per order dated 4/29/20
The clerk's motion to strike the reply is granted except as to portion of the reply that addresses the request for attorney fees.

98013-6

CASE NO. 78696-2-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

Indira Rai-Choudhury,
Petitioner,

v.

Stephanie Inslee, in her official capacity as personal representative of the Estate of Margaret Rai-Choudhury,
Respondent.

REPLY IN SUPPORT OF PETITION FOR REVIEW TO THE WASHINGTON STATE SUPREME COURT

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I. INTRODUCTION

Appellant Indira Rai-Choudhury presented admissible evidence to the trial court in opposition to the Estate' motion for summary judgment on the claim that her mother, Margaret Rai-Choudhury, was under an insane delusion that affected the dispositions set forth in her Last Will and Testament.[1] Indira presented evidence similar to evidence that the Washington Supreme Court recognized as relevant and probative of whether a person was under a insane delusion affecting the disposition in that person's last will and testament.[2] Indira also satisfied the requirements for a CR 56 (f) continuance that the trial court improperly denied. The trial court failed to recognize the relevance of facts regarding Margaret both before and after the execution of her will.

II. REPLY TO STATEMENT O FACTS

The following addresses a couple of factual inaccuracies in the Estate's response.

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[1] As a matter of clarity first names will be used because a number of individuals share the same surname. No disrespect is intended or implied.

[2] *In re Estate of Miller*, 10 Wn.2d 258, 267, 116 P.2d 526 (1941) and *In re Estate of Gwinn*, 36 Wn.2d 583, 219 P.2d 591 (1950). In both *Miller* and *Gwinn*, a parent changed their will to disinherit a child. In *Miller*, the Supreme Court found the parent's gifting supported by facts. In *Gwinn*, the Supreme Court held that a will was invalid because the parent's views of his child were not supported by evidence and contrary to historical relations.

The Estate stated that "In her dissolution, Margaret was awarded substantial assets." (Response, p. 5.) This is incorrect.

Margaret settled her dissolution action with her husband Prosenjit Rai-Choudhury. (CP 216.) Gregory Kosanke, Margaret's divorce attorney, noted that Margaret's dissolution was unusual due to her late age. Despite Margaret's complaints to Mr. Kosanke that Prosenjit was controlling and abusive, Mr. Kosanke testified that the dissolution was negotiated without any significant difficulty. (CP 211, 505, 514, 516.) Margaret's allegations against Prosenjit, such as those against Indira, had no factual support.

The Estate stated: "Margaret provided Tuttle with substantial reasons for not wanting anything to go to Indira." (Response, p. 7.) The Estate cited to CP 131-132, Mr. Tuttle's declaration.

Other than conclusory statements such as "she disclosed substantial information," and "Margaret provided me with substantial reasons why she did not want Indira inheriting anything from her Estate", Mr. Tuttle does not disclose any of the substantial information or substantial reasons in specificity. What reasons for Margaret's estate plan that Mr. Tuttle did provide at his deposition, such as Margaret's brothers having gone to the University of British Columbia as the reason to gift to UBC, were false and imagined. (CP 568.)

III. REPLY TO LEGAL ARGUMENTS

A. A Presumption of Lucidity Can Be Challenged By Showing Margaret's Reasoning for her Estate Plan had no Basis in Fact

The Estate cited case law that it is presumed that a person has capacity at the time of the execution of a will if the will is rational on its face and done in legal form. *In re Bottger's Estate*, 14 Wn.2d 676, 685, 129 P.2d 518 (1942).

The Estate then cited to California case law for the proposition that "even when the testator has an agreed mental disorder, there can be lucid periods." (Response, p. 14.) The Estate quoted from *Andersen v. Hunt*, 196 Cal. App. 4th 722, 727, 126 Cal. Rptr. 3d 736 (Cal. App. 2011) as follows:

> "[I]t is presumed that [her] will has been made during a time of lucidity . . . Thus a finding of lack of testamentary capacity can be supported only if the presumption of execution during a lucid period is overcome."

The quoted text without the above editing reads:

> "It must be remembered, in this connection, that '[w]hen one has a mental disorder in which there are lucid period, it is presumed that his will has been made during a time of lucidity.' (*Estate of Goetz* (1967) 253 Cal.App.2d 107, 1114 [61 Cal. Rptr. 181].) . . . Thus a finding of lack of testamentary capacity can be supported only if the presumption of execution during a lucid period is overcome."

The citation to California case law is unnecessary and misleading. This state's courts have already addressed circumstances in which a person suspected of having a mental disorder executed a will. The Court of Appeals previously

looked at the issue of determining the validity will of a person claimed to have insane delusion. The Court of Appeals held:

> "A prejudice or dislike that a testator might have for a relative is not ground for setting aside a will **unless the prejudiced and dislike cannot be explained on any other ground that that of an insane delusion**."

In re Trust & Estate of Melter, 167 Wn. App. 285, 312, 273 P.3d 991 (2012) (bold added).

The Washington Supreme Court expounded upon the relevance of the lack of evidence to support views and opinions that the testator relied upon in the execution of a last will and testament:

> "Mrs. Klein had resided with her daughter, and there had been a strong bond of affection between them. While eating a pudding served in dish made of thin opalescent glass, she discovered a small piece of glass which had broken off and lodged in the pudding. Mrs. Klein became suspicious that an attempt had been made to poison her. The idea grew in her mind and became an obsession. Its intensity increased. She made many accusations to various people that her daughter and son-in-law were attempting to kill or poison her. **The total absence of any rational foundation for such an idea in view of the affectionate relationship, its progressive development, and the effect it had upon the mental processes of Mrs. Klein, prompted the trial judge and this court on appeal to conclude that the will made by her was the product of insane delusion.** The will was unnatural in that the testatrix left the sum of one dollar to her daughter, her only child, and the remainder of her restate, except two hundred dollars, she gave to the church of which she was a member."

In re Estate of O'Neil, 35 Wash.2d 325, 334-335, 212 P.2d 823 (1949) (bold added), analyzing, *In re Estate of Klein*, 28 Wash.2d 456, 183 P.2d 518 (1947).

Indira is not required on summary judgment to satisfy the clear, cogent and convincing standard to challenge a will; that is reserved for trial. Indira must simply present a *prima facie* case with clear, cogent and convincing evidence that would overcome the presumed validity. *Tiger Oil Corp. v. Yakima County*, 158 Wn. App. 553, 562-563, 242 P.3d 936 (2010). This means that in response to a motion for summary judgment, Indira must present evidence of sufficient circumstances to support a logical and reasonable inference of the fact sought to be proved. *Thomson v. Jane Doe*, 189 Wn. App. 45, fn. 9, 356 P.3d 727 (2015).

It is not the purpose of summary judgment to cut short a party's claim when relevant discovery remains incomplete.

> "Summary judgment procedure ... is a liberal measure, liberally designed for arriving at the truth. Its purpose is not to cut litigants off from their right of trial by jury if they really have evidence which they will offer on a trial, it is to carefully test this out, in advance of trial by inquiring and determining whether such evidence exists."
>
> *Id.* (quoting *Whitaker v. Coleman*, 115 F.2d 305, 307 (5th Cir. 1940)); *see also Barber*, 81 Wn.2d at 144 ("The object and function of summary judgment procedure is to avoid a useless trial. **A trial is not**

> **useless, but is absolutely necessary where there is a genuine issue as to any material fact.**"); *Babcock v. State*, 116 Wn.2d 596, 599, 809 P.2d 143 (1991) ("Summary judgment exists to examine the sufficiency of legal claims and narrow issues, **not as an unfair substitute for trial.**").

Keck v. Collins, 181 Wash. App. 67, 87, 325 P.3d 306 (2014) (bold added).

The trial court should have granted Indira's CR 56 (f) motion for continuance because the Estate cited to a declaration from Linda Borland, a beneficiary of Margaret's Last Will and Testament, in support of Margaret's capacity and reasoning for Margaret's estate planning. Indira had identified, among others, the deposition of Linda Borland as additional relevant discovery that Indira should be able to complete before the trial court rules on the Estate's summary judgment motion. The trial court nevertheless denied Indira's request to depose Ms. Borland even though the Estate had submitted the declaration of Linda Borland in support of its motion for summary judgment. (CP 611.)

B. RCW 5.60.030 Excludes Testimony of Transaction With the Decedent and Statements Made by Decedent; It is Not a Complete Bar of All Testimony Concerning to Decedent

The Estate argued in its response:

> "Indira attempts to provide, through Indira, evidence on how much her mother loved her. Not only is it irrelevant, it is inadmissible through Indira."

(Response, p. 16.)

The Estate cites to RCW 5.60.030 for legal support for this proposition. With a broad brush the Estate quotes the statute and argues that all testimony by Indira regarding or related to Margaret is inadmissible. This is incorrect.

Testimony regarding the witness's acts is admissible. *Richards v. Pacific Nat'l Bank,* 10 Wn. App. 542, 519 P.2d 272 (1974). A party to an action against the estate may testify to the mental condition of the deceased. *In re Anderson's Estate,* 114 Wn. 591, 195 P. 994 (1921). A party may testify to her impressions, previously unexpressed to decedent, so long as the testimony does not reveal a statement made by the decedent or relate to a transaction with him. *Aetna Life Ins. Co. v. Boober*, 56 Wn. App. 567, 784 P.2d 186 (1990). This would apply to Indira's views and impressions of her mother's sudden alienation from her mother. Testimony of a representative as to transactions waives right to preclude adversary from giving her version – the door is open. *Johnston v. Medina Improv. Club, Inc.*, 10 Wn.2d 44, 116 P.2d 272 (1941). The statute does not prevent the introduction of documentary evidence, such as cards. *Thor v. McDearmid*, 63 Wn. App. 193, 817 P.2d 1380 (1991).

Indira's affidavits set forth: acts that she undertook; her impression and view of her relationship with her mother; the cards and calls over the years; Indira's understanding of her mother's views and feelings regarding her grandchildren; Indira's understanding of her mother's distrust of Prosenjit; and

testimony to rebut statements made by Margaret presented by the Estate. All the listed testimony is not barred by RCW 5.60.030.

C. Substantial Admissible Evidence Existed to Create a Genuine Issue of Material Fact

The Estate argued in its response:

> "Whether Margaret's love for, or concerns about Indira, were justified provides no basis to undo Margaret's testamentary plan."

(Response, p. 15.)

The Estate's argument is a reflection of the Court of Appeals' erroneous reasoning:

> "Given that the evidence would not shed light on Margaret's medical state or her beliefs regarding her will at the time she executed it, the court's determination was reasonable."

Rai-Choudhury v. Inslee, 10 Wn. App.2d 1048, 6, Not Reported (Div. I, 2019).

This reasoning is in direct conflict with prior Supreme Court holdings.

> "The capacity of a person to make a will must be determined as of the time it is made, but evidence bearing upon the mental condition of a testator **prior and subsequent** to the making of his will is relevant."

In re Estate of Gwinn, 36 Wn.2d 583, 587, 219 P.2d 591 (1950) (bold added).

> "In the determination of the question what is unjust or unnatural [in a will], the history of the testator's family is to be considered and the moral equities and obligations appearing therefrom." **A will is unnatural when it is contrary to what the testator, from his known views, feelings, and intentions would have been expected to make**."

In re Estate of Miller, 10 Wn.2d 258, 267, 116 P.2d 526 (1941) (bold added).

Indira submitted her own declarations; the declarations of her father; and the declaration of Jim Dodds to show that her mother's estate plan was inconsistent with Margaret's known view, feeling and opinions. Indira also submitted medical records that were properly attested to by the custodian of those records. Indira presented at least a *prima facie* case with clear, cogent and convincing evidence.

D. The Estate's Request for Attorneys' Fees and Expenses Should Be Denied

The Estate seeks attorneys' fees and expenses pursuant to RAP 18.1 and RAP 18.9 (a) for Indira filing a frivolous appeal. The Estate's request for attorneys' fees and expenses is in itself frivolous and meant to create unnecessary work. Indira has presented valid legal and factual arguments as to why the trial court and Court of Appeals orders were in error.

The Estate's request for attorneys' fees and expenses should be denied.

IV. CONCLUSION

It is clear that the Court of Appeals decision is based on reasoning contrary to existing case law established by the Washington Supreme Court. The Court of Appeals looked only to the time of Margaret's execution of her Last Will and Testament to determine whether evidence existed of an insane delusion. Instead of taking all reasonable inferences in Indira's favor, the trial court, as did the Court of Appeals, weighed the evidence presented to determine

the prevailing party. This was untenable and unreasonable given that it was a motion for summary judgment, no trial date had been set, and discovery had just commenced in earnest. The Court of Appeals should not have affirmed the trial court's ruling. The confirmation of the trial court's ruling was based on the application of incorrect law.

In any event, the Court of Appeals should have reversed the trial court's denial of Indira's motion for a CR 56 (f) continuance. The trial court's decision that the sought after evidence of Margaret's known view and feelings about Indira was irrelevant was contrary to existing law. It is patently unfair when a party is denied the ability to depose a witness whose declaration the opposing party relies. Indira should be permitted to continue her discovery as relevant evidences exists.

Dated this 28th day of February, 2020

Respectfully submitted,

AIKEN, ST. LOUIS & SILJEG, P.S.

By: _____
Christopher C. Lee, WSBA #26516
Attorneys for Petitioner

CERTIFICATE OF SERVICE

I certify, under penalty of perjury under the laws of the State of Washington, that on the date noted below, I sent in the manner indicated below, copies of: Reply in Support of Petition for Discretionary Review to the Washington State Supreme Court; and this Certificate of Service to:

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	Via U.S. Mail, Postage Prepaid
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Print Name: Jannavie Pienh
Date: February 28, 2020

APPENDIX

Andersen v. Hunt

Court of Appeal of California, Second Appellate District, Division Four

June 14, 2011, Filed

B221077

Reporter
196 Cal. App. 4th 722 *; 126 Cal. Rptr. 3d 736 **; 2011 Cal. App. LEXIS 732 ***

STEPHEN ANDERSEN et al., Plaintiffs and Respondents, v. PAULINE HUNT, Individually and as Trustee, etc., Defendant and Appellant.

Prior History: **[***1]** APPEAL from a judgment of the Superior Court of Los Angeles County, No. BP099392, Kenji Machida, Judge.

Notice: CERTIFIED FOR PARTIAL PUBLICATION*

Disposition: Affirmed in part; reversed in part.

Subsequent History: Rehearing denied by *Andersen v. Hunt, 2011 Cal. App. LEXIS 933 (Cal. App. 2d Dist., July 6, 2011)*

Review denied by *Andersen (Stephen) v. Hunt (Pauline), 2011 Cal. LEXIS 8834 (Cal., Aug. 24, 2011)*

Decision reached on appeal by *Andersen v. Hunt (In re Andersen Family Trust), 2015 Cal. App. Unpub. LEXIS 8635 (Cal. App. 2d Dist., Dec. 1, 2015)*

Related proceeding at, Magistrate's recommendation at *Profita v. Andersen, 2018 U.S. Dist. LEXIS 149397 (C.D. Cal., Aug. 8, 2018)*

Decision reached on appeal by, Costs and fees proceeding at *In re Andersen Family Trust (Andersen v. Hunt), 2019 Cal. App. Unpub. LEXIS 3871 (Cal. App. 2d Dist., June 5, 2019)*

Sanctions disallowed by, Decision reached on appeal by *Profita v. Andersen, 2019 Cal. App. Unpub. LEXIS 7937 (Cal. App. 2d Dist., Nov. 26, 2019)*

Core Terms

execute, deficit, testamentary capacity, the will, mental function, appreciate, decisions, sections, probate, contractual, evaluated, percent, lack testamentary capacity, make a decision, lack capacity

Case Summary

Procedural Posture
Plaintiffs brought an action to invalidate trust amendments executed by a decedent and recover funds placed in joint tenancy accounts held by the decedent and defendant. The Los Angeles County Superior Court, California, found that the decedent lacked testamentary capacity to execute the trust amendment and that defendant exerted undue influence with respect to the trust amendments and transfers. Defendant appealed.

Overview

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

After suffering a stroke, the decedent amended his trust to leave a 60 percent portion of his estate to defendant, who was the decedent's long-term romantic partner. Plaintiffs were the children of the decedent. While the original trust document was complex, the trust amendments were not. None of the contested amendments did more than provide the percentages of the trust estate the decedent wished each beneficiary to receive. In view of the trust amendments' simplicity and testamentary nature, the court concluded that they were indistinguishable from a will or codicil and, thus, the decedent's capacity to execute the amendments should have been evaluated pursuant to the standard of testamentary capacity set out in *Prob. Code, § 6100.5*. The trial court erred in evaluating the decedent's capacity to execute the trust amendments by the standard of contractual capacity set out in *Prob. Code, §§ 810 to 812*.

Outcome

That part of the judgment invalidating the trust amendments was reversed, but the judgment was affirmed in all other respects.

LexisNexis® Headnotes

Estate, Gift & Trust Law > ... > Will Contests > Testamentary Capacity > Tests for Testamentary Capacity

HN1 **Testamentary Capacity, Tests for Testamentary Capacity**

Prob. Code, § 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; or (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.

Estate, Gift & Trust Law > ... > Will Contests > Testamentary Capacity > Tests for Testamentary Capacity

HN2 **Testamentary Capacity, Tests for Testamentary Capacity**

Ability to transact important business, or even ordinary business, is not the legal standard of testamentary capacity. 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 or she is doing, to understand and recollect the nature and situation of his or her property and to remember, and understand his or her relations to, the persons who have claims upon the testator's bounty and whose interests are affected by the provisions of the instrument. It is a question, therefore, of the testator's mental state in relation to a specific event, the making of a will.

Estate, Gift & Trust Law > ... > Will Contests > Testamentary Capacity > Evidence

HN3 **Testamentary Capacity, Evidence**

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, Gift & Trust Law > ... > Will Contests > Testamentary Capacity > Evidence

Family Law > Guardians > General Overview

HN4 **Testamentary Capacity, Evidence**

The mere fact that the testator is under a guardianship will not support a finding of lack of testamentary

capacity without evidence that the incompetence continues at the time of the will's execution.

Estate, Gift & Trust Law > ... > Will Contests > Testamentary Capacity > Evidence

Estate, Gift & Trust Law > ... > Testamentary Capacity > Evidence > Presumption of Capacity

HN5 **Testamentary Capacity, Evidence**

When one has a mental disorder in which there are lucid periods, it is presumed that the person's will has been made during a time of lucidity. Thus, a finding of lack of testamentary capacity can be supported only if the presumption of execution during a lucid period is overcome.

Estate, Gift & Trust Law > ... > Testamentary Capacity > Evidence > Presumption of Capacity

Evidence > Inferences & Presumptions > Presumptions > Rebuttal of Presumptions

HN6 **Evidence, Presumption of Capacity**

See *Prob. Code, § 810*.

Estate, Gift & Trust Law > ... > Will Contests > Testamentary Capacity > Evidence

HN7 **Testamentary Capacity, Evidence**

See *Prob. Code, § 811*.

Estate, Gift & Trust Law > ... > Will Contests > Testamentary Capacity > Tests for Testamentary Capacity

HN8 **Testamentary Capacity, Tests for Testamentary Capacity**

See *Prob. Code, § 812*.

Governments > Courts > Judicial Precedent

HN9 **Courts, Judicial Precedent**

The 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. Cases are not authority for propositions not considered.

Estate, Gift & Trust Law > ... > Will Contests > Testamentary Capacity > Evidence

Estate, Gift & Trust Law > ... > Will Contests > Testamentary Capacity > Tests for Testamentary Capacity

HN10 **Testamentary Capacity, Evidence**

Prob. Code, § 811, subd. (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. *Prob. Code, § 811, subd. (b)*, states 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. *Prob. Code, § 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. Accordingly, *§§ 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.

Estate, Gift & Trust Law > ... > Will Contests > Testamentary Capacity > Tests for Testamentary Capacity

HN11 **Testamentary Capacity, Tests for Testamentary Capacity**

Regarding whether a trustor had capacity to execute a trust amendment that, in its content and complexity, closely resembles a will or codicil, it is appropriate to look to Prob. Code, § 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. Prob. Code, § 811, subd. (b). In other words, while § 6100.5 is not directly applicable to determine competency to make or amend a trust, it is made applicable through § 811 to trusts or trust amendments that are analogous to wills or codicils.

Headnotes/Summary

Summary

CALIFORNIA OFFICIAL REPORTS SUMMARY

After suffering a stroke, decedent amended his trust to leave 60 percent of his estate to defendant, who was decedent's long-term romantic partner. Plaintiffs, the children of decedent, brought an action to invalidate trust amendments executed by decedent and recover funds placed in joint tenancy accounts held by decedent and defendant. The probate court found that decedent lacked testamentary capacity to execute the trust amendment and that defendant exerted undue influence with respect to the trust amendments and transfers. (Superior Court of Los Angeles County, No. BP099392, Kenji Machida, Judge.)

The Court of Appeal reversed the part of the judgment invalidating the trust amendments, but affirmed the judgment in all other respects. While the original trust document was complex, the trust amendments were not. None of the contested amendments did more than provide the percentages of the trust estate decedent wished each beneficiary to receive. In view of the trust amendments' simplicity and testamentary nature, the court concluded that they were indistinguishable from a will or codicil and, thus, decedent's capacity to execute the amendments should have been evaluated pursuant to the standard of testamentary capacity set out in Prob. Code, § 6100.5. The trial court erred in evaluating decedent's capacity to execute the trust amendments by the standard of contractual capacity set out in Prob. Code, §§ 810–812. (Opinion by Suzukawa, J., with Epstein, P. J., and Manella, J., concurring.) **[*723]**

Headnotes

CALIFORNIA OFFICIAL REPORTS HEADNOTES

CA(1)[] **(1)**

Wills § 5—Testamentary Capacity—Standard.

Ability to transact important business, or even ordinary business, is not the legal standard of testamentary capacity. Rather, testamentary capacity involves the question of whether, at the time the will is made, the testator has sufficient mental capacity to understand the nature of the act he or she is doing, to understand and recollect the nature and situation of his or her property and to remember, and understand his or her relations to, the persons who have claims upon the testator's bounty and whose interests are affected by the provisions of the instrument. It is a question, therefore, of the testator's mental state in relation to a specific event, the making of a will.

CA(2)[] **(2)**

Wills § 5—Testamentary Capacity—Old Age.

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.

CA(3)[] **(3)**

Wills § 5—Testamentary Capacity—Guardianship.

The mere fact that the testator is under a guardianship will not support a finding of lack of testamentary capacity without evidence that the incompetence continues at the time of the will's execution.

CA(4)[] **(4)**

Wills § 5—Testamentary Capacity—Presumption of Lucidity.

When one has a mental disorder in which there are lucid periods, it is presumed that the person's will has been made during a time of lucidity. Thus, a finding of lack of testamentary capacity can be supported only if the

presumption of execution during a lucid period is overcome.

CA(5)[] **(5)**

Wills § 5—Contractual Capacity—Standard—Evidence.

Prob. Code, § 811, subd. (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. *Prob. Code, § 811, subd. (b)*, states 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 **[*724]** decision in question. *Prob. Code, § 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. Accordingly, *§§ 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.

CA(6)[] **(6)**

Wills § 5—Capacity to Execute Trust Amendment—Content and Complexity—Will or Codicil.

Regarding whether a trustor had capacity to execute a trust amendment that, in its content and complexity, closely resembles a will or codicil, it is appropriate to look to *Prob. Code, § 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. *Prob. Code, § 811, subd. (b)*. In other words, while *§ 6100.5* is not directly applicable to determine competency to make or amend a trust, it is made applicable through *§ 811* to trusts or trust amendments that are analogous to wills or codicils. Thus, in a case in which a decedent amended his trust to leave 60 percent of his estate to his long-term romantic partner, the probate court erred when it evaluated the decedent's capacity to execute trust amendments by the general standard of capacity set out in *Prob. Code, §§ 810 to 812*, instead of the standard of testamentary capacity set out in *§ 6100.5*.

[*Cal. Forms of Pleading and Practice (2011) ch. 444, Probate: Will Contests, § 444.13*; 14 Witkin, Summary of Cal. Law (10th ed. 2005) Wills and Probate, §§ 9, 121.]

Counsel: Law Offices of Marc B. Hankin, Marc B. Hankin; 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.

Judges: Opinion by Suzukawa, J., with Epstein, P. J., and Manella, J., concurring.

Opinion by: Suzukawa **[*725]**

Opinion

[737] SUZUKAWA, J.—**

INTRODUCTION

Plaintiffs and respondents Stephen Andersen (Stephen) and Kathleen Brandt **[**738]** (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

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

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 **[***2]** 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 **[***3]** of 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.
[*726]

STATEMENT OF FACTS AND OF THE CASE* [NOT CERTIFIED FOR PUBLICATION] **[***4]**

DISCUSSION

I., II.* [NOT CERTIFIED FOR PUBLICATION]

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. **[***5]** For the following reasons, we agree.

[739]** A. *Testamentary Capacity*

HN1[↑] *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 **[*727]** individual's devising property in a way which, except for the existence of the delusions or hallucinations, the individual would not have done." (*§ 6100.5, subd. (a)*.)

CA(1)[↑] **(1)** " 'It is thoroughly established by a series of

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

* See footnote, *ante*, page 722.

* See footnote, *ante*, page 722.

decisions that: HN2[↑] "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 [107 P.2d 25[])] ... .' (Estate of Powers (1947) 81 Cal.App.2d 480, 483–484 [184 P.2d 319]; **[***6]** Estate of Mann (1986) 184 Cal.App.3d 593, 605 [229 Cal.Rptr. 225].) Rather, testamentary capacity involves the question of 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 [251 P. 778]; 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 [265 Cal.Rptr. 1].)

CA(2)[↑] **(2)** "It is well established that HN3[↑] '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 [48 Cal.Rptr. 656], citing Estate of Sanderson (1959) 171 Cal.App.2d 651, 660 [341 P.2d 358] and Estate of Lingenfelter (1952) 38 Cal.2d 571, 581 [241 P.2d 990].) **[***7]** '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 [190 P.2d 277].) CA(3)[↑] **(3)** HN4[↑] Nor does the mere fact that the testator is under a guardianship support a finding of lack of testamentary capacity without evidence that the incompetence continues at the time of the will's execution. (Estate of Nelson (1964) 227 Cal.App.2d 42 [38 Cal.Rptr. 459]; Estate of Wochos (1972) 23 Cal.App.3d 47 [99 Cal.Rptr. 782].)

CA(4)[↑] **(4)** "It must be remembered, in this connection, that HN5[↑] '[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 [61 Cal.Rptr. 181].) ... 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 **[**740]** Mann, supra, 184 Cal.App.3d at pp. 603–604.) **[*728]**

B. *Capacity Generally*

Sections 810 to 813 set out the standard for capacity to make various kinds of decisions, **[***8]** transact business, and enter contracts. Section 810 provides:

HN6[↑] "(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:

HN7[↑] "(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, **[***9]** 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.
[*729]

"(3) Thought processes. Deficits in these functions may be demonstrated by the presence of the following: [¶] (A) Severely disorganized thinking. [¶] (B) Hallucinations. **[***10]** [¶] (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 **[**741]** 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: ***HN8***[↑] "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 **[***11]** 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 [32 Cal.Rptr.2d 419]*, 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 (1963) 218 Cal.App.2d 527, 541 [32 Cal.Rptr. 856]*, cited by Stephen and **[*730]** Kathleen, the court applied a higher standard to evaluate capacity **[***12]** 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 [279 P.2d 61]* ["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 [95 Cal.Rptr.2d 198, 997 P.2d 511]* [***HN9***[↑] "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 [92 Cal.Rptr.3d 595, 205 P.3d 1047]* [" ' "[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 **[***13]** appear to be correct that Wayne's capacity must be evaluated under *sections 810 to 812*, not *section 6100.5*.

CA(5)[↑] **(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, ***HN10***[↑] *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 **[**742]** 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 **[***14]** 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.
[*731]

CA(6)[↑] **(6)** **HN11**[↑] 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, **[***15]** 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, **[***16]** 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*[*] [NOT CERTIFIED FOR PUBLICATION]

IV., V.[*] [NOT CERTIFIED FOR PUBLICATION] **[*732]**

DISPOSITION

The part of the judgment invalidating the trust amendments is reversed, and the probate court is directed to enter a new and different judgment affirming the validity of the trust amendments. In all **[**743]** other respects, the judgment is affirmed. The parties are to bear their own costs on appeal.

Epstein, P. J., and Manella, J., concurred.

A petition for a rehearing was denied July 6, 2011, and respondents' petition for review by the Supreme Court was denied August 24, 2011, S195035.

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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.

[*] See footnote, *ante*, page 722.

[*] See footnote, *ante*, page 722.

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