. Moreover, Pauline urges, by reaching the validity of the first three amendments, the court exceeded the parties' May 18, 2009 stipulation, which she contends permitted John to brief only the issue of Wayne's capacity to execute the July 6, 2004 amendment.

We do not agree with Pauline that the probate court was precluded by its finding of laches from reaching the question of the validity of the first three trust amendments. "To preserve the trust and to respond to perceived breaches of trust, the probate court has wide, express powers to 'make any orders and take any other action necessary or proper

to dispose of the matters presented' by the section 17200 petition. (§ 17206.) . . . [¶] More important, the probate court has the '*inherent power* to decide all incidental issues necessary to carry out its express powers to supervise the administration of the trust.' (*Estate of Heggstad* (1993) 16 Cal.App.4th 943, 951, italics added.)" (*Schwartz v. Labow* (2008) 164 Cal.App.4th 417, 427.) In view of its broad discretion to decide incidental issues, the probate court was not precluded from reaching the issues of the validity of the first three trust amendments.

III. The Trial Court Erred in Evaluating Wayne's Capacity to Execute the Trust Amendments by Standards of Contractual Capacity, Not Testamentary Capacity

The probate court held that Wayne's capacity to execute the trust amendments should be evaluated pursuant to sections 810 to 812 ("contractual capacity"), rather than section 6100.5 ("testamentary capacity"). It also found that Wayne lacked contractual capacity as defined by sections 810 to 812.

Pauline contends that the trial court erred in evaluating Wayne's capacity to execute the trust amendments by the standard of contractual capacity, rather than testamentary capacity. She also contends substantial evidence does not support the conclusion that Wayne lacked testamentary capacity to execute the trust amendments. For the following reasons, we agree.

A. Testamentary Capacity

Section 6100.5 sets out the standard for testamentary capacity. It provides that a person is not mentally competent to make a will if at the time of making the will, either of the following is true:

"(1) 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.

"(2) The individual suffers from a mental disorder with symptoms including delusions or hallucinations, which delusions or hallucinations result in the individual's devising property in a way which, except for the existence of the delusions or hallucinations, the individual would not have done."

"'It is thoroughly established by a series of decisions that: "Ability to transact important business, or even ordinary business, is not the legal standard of testamentary capacity. . . ." (*Estate of Arnold* (1940) 16 Cal.2d 573, 586 . . . .)' (*Estate of Powers* (1947) 81 Cal.App.2d 480, 483-484; *Estate of Mann* (1986) 184 Cal.App.3d 593, 605.) Rather, testamentary capacity involves the question whether, at the time the will is made, the testator '"has sufficient mental capacity to understand the nature of the act he is doing, to understand and recollect the nature and situation of his property and to remember, and understand his relations to, the persons who have claims upon his bounty and whose interests are affected by the provisions of the instrument."' (*Estate of Arnold*[, *supra*,] 16 Cal.2d [at p.] 586, quoting *Estate of Sexton* (1926) 199 Cal. 759, 764; *Estate of Mann*, *supra*, 184 Cal.App.3d at p. 602.) It is a question, therefore, of the testator's mental state in relation to a specific event, the making of a will." (*Conservatorship of Bookasta* (1989) 216 Cal.App.3d 445, 450.)

"It is well established that 'old age or forgetfulness, eccentricities or mental feebleness or confusion at various times of a party making a will are not enough in themselves to warrant a holding that the testator lacked testamentary capacity.' (*Estate of Wynne* (1966) 239 Cal.App.2d 369, 374, citing *Estate of Sanderson* (1959) 171 Cal.App.2d 651, 660[,] and *Estate of Lingenfelter* (1952) 38 Cal.2d 571, 581.) 'It 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.' (*Estate of Selb* (1948) 84 Cal.App.2d 46, 49.) Nor does the mere fact that the testator is under a guardianship

support a finding of lack of testamentry capacity without evidence that the incompetence continues at the time of the will's execution. (*Estate of Nelson* (1964) 227 Cal.App.2d 42; *Estate of Wochos* (1972) 23 Cal.App.3d 47.)

"It must be remembered, in this connection, that '[w]hen one has a mental disorder in which there are lucid periods, it is presumed that his will has been made during a time of lucidity.' (*Estate of Goetz* (1967) 253 Cal.App.2d 107, 114.) . . . Thus a finding of lack of testamentary capacity can be supported only if the presumption of execution during a lucid period is overcome." (*Estate of Mann*, *supra*, 184 Cal.App.3d at pp. 603-604.)

B. Capacity Generally

Sections 810 to 813 set out the standard for capacity to make various kinds of decisions, transact business, and enter contracts. Section 810 provides:

"(a) For purposes of this part, there shall exist a rebuttable presumption affecting the burden of proof that all persons have the capacity to make decisions and to be responsible for their acts or decisions.

"(b) A person who has a mental or physical disorder may still be capable of contracting, conveying, marrying, making medical decisions, executing wills or trusts, and performing other actions.

"(c) A judicial determination that a person is totally without understanding, or is of unsound mind, or suffers from one or more mental deficits so substantial that, under the circumstances, the person should be deemed to lack the legal capacity to perform a specific act, should be based on evidence of a deficit in one or more of the person's mental functions rather than on a diagnosis of a person's mental or physical disorder."

Section 811 sets out the findings necessary to support a conclusion of lack of capacity, as follows:

"(a) A determination that a person is of unsound mind or lacks the capacity to make a decision or do a certain act, including, but not limited to, the incapacity to contract, to make a conveyance, to marry, to make medical decisions, to execute wills, or

to execute trusts, shall be supported by evidence of a deficit in at least one of the following mental functions, subject to subdivision (b), and evidence of a correlation between the deficit or deficits and the decision or acts in question:

"(1) Alertness and attention, including, but not limited to, the following: [¶] (A) Level of arousal or consciousness. [¶] (B) Orientation to time, place, person, and situation. [¶] (C) Ability to attend and concentrate.

"(2) Information processing, including, but not limited to, the following: [¶] (A) Short- and long-term memory, including immediate recall. [¶] (B) Ability to understand or communicate with others, either verbally or otherwise. [¶] (C) Recognition of familiar objects and familiar persons. [¶] (D) Ability to understand and appreciate quantities. [¶] (E) Ability to reason using abstract concepts. [¶] (F) Ability to plan, organize, and carry out actions in one's own rational self-interest. [¶] (G) Ability to reason logically.

"(3) Thought processes. Deficits in these functions may be demonstrated by the presence of the following: [¶] (A) Severely disorganized thinking. [¶] (B) Hallucinations. [¶] (C) Delusions. [¶] (D) Uncontrollable, repetitive, or intrusive thoughts.

"(4) Ability to modulate mood and affect. Deficits in this ability may be demonstrated by the presence of a pervasive and persistent or recurrent state of euphoria, anger, anxiety, fear, panic, depression, hopelessness or despair, helplessness, apathy or indifference, that is inappropriate in degree to the individual's circumstances.

"(b) A deficit in the mental functions listed above may be considered only if the deficit, by itself or in combination with one or more other mental function deficits, significantly impairs the person's ability to understand and appreciate the consequences of his or her actions *with regard to the type of act or decision in question.*

"(c) In determining whether a person suffers from a deficit in mental function so substantial that the person lacks the capacity to do a certain act, the court may take into consideration the frequency, severity, and duration of periods of impairment. . . ." (Italics added.)

Section 812 provides: "Except where otherwise provided by law, including, but not limited to, Section 813 and the statutory and decisional law of testamentary capacity, a person lacks the capacity to make a decision unless the person has the ability to communicate verbally, or by any other means, the decision, and to understand and appreciate, to the extent relevant, all of the following: [¶] (a) The rights, duties, and responsibilities created by, or affected by the decision. [¶] (b) The probable consequences for the decisionmaker and, where appropriate, the persons affected by the decision. [¶] (c) The significant risks, benefits, and reasonable alternatives involved in the decision."

C. Wayne's Capacity to Execute the Disputed Trust Amendments Should Have Been Evaluated by the Standard of Testamentary Capacity (Section 6100.5)

As the cases cited by the parties make clear, California courts have not applied consistent standards in evaluating capacity to make or amend a trust. In *Goodman v. Zimmerman* (1994) 25 Cal.App.4th 1667, 1673-1679, cited by Pauline, the court applied section 6100.5's standard for testamentary capacity to evaluate a decedent's capacity to execute a new will and trust amendment. In contrast, in *Walton v. Bank of California, supra*, 218 Cal.App.2d 527, 541, cited by Stephen and Kathleen, the court applied a higher standard to evaluate capacity to enter an irrevocable inter vivos trust, stating that "A person lacking capacity to make an ordinary transfer of property has no capacity to create an *inter vivos* trust." (See also *Estate of Bodger* (1955) 130 Cal.App.2d 416, 424 ["A declaration of trust constitutes a contract between the trustor and the trustee for the benefit of a third party."].) In these cases, however, the proper standard by which to evaluate capacity does not appear to have been in dispute. The cases therefore offer little assistance in resolving the question we now address—the measure by which a court should evaluate a decedent's capacity to make an after-death transfer by trust. (See *PLCM Group, Inc. v. Drexler* (2000) 22 Cal.4th 1084, 1097 ["language of an opinion must be construed with reference to the facts presented by the case; the positive authority of a decision is coextensive only with such facts"]; *Silverbrand v. County of Los Angeles*

(2009) 46 Cal.4th 106, 127 [“‘“[i]t is axiomatic that cases are not authority for propositions not considered”’”].)

As Stephen and Kathleen correctly note, section 6100.5 defines mental competency to make a “will,” not a testamentary transfer more generally. Thus, they appear to be correct that Wayne’s capacity must be evaluated under sections 810 to 812, not section 6100.5.

Stephen and Kathleen err, however, in suggesting that sections 810 to 812 set out a single standard of “contractual capacity.” They do not. To the contrary, section 811, subdivision (a) provides that a determination that a person lacks capacity to make a decision or do a certain act, including without limitation “to contract, . . . to execute wills, or to execute trusts,” must be supported by evidence of a deficit in one of the statutorily identified mental functions *and evidence of a correlation between the deficit and the decision or act in question.* Section 811, subdivision (b) contains similar language, stating that a deficit in one of the statutorily defined mental functions may be considered *only* if it significantly impairs the person’s ability to appreciate the consequences of his or her actions *with regard to the type or act or decision in question.* And section 812 provides that a person lacks capacity to make a decision only if he or she cannot appreciate the rights, duties, consequences, risks and benefits “*involved in the decision*.” (Italics added.) Accordingly, sections 810 to 812 do not set out a single standard for contractual capacity, but rather provide that capacity to do a variety of acts, including to contract, make a will, or execute a trust, must be evaluated by a person’s ability to appreciate the consequences *of the particular act he or she wishes to take.* More complicated decisions and transactions thus would appear to require greater mental function; less complicated decisions and transactions would appear to require less mental function.

When determining whether a trustor had capacity to execute a trust amendment that, in its content and complexity, closely resembles a will or codicil, we believe it is appropriate to look to section 6100.5 to determine when a person’s mental deficits are sufficient to allow a court to conclude that the person lacks the ability “to understand and

appreciate the consequences of his or her actions with regard to the type of act or decision in question." (§ 811, subd. (b).) In other words, while section 6100.5 is not directly applicable to determine competency to make or amend a trust, it is made applicable through section 811 to trusts or trust amendments that are analogous to wills or codicils.

In the present case, while the original trust document is complex, the amendments are not.[5] Indeed, none of the contested amendments does more than provide the percentages of the trust estate Wayne wished each beneficiary to receive. The May 28, 2003 amendment provided that Pauline was to receive 60 percent of the trust residue, and Stephen, Kathleen, and John were to receive the remaining 40 percent in equal shares; the November 18, 2003 amendment specified the same 60 percent/40 percent allocation if Wayne predeceased Pauline, but provided that if Pauline died first, Taylor should receive a portion of the trust assets; and the July 6, 2004 amendment eliminated John as a beneficiary, providing that "Steve will have the portion that had been set aside for his son."

In view of the amendments' simplicity and testamentary nature, we conclude that they are indistinguishable from a will or codicil and, thus, Wayne's capacity to execute the amendments should have been evaluated pursuant to the standard of testamentary capacity articulated in section 6100.5. The trial court erred in evaluating Wayne's capacity under a different, higher standard of mental functioning.

D. There Is No Substantial Evidence That Wayne Lacked Testamentary Capacity When He Executed the Trust Amendments

Pauline contends that when Wayne's capacity is evaluated under the correct standard, there is no substantial evidence that Wayne lacked capacity to execute the 2003 and 2004 trust amendments. For the reasons that follow, we agree.

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[5] Stephen and Kathleen do not seriously contend otherwise. While they urge that the Andersen Family Trust "is a complicated document spanning 16 pages" that contains "numerous patent and latent ambiguities," they make no argument that the amendments (as opposed to the original trust document) are complex.

A testator is presumed sane and competent, and the burden is on the persons challenging competency to overcome the presumption. (*Estate of Mann*, *supra*, 184 Cal.App.3d at p. 602; see also § 8252 ["The contestants of the will have the burden of proof of lack of testamentary intent or capacity, undue influence, fraud, duress, mistake, or revocation."].) As indicated above, a person lacks capacity to make a will if at the time of the making of the will, he cannot understand the nature of the testamentary act, recall the nature of his assets, or recall his relations to living descendants and those whose interests are affected by the will. (§ 6100.5.)

California cases consistently state that testamentary capacity is a low standard. For example, in *Estate of Mann*, *supra*, 184 Cal.App.3d 593, the trial court revoked probate of a will upon a jury finding that the testator was of unsound mind. The evidence at trial was that the testator had been under a conservatorship for the last six years of her life, was unable to pay her own bills, did not eat properly, and was unclean and smelled of urine. (*Id*. at p. 600.) Her doctor diagnosed her as suffering from senile dementia, and in a declaration filed in the conservatorship proceeding, stated that testator was "'unable to rationally and intelligently handle her own affairs,'" "would sometimes appear extremely senile," and "misrepresent[ed] reality, for example, by saying she had no problem going to the bathroom while she was 'covered with her own feces.'" (*Ibid*.) Notwithstanding this testimony, the appellate court held that the evidence of incompetence was insufficient to justify setting aside her will. "It must be remembered, in this connection, that '[w]hen one has a mental disorder in which there are lucid periods, it is presumed that his will has been made during a time of lucidity.' [Citation.] Dr. Lee testified that decedent's mental state fluctuated and that the conservatorship was established to protect her from the 'worst times.' Vonnie Adcock testified that even in late 1977 decedent had periods of alertness, as John Finn, decedent's tax accountant, also testified. Thus a finding of lack of testamentary capacity can be supported only if the presumption of execution during a lucid period is overcome." (*Id*. at p. 604.) Further, the court said: "The witnesses to execution of the will all testified decedent was aware of what she was doing at the time, and that they would not have signed the will if this had

not been true. [Fn. omitted.] While the jury was free to disbelieve this testimony, '[d]isbelief does not create affirmative evidence to the contrary of that which is discarded.' [Citation.] The only evidence suggestive of decedent's incapacity at the time the will was executed is in fact evidence of her condition at other times. That is, the only bases for the conclusion she lacked capacity at the time of execution would be inferences that the factors leading to the conservatorship rendered her incapable of comprehending the extent of her property *and continued* to so affect her at the time of the will's execution, and that her senility caused faulty recollection at this time. [¶] There are several problems in the indulging of such inferences." (*Id*. at p. 604.) Finally, "while advanced senility which interferes with the ability to understand the nature of the testamentary act, the extent of one's property and one's relations to those interested in it is sufficient evidence of testamentary incapacity [citations], the evidence in this case is of a much lesser degree of senility at the time of execution. Indeed, the only evidence was of a degree of senility which did not preclude mental alertness, and Dr. Lee, the only witness who testified decedent was medically senile, also stated she was alert when the will was executed and understood the nature and implications of her act." (*Id*. at p. 605.)

In the present case, no witness testified, and no medical record reflects, that at any time prior to his 2006 stroke Wayne did not recall what assets he owned, who his children and grandson were, who Pauline was, or what it meant to provide for his children and Pauline through his trust. Indeed, even petitioners conceded Wayne's capacity: Stephen admitted that before his father's 2006 stroke, Wayne always recognized him and knew who Kathleen was, and Kathleen testified that when she spoke to Wayne on the telephone, he routinely asked how Stephen and his family were. Dr. Chen, too, testified that he was not aware of any medical evidence suggesting that before December 31, 2005, Wayne did not know who his children and grandson were or what property he owned. And Eva Jeffers testified that at no time during her dealings with Wayne in 2003 and 2004 did Wayne indicate that he did not know what assets were in the trust, who his children or grandson were, or what he was signing. She testified that in her judgment, there was no occasion on which Wayne lacked testamentary capacity.

Stephen and Kathleen urge that Wayne's lack of capacity is demonstrated by Dr. Stern's January 7, 2004 letter to the Internal Revenue Service, which stated that "It has been determined that Mr. Andersen is not able to handle his own financial affairs." We do not agree. While this document arguably evidences Wayne's lack of capacity to handle financial affairs, it does not evidence lack of *testamentary* capacity. (*Conservatorship of Bookasta*, *supra*, 216 Cal.App.3d at p. 450 ["'It is thoroughly established by a series of decisions that: "Ability to transact important business, or even ordinary business, is not the legal standard of testamentary capacity. . . ."'"]; *Estate of Mann*, *supra*, 184 Cal.App.3d at p. 605 ["Inability to transact ordinary business does not establish testamentary incapacity."].)

Lack of testamentary capacity also is not demonstrated by a May 17, 2005 letter from Dr. David Grossman to "Whom It May Concern," which states that in the year Dr. Grossman had known Wayne, "he has not been able to make sound decisions on his own regarding his finances or managing his medications" and "[a]ny document signed at this time would certainly be void in terms of its true meaning given his dementia." Although this document suggests that Dr. Grossman may have believed Wayne lacked capacity, there is no evidence that Dr. Grossman was familiar with the elements of testamentary capacity and, thus, was competent to render a legal opinion (as opposed to a medical opinion) on this issue. Moreover, even if Wayne lacked testamentary capacity in May 2005, such incapacity would not be probative of his capacity when he executed the trust amendments years earlier. (*Estate of Schwartz* (1945) 67 Cal.App.2d 512, 520 ["[E]vidence of the condition of the testatrix' mind, before and even after the date of her testamentary act, is admissible, but it assumes importance only insofar as it bears upon that condition at the very time of the execution of the will."].)

Finally, lack of capacity is not demonstrated, as Stephen and Kathleen assert, by "forty-eight trial exhibits relating to Wayne Andersen's diminished capacity due to dementia and/or alcoholism." While petitioners certainly are correct that the exhibits demonstrate that Wayne suffered from diminished capacity, dementia, and alcoholism in the last years of his life, none suggests that Wayne lacked *testamentary capacity* at any

time relevant to this litigation. To the contrary, while Wayne's memory appears to have been very poor throughout 2003 to 2005, the medical records reflect that his speech and reasoning remained intact. The records reflect, moreover, considerable fluctuation in Wayne's mental state, as evidenced most clearly by dramatic changes in his performance on the MMSE (29/30 on 5/1/2003; 16/30 on 8/22/2003; 26/30 on 1/28/2004). Thus, even if Wayne lacked testamentary capacity at some points in time, nothing suggests that he lacked capacity when he executed the trust amendments.

In sum, the evidence of lack of capacity here is much weaker than that held insufficient to justify the setting aside of testamentary documents in others cases, such as *Estate of Mann*, *supra*, 184 Cal.App.3d 593. It is not enough to overcome the presumption that Wayne was competent when he executed the 2003 and 2004 trust amendments.

IV. There Is No Substantial Evidence That the Trust Amendments Were the Product of Pauline's Undue Influence

The probate court found that the evidence at trial was sufficient to give rise to a presumption of undue influence by Pauline and that Pauline failed to rebut the presumption because she "failed to present clear and convincing evidence that the amendments were not the result of such undue influence." The court thus found that "Hunt exercised undue influence in connection with the disputed trust amendments." Pauline contends that this finding was erroneous because the evidence presented was insufficient to give rise to a presumption of undue influence. We agree.

"The principle that a will is invalid if procured by the undue influence of another predates the 1931 adoption of the Probate Code (see, e.g., *Estate of Ricks* (1911) 160 Cal. 467, 480), but is now codified in section 6104.[**6**] Undue influence is pressure brought to bear directly on the testamentary act, sufficient to overcome the testator's free will,

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6 Section 6104 provides: "The execution or revocation of a will or a part of a will is ineffective to the extent the execution or revocation was procured by duress, menace, fraud, or undue influence."

amounting in effect to coercion destroying the testator's free agency. (*Estate of Fritschi* (1963) 60 Cal.2d 367, 373-374; *Estate of Sarabia* (1990) 221 Cal.App.3d 599, 604-605.)" (*Rice v. Clark* (2002) 28 Cal.4th 89, 96.) "These principles are manifestly as applicable to an estate plan formalized by simultaneously executed inter vivos trust and pour-over will as to a will alone." (*Hagen v. Hickenbottom* (1995) 41 Cal.App.4th 168, 182.)

"Although a person challenging the testamentary instrument ordinarily bears the burden of proving undue influence (§ 8252), this court and the Courts of Appeal have held that a presumption of undue influence, shifting the burden of proof, arises upon the challenger's showing 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. (*Estate of Fritschi*, *supra*, 60 Cal.2d at p. 376; *Estate of Sarabia*, *supra*, 221 Cal.App.3d at p. 605; *Estate of Auen* (1994) 30 Cal.App.4th 300, 309; see also *id*. at p. 310 [where person alleged to have exerted influence was testator's attorney, any benefit other than compensation for legal services may be considered 'undue'].)" (*Rice v. Clark*, *supra*, 28 Cal.4th at pp. 96-97.)

The presumption of undue influence arises only if *each* of the three elements is shown. (*Estate of Sarabia*, *supra*, 221 Cal.App.3d at p. 605.) "If this presumption is activated, it shifts to the proponent of the will the burden of producing proof by a preponderance of evidence that the will was not procured by undue influence." (*Ibid*.)

Pauline contends there is no evidence that she "actively participated" in the preparation or execution of the trust amendments, and we agree. The only evidence concerning the preparation and execution of the trust amendments was the testimony of Eva Jeffers, Wayne's attorney. She testified that in May 2003, Wayne called her to make an appointment to discuss his trust.[7] Following that conversation, Wayne came to

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[7] The reporter's transcript reflects that Jeffers was asked whether Wayne called her "[a]t some point before *February* 28, '03" to make an appointment to discuss his trust, to which Jeffers responded "yes." It is clear from the context, however, that the telephone call and meeting about which Jeffers testified took place shortly before *May* 28, 2003.

Jeffers's office and said that he wanted to change his trust to leave a portion of his estate to Pauline. Several days later, Wayne returned to Jeffers's office to sign the trust amendment. The only persons present when Wayne signed the amendment were Wayne, Jeffers, and the notary.

Our review of the record does not reveal any evidence to contradict Jeffers's testimony that Wayne, not Pauline, made the appointment to amend the trust. Similarly, there is no evidence to contradict Jeffers's testimony that neither Pauline nor anyone else was present when Wayne came to Jeffers's office to tell her how he wished to amend his trust, and then when he returned to her office several days later to sign the May 28, 2003 trust amendment. Accordingly, there is no substantial evidence that Pauline actively participated in procuring the amendment's preparation or execution. The trial court erred in concluding that Stephen and Kathleen presented sufficient evidence to give rise to a presumption of undue influence and to shift the burden of proof to Pauline. (See, e.g., *Estate of Mann*, *supra*, 184 Cal.App.3d at p. 607 ["'[M]ere opportunity to influence the mind of the testator, even coupled with an interest or a motive to do so, is not sufficient.' [Citations.] There must be activity by the beneficiary in the actual preparation of the will."]; *Estate of Straisinger* (1967) 247 Cal.App.2d 574, 586 ["The evidence also fails to disclose active participation by the Cunninghams in the procurement of the will. . . . Physical presence of the beneficiary at the execution of the will is insufficient. [Citations.] Nor does the procurement of a person to witness a will or of an attorney to draw one constitute active participation. [Citations.] There must be activity on the part of a beneficiary in the matter of the actual preparation of the will. [Citation.]".)

We conclude, moreover, that considered as a whole, the record does not support the conclusion that the trust amendments were the product of Pauline's undue influence. "To sustain a finding of undue influence there must be some evidence, direct or circumstantial, that the person charged with exerting such influence overcame the volition of the testatrix so that the will was not in fact her testamentary act." (*Estate of Williams* (1950) 99 Cal.App.2d 302, 309-310.) "'"[T]he kind of influence that may be held to be undue influence warranting a repudiation of a will 'must be such as in effect

destroyed the testator's free agency, and substituted for his own another person's will' [citation]; and mere general influence, however strong or controlling, not brought to bear on the testamentary act, 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' [citations]. So, also, proof of mere opportunity to influence the mind of the testatrix, even though coupled with an interest or with a motive so to do, is insufficient. In order to warrant setting aside a will on this ground there must be substantial proof, direct or circumstantial, of a pressure which overpowers the volition of the testator and operates directly on the testamentary act.'"" (*Id*. at p. 310.)

"Although not always stated in the same way, there are apparently five questions to which the courts have given consideration in discussing this problem: [¶] 1. Does the will cut off the natural objects of the decedent's bounty, and unduly benefit the proponent? [¶] 2. Is there a variance between the terms of the will and the expressed intentions of the testatrix? [¶] 3. Was there an opportunity afforded by the legatee's relationship to the decedent to influence the testatrix? [¶] 4. Was the decedent's mental and physical condition such as to permit a subversion of her freedom of will? [¶] 5. Was the beneficiary active in procuring the execution of the will?" (*Estate of Williams*, *supra*, 99 Cal.App.2d at p. 311.)

In the present case, there is no substantial evidence to support a finding of undue influence. First, the trust amendments did not "cut off the natural objects of the decedent's bounty"—Stephen and Kathleen remained beneficiaries under all post-2003 versions of the trust. Second, the amendments did not "unduly" benefit Pauline, with whom Wayne was romantically involved for more than 15 years. (See *In re Conservatorship of Davidson* (2003) 113 Cal.App.4th 1035, 1061-1062 ["The issue is not whether [beneficiary] profited from [decedent's] disposition of her estate; it is whether his profit was 'undue.'" Held: no undue influence where beneficiary had a 40-year friendship with decedent and cared for decedent during the last years of her life.].) Third, there was not a variance between the terms of the will and Wayne's expressed intentions. No witness testified that after May 2003, Wayne ever expressed to anyone an intention to

leave the entirety of his estate to his children. To the contrary, Eva Jeffers testified that Wayne repeatedly told her that he wanted to leave part of his estate to Pauline, and a June 10, 2003 doctor's note states that Wayne told his treating physician that "his kids are basically bullying him into giving up his home, and he has taken them out of his will and has accessed a lawyer." Fourth, there is no evidence that Wayne's mental and physical condition was such as to permit "a subversion of [his] freedom of will." All of the testimony, including that of Stephen and Kathleen, pointed to the fact that Wayne did what he wanted to do, even in the face of strong disapproval from the people closest to him. Finally, as we have said, there is absolutely no evidence that Pauline was active in procuring the execution of the trust amendments. Accordingly, there is no substantial evidence that Pauline exercised undue influence over Wayne in connection with the trust amendments.

Stephen and Kathleen contend that they need not have demonstrated that Pauline "coerced" Wayne and "destroyed his free agency"; rather, they suggest, citing *In re Marriage of Starr* (2010) 189 Cal.App.4th 277, 286, "there is another type of conduct that amounts to undue influence: the use of confidence or authority to obtain an unfair advantage. (Civ. Code, § 1575, subd. 1.) This is triggered by one party's breach of a confidential relationship." Stephen and Kathleen contend that the probate court "expressly found an abuse of [a] confidential relationship," and thus that we must affirm its finding of undue influence.

We do not agree. The undue influence at issue in *Marriage of Starr* concerned a husband's breach of his promise to his wife to put her on the title to the family home after the home purchase was complete. Upon their divorce, the husband urged that the house was his separate property; the wife argued that it was community property. (189 Cal.App.4th at p. 279.) The court held that the husband had exercised "undue influence" over his wife by making a false representation to her that she accepted because of the nature of their relationship. It explained its finding by discussing *Brison v. Brison* (1891) 90 Cal. 323, which concerned a similar set of facts: "[In *Brison*], [t]he Supreme Court held that the evidence of the wife's 'subsequent refusal to reconvey was not merely the

breach of an agreement, but was the betrayal of a confidence, and the violation of a trust, constituting a constructive fraud, which a court of equity will remedy. . . . The influence which the law presumes to have been exercised by one spouse over the other is not an influence caused by any act of persuasion or importunity, but is that influence which is superinduced by the relation between them, and generated in the mind of the one by the confiding trust which he has in the devotion and fidelity of the other. Such influence the law presumes to have been undue, whenever this confidence is subsequently violated or abused.' (*Brison*[], *supra,* at p. 336, citing to Civ. Code, § 1575, subd. 1.)" (*In re Marriage of Starr*, *supra*, 189 Cal.App.4th at 285.) This case is "significant for three reasons. First, [it] announced the overarching principle that constructive fraud due to breach of a confidential relationship amounts to undue influence, terminology that was adopted by other courts. Second, [it] differentiated such constructive fraud from the other forms of undue influence based on acts of coercion or overpersuasion. Third, [it] established a paradigm of constructive fraud arising from one spouse's conveyance of property to the other spouse based on an unfulfilled promise by the other spouse to reconvey." (*Ibid*.)

The kind of breach of trust at issue in *Brison* and *Marriage of Starr* is not present here. Both of those cases concerned a spouse's conveyance of the family home to the other spouse based on the explicit representation that it would be reconveyed in the future. Here, there is no evidence of any explicit (or implicit) promise by Pauline to do something in exchange for her inclusion in Wayne's trust. *Marriage of Starr* simply does not apply.

V. Substantial Evidence Supports the Probate Court's Finding That Wayne Lacked Capacity to Open Joint Tenancy Accounts and to Sign a Change of Life Insurance Beneficiary Form

Pauline contends that substantial evidence did not support the probate court's finding that Wayne lacked capacity to open joint checking accounts or to sign a change of life insurance beneficiary form. For the reasons that follow, we do not agree.

The probate court found that following his May 2003 stroke, Wayne lacked the capacity to understand the legal effect of placing his assets in joint tenancy accounts with Pauline. The court explained: "[W]hile Wayne undoubtedly wanted Hunt to have signature authority on the joint tenancy accounts, there was no credible evidence that he intended to give Hunt 50% ownership or gift the accounts to Hunt on death. Given his condition after the 2003 stroke, Wayne could not have understood that he need not make Hunt an undivided 50% joint tenant owner of the funds in order to make the funds accessible to her. It should be noted that there were no substantial gifts by Wayne to Hunt prior to the 2003 stroke, no joint tenancy accounts established, and no change in Wayne's Will (Ex. 2, in which he expressed his desire and intention that all assets be placed in the Trust). Further, there was no change in Wayne's Will to give Hunt any non-trust assets and no evidence of Wayne's desire or intent to give Hunt any more than the 60% Trust interest (except Hunt's self-serving testimony)." Thus, the court said, "the joint tenancy accounts at Countrywide (No. 211836, opened September 30, 2005), Citibank (No. 9250, opened February 28, 2005) and WaMu (No. 5808, opened May 19, 2003 and No. 7328, opened August 29, 2003) were void *ab initio*."

With respect to the life insurance policy, the court concluded that because of Wayne's May 2003 stroke, he "lacked capacity when he executed the change of beneficiary form on October 11, 2003 naming Hunt as primary beneficiary."

Pauline contends that the court's findings were not supported by substantial evidence, but her cursory argument does not persuade us. She points to her own testimony that Wayne managed his own finances and carried a checkbook with him until his 2006 stroke, while entirely ignoring the testimony of both medical experts that Wayne likely was not competent to manage his financial affairs after his 2003 stroke. This is not sufficient. (E.g., *OCM Principal Opportunities Fund, L.P. v. CIBC World Markets Corp*. (2007) 157 Cal.App.4th 835, 866-867 ["On review for substantial evidence, '"[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.”””].)

DISPOSITION

The part of the judgment invalidating the trust amendments are reversed, and the probate court is directed to enter a new and different judgment affirming the validity of the trust amendments. In all other respects, the judgment is affirmed. The parties are to bear their own costs on appeal.

CERTIFIED FOR PARTIAL PUBLICATION

SUZUKAWA, J.

We concur:

EPSTEIN, P.J.

MANELLA, J.