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**UNITED STATES BANKRUPTCY COURT
CENTRAL DISTRICT OF CALIFORNIA
LOS ANGELES DIVISION**

SACV14-00163 VAP

In re:

WILLIAM E PRESTON,

Debtor(s),

R. TODD NEILSON

Plaintiff(s),

v.

JOYCE MOORE, THE PRESTON MUSIC GROUP, INC., THE WILLIAM PRESTON TRUST, FREDERICK WILHELMS III

Defendant(s).

Case No.: 8:05-bk-50128-TA

Adversary No.: 8:11-ap-01231-TA

Chapter: 7

PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW REGARDING CAPACITY OF WILLIAM E PRESTON ON THE DATE OF THE FILING OF THE BANKRUPTCY PETITION

Hearing Judge: Hon. Gregg W. Zive

Trial:

Date: October 8, 2013
October 9, 2013
November 19, 2013

Time: 9:00 a.m.
Ctrm: 1445

R. Todd Neilson (“Neilson”), the Chapter 7 Trustee for the bankruptcy estate of William E Preston (“Debtor”) filed a complaint for declaratory and injunctive relief against

1 defendants The William Preston Trust (the “Trust”), Frederick Wilhelms, III in his capacity
2 as trustee of The William Preston Trust, Joyce Moore (“Moore”) and The Preston Music
3 Group, Inc. on May 20, 2011. Answers were filed by the Trust on October 28, 2011, and
4 by Moore on January 31, 2013. The Preston Music Group filed its answer on February 4,
5 2013. The complaint seeks a judgment declaring that Debtor was not incapacitated at the
6 time of the filing of the bankruptcy petition, that the Trust remained revocable and that the
7 assets currently held by Neilson and any other assets of Debtor are assets of the
8 bankruptcy estate. Pursuant to order entered January 30, 2013, Phase One of the trial in
9 this adversary proceeding was limited to Neilson’s first claim for relief – whether Debtor
10 was “incapacitated” so as to render the William Preston Trust irrevocable. Trial in this
11 adversary was assigned to the Hon. Gregg W. Zive by order entered February 19, 2013
12 and the trial was held on October 8 and 9 and November 19, 2013. The matter was taken
13 under submission and these proposed findings of fact and conclusions of law have been
14 prepared for submission to the District Court for entry of a final judgment pursuant to 28
15 U.S.C. § 157(c)(1) in compliance with the orders entered October 12, 2011 finding that
16 the Court has “related to” jurisdiction over these non-core issues.

17 I. PLEADINGS

18 In preparation for trial, the Court reviewed the following pleadings:

- 19 • *Notice of Filing of Documents Pursuant to Court Scheduling Order* filed September
20 9, 2013 [Docket No. 196];
- 21 • *Plaintiff’s Identification of Witnesses to Testify at Trial* filed September 9, 2013
22 [Docket No. 194];
- 23 • *Plaintiff’s Trial Brief* filed September 9, 2013 [Docket No. 193];
- 24 • *Trial Brief* filed by the Trust on September 9, 2013 [Docket No. 197];
- 25 • *Trustee’s Complaint for: (1) Declaratory Relief against Defendants; (2) Injunctive
26 Relief* filed May 20, 2011 [Docket No. 1];
- 27 • *Answer to Trustee’s Complaint for (1) Declaratory Relief (2) Injunctive Relief* filed
28 by the Trust on October 28, 2011 [Docket No. 30];

- 1 • *Defendant Preston Music Group, Inc. Answer to Adversary Complaint* filed
2 February 4, 2013 [Docket No. 142];
- 3 • *Defendant Joyce Moore Answer to Adversary Complaint* filed January 31, 2013
4 [Docket No. 136];
- 5 • *Joint Pre-Trial Order for Phase One* entered June 21, 2013 [Docket No. 176];
- 6 • *Scheduling Order Re: Pre-Trial Conference* entered June 21, 2013 [Docket No.
7 177];
- 8 • *Statement of Decision Construing Dismissal Motion as One for Amendment Under*
9 *FRBP 1009, Granting Motion as to William E. Preston Trust and Denying Motion to*
10 *Dismiss as to Individual Debtor, William E. Preston* entered October 31, 2010
11 [8:05-bk-50128-TA, Docket No. 438];
- 12 • *[Amended] Order Denying Motion of Defendants Joyce Moore and Preston Music*
13 *Group, Inc. to Dismiss Plaintiff's Complaint* entered October 12, 2011 [Docket No.
14 27];
- 15 • *Order Denying Motion of Defendant The William Preston Trust by and Through its*
16 *Trustee, Frederick Wilhelms, III to Dismiss Adversary Proceeding Pursuant to Fed.*
17 *R. Civ. Pro 12(b)(1) & (2) BK Rule 7012(B)* entered October 12, 2011 [Docket No.
18 28];
- 19 • *Declaration of Scott Lee Re: Minute Order of the Honorable Virginia A. Phillips,*
20 *U.S. District Judge, Denying Motion to Withdraw Reference (Doc. No. 1), Denying*
21 *Motion to Consolidate (Doc. No. 6) as Moot, and Vacating January 9, 2011 [sic]*
22 *Hearing (in Chambers) Entered on December 8, 2011* filed December 9, 2011
23 [Docket No. 35];
- 24 • *Order Denying Joyce Moore's Motion to Certify Appeal of Interlocutory Order*
25 *Denying Motion to Dismiss Adversary Complaint Pursuant to Stern v. Marshall to*
26 *the United States Court of Appeals for the Ninth Circuit* entered December 12,
27 2011 [Docket No. 36];
- 28 • *Order Denying: (A) Trustee's Motion for Summary Judgment on the First Cause of*
Action (on the Capacity of William Everett Preston Prior to and as of the Filing of

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the Bankruptcy Petition and the Revocability of the William Preston Trust); (B) Defendants' Motion for Summary Judgment on Plaintiff's First Caused [sic] of Action; and (C) Defendants Joyce Moore and Preston Music Group, Inc. [sic] Motion for Summary Judgment on Plaintiff's Second Cause of Action entered January 4, 2013 [Docket No. 120] and pleadings related thereto;

- *Order Setting Trial Date in Adv. No 8:11-01231-TA, Establishing Deadline for Filing of Withdrawal of Reference Motions and Assigning Related Adversary Proceedings to Judge Philip H. Brandt for Further Scheduling and Trials entered January 11, 2013 [Docket No. 125];*
- *Order Reassigning Adversary Proceeding to Judge Gregg W. Zive entered February 19, 2013 [Docket No. 149];*
- *Scheduling Order entered March 5, 2013 [Docket No. 154];*
- *Order Determining Choice of Law entered June 14, 2013 [Docket No. 173];*
- *Notice/Request to Withdraw Pretrial Motion for Entry of Judgment for Defendant in Adversary Proceeding filed July 12, 2013 [Docket No. 183];*
- *Order Denying Motion for Stay Pending Decision by United States Supreme Court entered July 24, 2013 [Docket No. 187];*
- *Order Granting Request to Set Trial Order entered September 16, 2013 [Docket No. 208];*
- *Order Granting Motion in Limine to Exclude Declarations or Affidavits of Valerie Ervin, Joyce Moore, Ollie Ervin, David Spero, Otto D'Angelo, Dr. Robert Waldman, Dr. Lee Ann Kelley, and Dr. Vincent Cariatti as Hearsay entered October 1, 2013 [Docket No. 221] and pleadings related thereto;*
- *Order Granting Motion in Limine to Exclude Testimony of Joyce Moore and Robert P. Waldman, M.D. as Hearsay entered October 1, 2013 [Docket No. 222] and pleadings related thereto;*
- *Order Granting Plaintiff's Motion in Limine to Exclude Expert Opinions of Defendants' Expert Witnesses entered October 1, 2013 [Docket No. 223] and pleadings related thereto;*

- 1 • *Testimony Declaration of Lee Ann Kelley MD* filed October 8, 2013 [Docket No.
2 227];
3 • *Testimony Declaration of Joyce Moore* filed October 8, 2013 [Docket No. 228];
4 • *Testimony Declaration of Otto D’Agnolo* filed October 9, 2013 [Docket No. 229];
5 • *Testimony Declaration of Roger Friedman* filed October 9, 2013 [Docket No. 230];
6 and
7 • *Testimony Declaration of Ollie Ruben Ervin* filed October 9, 2013 [Docket No.
8 231].¹

9 The Court has considered and taken judicial notice of the entire docket in this
10 adversary proceeding and in the bankruptcy case (8:05-bk-50128-TA). See Fed. Rules of
11 Evid. 201.

12 II. Findings of Fact

- 13 1. Debtor filed a voluntary chapter 11 petition on October 21, 2005. Neilson was
14 appointed Chapter 11 Trustee on January 20, 2006. [2:05-bk-50015-VK, Docket
15 No. 17] The case was converted to chapter 7 on July 17, 2006. [8:05-bk-50128-
16 TA, Docket No. 6] Neilson continued as the Chapter 7 Trustee.
17 2. Five of the signatures on Debtor’s bankruptcy petition were found to be authentic
18 signatures, probably made on or about October 10, 2005. [8:05-bk-50128-TA,
19 Docket No. 438, p. 7, lines 20-23]

20 _____
21 ¹ This declaration was not considered because Mr. Ervin did not appear at trial. At the
22 conclusion of testimony on October 9, 2013 and after discussions regarding the efforts
23 made to secure Mr. Ervin’s appearance, the Court granted the Trust a continuance to
24 November 19, 2013. [Oct. 9, 2013 Transcript, p. 209-224] The Court stated at that time
25 that Mr. Ervin’s declaration would not be accepted if he did not appear. [*Id.* at p. 217,
26 lines 22-23] At the beginning of trial on November 19, 2013, the Court was informed that
27 Mr. Ervin had been subpoenaed and had failed to appear. [Nov. 19, 2013 Transcript, p.
28 4-5] The Court issued an order to show cause against Mr. Ervin instructing him to appear
in the afternoon on November 19, 2013. [*Id.* at p. 8, lines 11-16] During the afternoon
hearing on November 19, 2013, the Trust’s counsel informed the Court that her private
investigator had not been truthful on his proof of service. [*Id.* at p. 11, lines 4-6] Pursuant
to order entered June 21, 2013, all direct testimony in this trial was to be by declaration
and witnesses whose declarations were offered were to be present for cross-
examination. [Scheduling Order Re: Pre-Trial Conference, Docket No. 177]

- 1 3. Debtor authorized the filing of his bankruptcy case. [8:05-bk-50128-TA, Docket No.
2 438, p. 10, lines 16-19]
- 3 4. Debtor fell into a coma on November 21, 2005 and remained in that state until his
4 death on June 6, 2006. [Oct. 8, 2013 Transcript, p. 42, lines 4-11]
- 5 5. Debtor ceased being the trustee of the trust when he resigned in favor of Mr.
6 Wilhelms in late September or October 2004. [Oct. 9 Transcript, p. 144, lines 2-5]
7 Moore and Valerie Ervin were named co-successor trustees but later resigned. [*Id.*
8 at p. 145, lines 1-8] Moore resigned in favor of Teri Wilhelms and Ms. Ervin
9 resigned in favor of Heather Sauber. [*Id.* at lines 9-16] When Mr. Wilhelms passed
10 away, Ms. Wilhelms and Ms. Sauber became the trustees. [*Id.* at p. 146, lines 5-
11 14]
- 12 6. Moore was Debtor's personal manager intermittently from 2001 through his death.
13 [Oct. 8, 2013, p. 214-215, lines 13-25, 1-13] She describes herself as "often his
14 schlepp and driver" and his "family." [Oct. 9, 2013 Transcript, p. 161, lines 20-23]
15 Debtor did not have a business manager in the fall of 2005. [*Id.* at p. 163, lines 17-
16 19]
- 17 7. As of October 2004, Moore held a medical power of attorney for Debtor. [Oct. 8,
18 2013 Transcript, p. 212, lines 13-20] Moore was very aware of Debtor's medical
19 condition during the time she held the medical power of attorney. [*Id.*]
- 20 8. Moore coordinated Debtor's care with Dr. Lee Ann Kelley, M.D. [Plaintiff's Exh. 67,
21 p. 96; Oct. 8, 2013 Transcript, p. 102, lines 11-20] They discussed his dialysis and
22 made alterations to his medications. [*Id.*] Moore and Dr. Kelley spoke on the
23 telephone frequently about Debtor's care. [*Id.*]
- 24 9. Ollie Ervin worked as a personal assistant to Debtor. He traveled with Debtor and
25 helped with tasks such as packing bags. [Oct. 9 Transcript, p. 21, lines 4-6]
- 26 10. Debtor's sister, Rodena Preston, filed conservatorship actions in Arizona and
27 California in January 2006 and March 2006. [*Id.*, p. 91-92, lines 24-25, 1-3] One of
28 the purposes of Debtor's bankruptcy filing was to protect Debtor's assets from
Debtor's sister. [*Id.* at p. 92 lines 4-7] As detailed below, declarations of Dr. Lee

1 Ann Kelley, M.D. were filed in the Arizona and California conservatorship actions.
2 Those declarations are contrary to Dr. Kelley's trial declaration and are predicate
3 to the finding that that her trial declaration and testimony are not persuasive.

4 11. Debtor was under the psychiatric care of Dr. Kelley beginning in September 2004.
5 [Trial Decl. of Lee Ann Kelley, M.D. ¶ 13] Debtor received treatment for anxiety,
6 situational panic disorder and related claustrophobia relating to Debtor's dialysis
7 treatment and inability to deal with sitting in an airplane. [*Id.* at ¶ 16] Debtor was
8 prescribed medication for his dialysis sessions, as well as for generalized
9 depression and difficulty sleeping. [*Id.* at ¶ 18; see also Oct. 8, 2013 Transcript, p.
10 156-157]

11 12. Debtor was addicted to crack cocaine. [Oct. 8, 2013 Transcript, p. 211, lines 15-
12 23; Oct. 9 Transcript, p. 22, lines 10-16, p. 177, lines 16-24, p. 178, lines 1-2; Trial
13 Decl. of Roger Friedman ¶¶ 23, 24] Debtor acknowledged this to Dr. Kelley in
14 September and October 2004. [Trial Decl. of Lee Ann Kelley, M.D., ¶ 20]

15 13. There were periods of time when Debtor was able to remain sober, but Debtor was
16 using drugs beginning in February 2005. [Trial Decl. of Lee Ann Kelley, M.D. at ¶¶
17 22, 23, 24]

18 14. According to one account, Debtor was "stoned most of the time." [Oct. 9, 2013
19 Transcript at p. 186, lines 7-13]

20 15. Debtor's depression had increased in late February 2005 and he increased the
21 dosage of medication before dialysis. [Trial Decl. of Lee Ann Kelley, M.D. at ¶¶ 29-
22 30]

23 16. Debtor was admitted to the Mayo Hospital on September 4, 2005 with an infection.
24 He had been using cocaine. [*Id.* at ¶ 33]

25 17. Moore knew that in September 2005, Debtor's nephrologist threatened to stop
26 dialysis because of Debtor's bingeing. [Oct. 8, 2013 Transcript, p. 227, lines 11-25]
27 Moore also knew that Debtor's other doctors also pleaded with Debtor to stop his
28 drug use. [Oct. 8, 2013 Transcript, p. 228, lines 1-5]

- 1 18. As of October 23, 2005, Moore knew that Debtor had a history of cocaine abuse.
2 [Oct. 9 Transcript at p. 237, lines 6-8]
- 3 19. Until October 23, 2005, Moore was not concerned that Debtor was dependent on
4 cocaine. [Oct. 8, 2013 Transcript, p. 223, lines 9-11]
- 5 20. Debtor was in the Bahamas, at the Atlantis, from October 15 to 17, 2005 to
6 celebrate Sam Moore's birthday. [Trial Decl. of Roger Friedman ¶ 12] During that
7 time, there were suspicions that Debtor was trying to get drugs. [Oct. 9, 2013
8 Transcript at p. 176, lines 1-7]. On this trip, Debtor was coherent, cogent and
9 charming. [Trial Decl. of Roger Friedman ¶12]
- 10 21. Debtor traveled to Los Angeles with Moore, Sam Moore and Ollie Ervin on
11 October 18, 2005. [Oct. 9 Transcript, p. 147, lines 19-25]
- 12 22. Debtor was fine on the airplane and at rehearsal on October 18, 2005. [*Id.* at p.
13 148, lines 3-16]
- 14 23. Debtor had dialysis the morning of October 19, 2005. [Oct. 9 Transcript, p. 196,
15 lines 16-18] At times Debtor was sleepy after dialysis. [*Id.* at p. 197, lines 8-11]
- 16 24. Debtor attended a recording session on the morning of October 19, 2005. [Oct. 9
17 Transcript, p. 195, lines 8-12] In video taken of the recording session, there was
18 mutual satisfaction about the performance. [Plaintiff's Exh. 235; Oct. 9, 2013
19 Transcript, p. 208, lines 6-8] Debtor did not appear gruff and none of the
20 performers with Debtor indicated any discomfort or unhappiness with his
21 performance. [Oct. 9 Transcript, p. 208, lines 10-11, 21-24] Debtor did not appear
22 withdrawn, although based on descriptions perhaps he could be more outgoing at
23 other times. Debtor did not appear "happy-go lucky" in the video. [*Id.* at p. 208-
24 209, lines 24-25, 1-4]
- 25 25. In the video of the October 19, 2005 recording session, Debtor communicated with
26 the other artists, played the organ, posed for photographs and got up to leave with
27 everyone else. [Plaintiff's Exh. 235]
- 28

- 1 26. On the evening of October 19, 2005, Debtor attended the Concert for Bangladesh
2 DVD release party. Debtor was photographed and performed three songs at the
3 event. [Oct. 9 Transcript, p. 196, lines 4-6]
- 4 27. Both Moore and Valerie Ervin believe they saw Debtor's drug dealer or his car at
5 Debtor's hotel on October 19, 2005. [Oct. 9 Transcript at p. 66, lines 9-17; p. 237-
6 238, lines 24-25, 1]
- 7 28. Accounts of Debtor's mood at the Concert for Bangladesh event on October 19
8 vary from "gruff and moody" [*Id.* at p. 149, lines 2-7] to normal and in good spirits.
9 [*Id.* at p. 15, lines 19-21; p. 18, lines 10-23]
- 10 29. Debtor shopped for a new coat at Macy's with Valerie and Ollie Ervin on the way
11 to the Concert for Bangladesh event. [*Id.* at p. 14 lines 20-23]
- 12 30. Opinions on whether Debtor was high at the Concert for Bangladesh event on
13 October 19 also vary. Moore and Valerie Ervin did not believe Debtor was high.
14 Based on his impressions from a photograph, Roger Friedman did. [Oct. 8, 2013
15 Transcript at p. 206-207, lines 24-25, 1-4; p. 237 lines 9-17; Oct. 9 Transcript at p.
16 18-19, lines 24-25, 1-4; p. 160, lines 13-18; p. 186, lines 7-13]
- 17 31. Debtor was to travel with Moore to Cleveland on October 20, 2005 for a Rock and
18 Roll Hall of Fame event, but did not go because he did not feel well. Debtor
19 returned to Arizona with Ollie Ervin instead. [Oct. 8 Transcript, p. 209, lines 8-13;
20 Oct. 9 Transcript, p. 151-152, lines 11-25, 1-3; p. 153, lines 3-9; 20-25]
- 21 32. Debtor had a dialysis appointment scheduled for October 21, 2005, but at Debtor's
22 request, Moore rescheduled the appointment for approximately 5:00 a.m. on
23 October 22, 2005. [Oct. 8 Transcript, p. 209, lines 8-17; Oct. 9, Transcript, p. 154,
24 lines 3-19]
- 25 33. When Moore spoke with Debtor on October 21, 2005, he was abrupt and
26 demanding, which was unusual. [Oct. 9 Transcript, p. 154, lines 20-24] Debtor was
27 ecstatic when Moore was able to get him a dialysis appointment at 5:00 a.m. on
28 October 22, 2005. [*Id.* at p. 155, lines 19-25]

- 1 34. Moore picked Debtor up at 4:30 a.m. on the morning of October 22, 2005 to take
2 him to his 5:00 a.m. dialysis appointment. Debtor was more awake than usual, but
3 Moore was not concerned. [Oct. 8 Transcript, p. 209, lines 14-17; Oct. 9
4 Transcript, p. 156, lines 8-16]
- 5 35. Moore returned to the dialysis center two hours later when she was informed that
6 Debtor had a seizure. [Oct. 8 Transcript, p. 209, lines 19-21; Oct. 9 Transcript, p.
7 158, lines 1-10]
- 8 36. When Moore arrived at the dialysis center, Debtor was swollen and incoherent. He
9 was jumping and flailing around. [Oct. 9 Transcript, p. 158-159, lines 18-25, 1-4]
- 10 37. Moore asked that the paramedics be called and followed the ambulance to the
11 hospital. [*Id.* at p. 159, lines 12-17]
- 12 38. The morning of October 22, 2005 was the first time Moore suspected that Debtor
13 had been using crack cocaine. [Oct. 8 Transcript, p. 209, lines 19-25; Oct. 9
14 Transcript, p. 208-209, lines 25, 1-4]
- 15 39. Upon arrival at the hospital on October 22, 2005, Debtor was not capable of
16 answering questions, so Moore and Ollie Ervin provided a history to the doctors.
17 [Oct. 9 Transcript, p. 232, lines 12-16, p. 236, lines 2-6; Plaintiff's Exh. 42, p. 109,
18 117, 119]
- 19 40. When Dr. Kelley saw Debtor on October 23, 2005, more than 30 hours after his
20 admission to the hospital, Debtor was restless and had decreased eye contact.
21 Debtor was depressed and had impaired judgment due to drug use. [Trial Decl. of
22 Lee Ann Kelley ¶¶ 37, 39]
- 23 41. Dr. Kelley's discussions on October 23, 2005 were with Debtor, not Moore. [Oct. 8,
24 2013 Transcript, p. 71, lines 14-18] During this visit, Dr. Kelley convinced Debtor to
25 seek drug treatment. [*Id.*, p. 71-72, lines 18-25, 1-10] If Debtor had lacked
26 capacity, these conversations would have been with Moore, Debtor's medical
27 power of attorney.
- 28 42. Dr. Kelley diagnosed Debtor as dependent on cocaine. [Trial Decl. of Lee Ann
Kelley ¶ 41]

1 43. Debtor was ill on multiple levels and was sicker on October 23, 2005 than usual.

2 [Oct. 8, 2013 Transcript, p. 185, lines 16-21]

3 44. Debtor was able to provide his medical history to Dr. Kwan Lee during a visit on

4 November 4, 2005. [Plaintiff's Exh. 42, p. 132]

5 45. The declaration of Dr. Kelley was filed in support of a Motion for Order Vacating

6 Appointment of Temporary Conservator and Opposition to Petition to Appoint

7 Permanent Conservator filed March 8, 2006 in Los Angeles Superior Court by

8 Samuel and Joyce Moore. [Trial Decl. of Lee Ann Kelley, M.D., Exh. 5; Plaintiff's

9 Exh. 50, p. 40] In that declaration, Dr. Kelley stated:

10 ...it is my opinion that Mr. Preston functioned
11 at a very high level as a person, and
12 professionally as a musician until his tragic
13 event in late November 2005...He was also
14 capable of understanding that his previous
15 behavior had resulted in adverse
16 consequences in his life and career. As this is
incompatible with any allegation that he might
be cognitively impaired to the degree of being
able to manage his own affairs, *Mr. Preston
was clearly competent in managing his affairs
and making decisions...* (emphasis added)

17 [*Id.*, p. 40-42, ¶ 6] The same declaration was filed in support of an Opposition to

18 the Petition for Emergency Appointment of Temporary Guardian of an Adult in

19 Arizona Superior Court in May, 2006. [Plaintiff's Exhibit 66, p. 13, ¶ 6] Dr. Kelley's

20 two 2006 declarations are also consistent with her interaction with Debtor on

21 October 23, 2005 and are indisputably inconsistent with her 2013 declaration.

22 46. On April 18, 2006, Moore provided two versions of a declaration by Dr. Kelley,

23 signed on April 17, 2006, to the Trustee's counsel by fax. In both versions of the

24 declaration, Dr. Kelley stated:

25 ...it is my opinion that Debtor functioned at a
26 very high level as a person...until his tragic
27 medical event in late November of 2005. In
28 short, I believe the Debtor may have been
behaviorally impaired (i.e., he was unable to
focus and be attentive for an extended period
of time) *but was not cognitively impaired (i.e.*

1 *he was able to make rational decisions)*
2 *between September of 2005 through October*
3 *21, 2005 (emphasis added)*

4 [Plaintiff's Exh. 49, p. 2, ¶ 5] This declaration was filed with the Bankruptcy Court
5 as Docket Number 36 on April 20, 2006 in support of the Trustee's request to
6 waive the pre-petition credit counseling requirement. [Plaintiff's Exh. 8, p. 1] Moore
7 and Dr. Kelley worked together to provide this information because they wanted
8 the bankruptcy case to continue.

9 47. In her trial testimony declaration filed September 9, 2013, and in Exhibits 2 and 4
10 to that declaration, dated August and July 2012, respectively, Dr. Kelley changed
11 her testimony to state that Debtor was not competent at least from the evening of
12 October 19, 2005. [Trial Decl. of Lee Ann Kelley, M.D., ¶ 53; Exh. 2, ¶ 26; Exh. 4,
13 p. 67]

14 48. Dr. Kelley's subsequent diagnosis that Debtor was mentally incompetent on
15 October 19, 2005 due to crack cocaine use [Trial Decl. of Lee Ann Kelley ¶ 42]
16 was allegedly based on her review of records in 2013 that she asserted she did
17 not have when she signed her 2006 declarations in which she testified Debtor was
18 competent [Oct. 8, 2013 Transcript, p. 141-142, lines 21-25, 1-16] and on Ollie
19 Ervin's declaration². [Oct. 8, 2013 Transcript, p. 169, lines 7-20] However, as a
20 treating physician, Dr. Kelley admitted she could have easily obtained those
21 records in 2006 before she signed the two declarations. [Oct. 8, 2013 Transcript,
22 p. 168, lines 5-24] The Court finds Dr. Kelley's 2013 declaration not to be
23 persuasive.

24 49. In Moore's declaration, which was dated and filed with the Bankruptcy Court as
25 Docket Number 36 on April 18, 2006 in support of the Trustee's request to waive
26 the pre-petition credit counseling requirement, Moore stated that she believed
27 "Debtor was absolutely at all times herein rational and able to evaluate his
28 financial situation." [Plaintiff's Exh. 1, p. 4, ¶ 19; Plaintiff's Exh. 83; Oct. 9, 2013

² This declaration is hearsay, was not admitted and was not subject to cross examination.

1 Transcript, p. 129, lines 11-15] Moore acknowledges signing this declaration. [Oct.
2 9, 2013 Transcript, p. 114 lines, 7-14] This declaration was faxed to the Trustee's
3 counsel by the Law Offices of Cara Blake on April 18, 2006. [Plaintiff's Exh. 47]
4 The Court finds Moore's trial declaration and testimony seven years later not to be
5 credible.

6 50. There is no evidence of any threats on the part of the Trustee or his counsel in
7 connection with the preparation of the declaration supporting the waiver of pre-
8 petition credit counseling. Trustee's counsel stated that the declarations needed to
9 be truthful and accurate, which is not threatening. [Plaintiff's Exh. 60]

10 **III. Conclusions of Law**

11 1. The "Declaration of Trust Named The William Preston Trust" and the "Abstract of
12 The William Preston Trust" provide, at §5(c):

13 Incapacity: If the settlor becomes
14 incapacitated, no person including his or her
15 legal guardian, conservator, court appointed
16 conservator, or one holding his or her Durable
17 Power of Attorney shall have any power or
18 authority to revoke or amend this trust.

19 [Plaintiff's Trial Brief, Exh. 14 p. 173; 192]

20 2. The Durable Power of Attorney of William Everett Preston provides:

21 Principal shall be deemed to be incapacitated if
22 at any time two (2) licensed physicians certify
23 in writing that Principal has become physically
24 and mentally incapacitated and is unable to
25 manage his/her affairs in his/her best interest,
26 whether or not a court of competent jurisdiction
27 has declared Principal incompetent, mentally ill
28 or in need of a conservator/guardian.

[Plaintiff's Trial Brief, Exh. 14 p. 225]

3 California law is to be applied to determine whether Debtor was incapacitated, as
defined by the Trust's governing documents, on the date the bankruptcy petition
was filed. [*Order Determining Choice of Law*, Docket No. 173]

- 1 4. Cal. Probate Code § 810(a) provides that there is a “rebuttable presumption
2 affecting the burden of proof that all persons have the capacity to make decisions
3 and to be responsible for their acts or decisions.”
- 4 5. The burden is on the contesting party to overcome the presumption of capacity.
5 *Estate of Mann*, 184 Cal.App.3d 593, 602, 229 Cal.Rptr. 225 (1986).
- 6 6. Cal. Probate Code § 810(b) provides that a “person who has a mental or physical
7 disorder may still be capable of contracting, conveying, marrying, making medical
8 decisions, executing wills or trusts, and performing other actions.”
- 9 7. Cal. Probate Code § 811 provides that a determination that a person lacks
10 capacity must be supported by evidence of a deficit in certain enumerated mental
11 functions, and evidence of a correlation between the deficit/deficits and the
12 decision or acts in question. Section 811(b) provides that a deficit in the
13 enumerated mental functions may only be considered if it, by itself or in
14 combination with one or more mental function deficits, “significantly impairs the
15 person’s ability to understand and appreciate the consequences of his or her
16 actions with regard to the type of act or decision in question.”
- 17 8. Pursuant to Cal. Probate Code § 812, a person lacks capacity to make a decision
18 unless the person has the ability to communicate verbally, or by other means, the
19 decision, and to understand and appreciate, to the extent relevant, all of the
20 below:
 - 21 (a) The rights, duties, and responsibilities
22 created by, or affected by the decision.
 - 23 (b) The probable consequences for the
24 decision maker and, where appropriate, the
25 persons affected by the decision.
 - 26 (c) The significant risks, benefits, and
27 reasonable alternatives involved in the
28 decision.
9. Evidence of mental condition both before and after the execution of an instrument
is relevant and admissible to the determine soundness of mind at the time of
execution of a will. *In the Matter of Harry C. Fisher*, 202 Cal. 205, 208 (1927). In

1 the absence of evidence that “intemperate use of alcoholic beverages” has
2 destroyed testamentary capacity, there is no presumption that it has been
3 destroyed, even if it is shown that there is a continuing habit. *Id.* at 209.

4 10. The fact that Debtor was addicted to crack cocaine did not incapacitate him
5 unless he had no intelligent comprehension of what he was doing. *See In the*
6 *Matter of George A. Little*, 46 Cal.App. 776, 789 (1920).

7 11. A testator’s intoxication, assuming it is established on the day of the execution of
8 the will, must have been such that it deprived him of judgment while executing it.
9 “It must affirmatively appear that the mind of the testator was totally destroyed, ...
10 that he was incapable of comprehending the nature of his act, the extent of his
11 property and those who had a claim upon his bounty.” *In the Matter of the Estate*
12 *of Frank Smethurst*, 15 Cal.App.2d 322, 331-332 (1936).

13 12. The Trust has not met its burden under section 810. It has demonstrated that
14 Debtor was a drug addict. The Trust has not established that Debtor had a deficit
15 in mental function that impaired his ability to understand the decision to file a
16 bankruptcy petition, as required under section 811. On October 19, 2005, Debtor
17 participated in a rehearsal session and attended a public event where he had
18 conversations with multiple people. On October 20, 2005, Debtor was able to ask
19 Moore to make the arrangements for him to travel back to Arizona, rather than to
20 Cleveland. On October 21, 2005, the petition date, Debtor was lucid enough to
21 call Moore and ask her to reschedule his dialysis appointment. Moore did not
22 question these requests. It was not until October 22, 2005, the day after the
23 petition was filed, that Debtor had a seizure during dialysis that resulted in his
24 admission to the hospital. By October 23, 2005, Debtor was communicating with
25 Dr. Kelley. By October 23, 2005 Debtor was signing releases of information and
26 communicating with his physicians.

27 13. The petition documents had been prepared and signed days before the petition
28 was filed. There has already been a finding that Debtor intended to file his
bankruptcy petition. The Trust has not established that Debtor was not able to

1 comprehend his actions during the time the petition documents were prepared. To
2 the contrary, it appears Debtor was actively working and participating in social
3 engagements up until the petition date.

4 14. A party cannot create an issue of fact by providing a declaration that contradicts
5 her prior testimony. *Kennedy v. Allied Mutual Insurance Co.*, 952 F.2d 262, 266
6 (9th Cir. 1991); *Radobenko v. Automated Equipment Corp.*, 520 F.2d 540, 544 (9th
7 Cir. 1975) (sham issues should not subject a defendant to the burden of trial).

8 15. Moore and Dr. Kelley both signed declarations in 2006 stating that Debtor was
9 “not cognitively impaired” and “rational.” Their story changed once the Trustee
10 began to pursue Moore. Dr. Kelley could have had access to the Mayo medical
11 records when she prepared her April 2006 declaration.

12 16. Dr. Kelley would not have discussed entering rehab with Debtor on October 23,
13 2005 if he was incapacitated. She would have discussed it with Moore, Debtor’s
14 medical power of attorney, who regularly attended Debtor’s doctor appointments
15 and communicated with Debtor’s doctors. Dr. Kelley and Moore had a history of
16 working together and communicating with each other with respect to Debtor’s
17 medical care. By November 4, 2005, Debtor was able to provide his own medical
18 history to doctors.

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17. Moore was very familiar with Debtor, his medical conditions and drug use. She had been his medical power of attorney since October 2004. Moore knew that Debtor's doctors had encouraged him to stop his drug use. If Moore believed that Debtor was incapacitated, she would not have contested the conservatorship proceedings in California and Arizona because Debtor would have needed some form of protection.
18. The later assertions of Debtor's incapacity by Moore and Dr. Kelley should be disregarded in favor of their earlier declarations.
19. The Trust has failed to meet its burden and has failed to overcome the rebuttable presumption of capacity. Debtor was not incapacitated on the petition date, October 21, 2005.

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Date: February 4, 2014



Gregg W. Zive
United States Bankruptcy Judge