SUPERIOR COURT OF CALIFORNIA

COUNTY OF SANTA CLARA

In the Matter of: THE JANICE E. HUGILL AND WILLIAM B. HUGILL DECLARATION OF TRUST dated August 13, 1990, as Amended and Restated.	**Case Number: 1-12-PR-170606** **FINAL STATEMENT OF DECISION**

On March 27, 28, 29, and 30, 2017, and April 3, and 4, 2017, the Court tried petitioner, Edward Bennett Gregg's Petition to Determine Validity of June 25, 2008, Trust Amendment under Probate Code Section 17200 filed May 18, 2012.

Petitioner, Edward Bennett Gregg ("Bennett") was represented by Kenneth Kossoff, Esq., and Michael Hugill ("Michael"), the trustee of the Janice E. Hugill and William B. Hugill Trust dated August 13, 1990, as amended and restated, was represented by Michael G. Desmarais, Esq. Respondents, Marjorie Montgomery and Patrick Hugill, were represented by Craig A. Hansen, Esq.

Having considered all of the evidence, the credibility of the witnesses, and pre trial briefs and proposed statements of decision, the Court issued its Proposed Statement of Decision on May 5, 2017 pursuant to code of Civil Procedure section 632 and California Rules of Court, Rule 3.1590. Thereafter Petitioner Bennett filed his Objections to the

Proposed Statement of Decision on May 26, 2017 pursuant to California Rules of Court, Rule 3.1590(g). To the extent that this Statement of Decision has not elaborated upon certain arguments and/or objections raised by Bennett, they have been reviewed and considered prior to the issuance of this Decision.

The court saw, heard, and read the video-taped and transcribed depositions and trial testimony of William Porter, A. Martin Lybrand, Tracie McGowan, Mark J. McGown, Alfred Shen, M.D., David S. Wilgard, M.D., Michael Hugill, Jonathan Mueller, M.D., Edward Bennett Gregory, Holly Hugill, Ernest I. Sussman, James Missett, and William Lynch. At least 153 exhibits were received into evidence and carefully considered by the court.

No final arguments were heard, and this matter was deemed submitted on May 1, 2017.

Following the submission of this matter, the court reviewed its own extensive notes taken during the trial. The court also carefully reviewed all of the evidence, the pleadings and filings, and all legal memoranda, briefs, and points and authorities submitted by the parties.

The totality of the credible testimony and the writings presented at trial support the court's findings and conclusions. When differing inferences can be drawn from the evidence, the court, as a fact finder, has found most credible those inferences which support the court's determinations. The court has carefully considered the many factors provided for in the Evidence Code and in case law, with particular reference to, but not limited to, Evidence Code section 780, in evaluating the credibility and believability of the evidence.

In making its decision, the court resolves all credibility issues in favor of its findings and determinations. Any specific findings or determinations necessary or appropriate to validate and make fully effective this court's judgment are deemed made.

The Court now makes its findings and enters its statement of decision.

William B. Hugill ("William") was born in 1917. During World War II, he served in the United States Army Air Corps in England. After the war, William continued to serve,

attaining the rank of full colonel, a rank he held for the last 50 years of his life.

In 1945, William married Suzanne Rousselle. In 1947, the couple had a son, Patrick William Hugill ("Patrick"), born in Brussels, Belgium. In 1951, William and Suzanne dissolved their marriage.

In 1952, William married Marion Hedmark. In 1953 William and Marion had a son, Michael, born at Chateauroux Air Force Base in France. Two years later, William and Marion had a daughter, Holly Louise Hugill ("Holly"), born after William was transferred to Manston, England. And two years after that, William and Marion had another daughter, Marjorie M. Montgomery ("Marjorie"), born at Langley Air Force Base in Hampton Roads, Virginia.

In 1967, William and Marion dissolved their marriage.

In 1978, William married Janice E. Hugill ("Janice"), to whom he remained married until her death in 1996.

William and Janice executed a Trust, which provided that, upon the death of the first of them, the trustee would divide the trust estate into two separate trusts: (1) Trust A, the Decedent's Trust, which would include property representing a specified share of the decedent's interest in his or her separate estate and one-half of the community estate; and (2) Trust B, the Survivor's Trust, which would include all remaining property in the trust estate.

The Trust further provided that, upon the death of the second of William and Janice to die, Trust A and Trust B would both terminate, and 30 percent of the residue of the trust estate would be distributed outright, in equal shares, to William's four children Michael, Patrick, Marjorie, and Holly-with the remaining 70 percent to be held in a Grandchildren's Subtrust for the benefit of William's six grandchildren, in equal shares: Cameron and Kathleen, Michael's children; Bennett, Forrest, and Brandi, Holly's children; and Ryan, Marjorie's son.

In 1996, Janice died. Pursuant to the terms of the Trust, William divided the Trust estate property into Trust A and Trust B, as described above. The Trust provided that Trust A was unamendable and irrevocable but that Trust B was amendable and revocable.

During the remaining 15 years of his life, William would amend Trust B nine times.

In 1997, William executed the "First Amendment to Declaration of Trust." This instrument amended Trust B to set aside $900,000 of the trust estate to fund the Grandchildren's Subtrust upon William's death and to provide that, upon his death, the residue of the trust estate would be distributed outright to his four children as follows: 35 percent to Holly, 30 percent to Patrick, 30 percent to Marjorie, and 5 percent to Michael.

In 1998, William executed the "Second Amendment to Declaration of Trust" and then the "Third Amendment to Declaration of Trust." Neither amended Trust B in any material way.

In 2000, William executed the "Declaration and Restatement of Trust in Entirety." This instrument amended Trust B by increasing Patrick's share of the residue of the trust estate from 30 percent to 35 percent, eliminated Michael's 5 percent share, and left Holly's 35 percent and Marjorie's 30 percent shares unchanged. It also amended Trust B to name a new, seventh grandchild, Noelle Montgomery, Marjorie's daughter, as a beneficiary of the Grandchildren's Subtrust.

In 2001, William executed the "Amendment of Trust First Amendment to Restatement in Entirety of Trust 'B.'" This instrument amended Trust B to remove Michael's children, Cameron and Kathleen, as beneficiaries of the Grandchildren's Subtrust. But in 2002, William executed the "Amendment of Trust Second Amendment to Restatement in Entirety of Trust "B,'" and restored Cameron and Kathleen as beneficiaries of the Grandchildren's Subtrust.

Three years later, in 2005, William executed the "Amendment of Trust Third Amendment to Restatement in Entirety of Trust 'B.'" This instrument amended Trust B to again remove Cameron as a beneficiary of the Grandchildren's Subtrust. Later in 2005, William executed the "Amendment of Trust Fourth Amendment to Restatement in Entirety of Trust 'B.'" This instrument did not amend Trust B in any material way.

Later in 2005, Michael and his wife Laurie separated, and in due course, dissolved their marriage. William had not liked Laurie and had let Michael know it. By 2006, with

Laurie no longer in the picture, William and Michael had begun to reconcile. A. Martin Lybrand, William's estate planning attorney, stated in notes he kept dating back to 2006 that "Michael (disinherited) and father (Bill) got together last week and are trying to reconcile their differences." Later, at a deposition, Lybrand confirmed the accuracy of his notes.

In 2007, William visited Marjorie for a week and told her he was going to amend Trust B to restore Michael as a beneficiary of the residue of the trust estate. In March 2008, William called Michael and told him he was going to amend Trust B to make everything equal again. William asked Michael to serve as executor of his estate; Michael agreed. William told Michael he would make the necessary changes with his attorney.

On June 5, 2008, William executed the final amendment to Trust B, entitled the "Amendment of Trust Second [sic] Amendment to Restatement in Entirety of Trust 'B'" ("2008 Amendment"). This amendment restored Michael as a beneficiary of the residue of the trust estate and provided for the distribution of that residue in equal shares to William's four children. William also restored Cameron as a beneficiary of the Grandchildren's Subtrust, thereby making all seven grandchildren beneficiaries of that trust in equal shares. This amendment also appointed Michael as the successor trustee.

Around May 15, 2008, William, then 90 but still living independently, fell out of bed at his home in Rancho Mirage in Riverside County, and suffered a subdural hematoma or blood clot. Four days later, William was admitted to Eisenhower Medical Center (EMC) in Rancho Mirage.

On May 21, 2008, Michael received a call from EMC and was told about William's fall. Before leaving for the hospital, Michael called Holly, Bennett's mother, and asked her to meet him there. Michael drove directly to the hospital from his home in San Jose. Upon his arrival later that day, Michael found William conscious and Holly already there. On that day, EMC records noted: "Normal psychiatric evaluation in this elderly male [i.e., William]. Normal interpersonal interactions[,] appears functionally intact and deals appropriate[ly] with others." "Alert and oriented with normal mental status."

Michael talked with William about how William felt. William told Michael to call

Lybrand, his estate planning attorney, and make sure William's estate planning documents were amended to make everything equal.

Michael called Lybrand, who was in Los Angeles, and told him that William was in the hospital and would undergo surgery and that William had asked Michael to contact Lybrand about his trust. Lybrand then spoke with William and found him unintelligible. Lybrand told Michael that, because he (Lybrand) was in the midst of trial, he could assist William only if he first received "certification form [sic] a licensed physician" that William "had the mental capacity to understand what" Michael "was proposing to do." Lybrand suggested that Michael contact a local estate planning attorney. Tracie McGowan, a hospital social worker ("Social Worker McGowan"), gave Michael the names of several estate planning attorneys, including Mark McGowan, her then husband ("Attorney McGowan").

On May 22, 2008, while William was awaiting the following day's surgery, Michael called Attorney McGowan. At his request, Michael retrieved estate planning documents from William's house across the street from EMC and went to McGowan's office. Michael met with McGowan, gave him the documents he had retrieved, and told McGowan that William had told him (Michael) that William wanted to change his trust to make everything equal again and wanted Michael to serve as executor. McGowan later spoke with Lybrand.

That afternoon, Attorney McGowan went to EMC. McGowan spoke with William alone about William's children, his relationship with them, and his assets. In response to McGowan's questions, William responded he wanted (1) to amend Trust B distribute the residue of the trust estate equally to all of his children and to distribute the portion of the trust estate allocated to the Grandchildren's Subtrust (which was $900,000) equally to all his grandchildren; (2) Michael to be in charge; and (3) Holly to have a house William held with her in joint tenancy. McGowan later confirmed in a deposition that William so responded on each of these points and did so clearly.

Having concluded that William had testamentary capacity and was free from undue influence, Attorney McGowan drafted estate planning documents in accordance with William's request.

That evening, Attorney McGowan returned to the hospital with the estate planning documents he had drafted. By that time, however, William's condition had worsened.

Social Worker McGowan told Michael, that such documents should not be "completed at the bedside of a critically ill Patient." According to her, one reason was the "obvious conflict of interest," while another was that William had been "intermittently confused and unable to communicate." (William had exhibited forgetfulness, confusion, and inability to follow commands and answer questions; and on one occasion, when asked where he was, William apparently answered, "The moon."

Michael told Social Worker McGowan that William "may not make it through surgery." She reiterated that such documents should not be "completed at bedside, particularly in this situation." Later, at her deposition, Social Worker McGowan later clarified that "it wasn't my practice to have anyone sign any legal documentation at Critical Care Unit" and that "it may not be in the patient's best interest to sign this document right now." She added that Michael "was very agreeable," "[h]e was not pushy to me at all," "[h]e just-he agreed and was amicable." She also added that William "was clear... that that he wanted Michael to be his DPOA"—i.e., to hold his durable power of attorney—"for that hospitalization." She denied that William "had already been put under duress to sign the legal documents that had been prepared for his signature": "I didn't get that sense. The family was very cooperative. Mr. Hugill, William at the time was not-didn't seem to be in any conflict or-with Michael. It was amicable. [,] And Michael and-they were there. You know, they were there every day. And they did appear, in my estimation to be very caring."

Attorney McGowan spoke with a nurse and was told that William "was not awake, alert and oriented." When McGowan asked William who the President of the United States was, William "was unable to provide [an] answer." As a result, McGowan told Michael and Holly that "it would not be prudent to complete any documentation until [William] is able to be clear, and fully expressive"; Michael and Holly responded that they "understood." With Michael's agreement, McGowan decided not to proceed with executing the documents.

Hospital records reveal, however, that some hours later, Holly, not Michael, called a

nurse, who wrote that Holly was "upset that legal work was not signed by [William] prior to surgery," and was told that he was "not able" to do so.

On May 23, 2008, William's blood clot was successfully removed in surgery. That day, Attorney McGowan wrote on a cover memorandum to the amended estate planning documents he had drafted that "[t]he enclosed documents are provided as evidence of work, and are not authorized or endorsed by attorney for current execution, having not witnessed [William] Hugill in a state of capacity at time of presentation yesterday evening. No document should be signed without first obtaining at least one doctor's note, preferably two, confirming Mr. Hugill's lucidity, capacity and competency to execute legal documentation."

At his deposition, McGowan testified that he did not address the cover memorandum to William. McGowan testified that William, as the trustor, did not need to obtain a certificate of his competency before he decided to sign anything. McGowan said that William, as "Trustor," was "certainly entitled to decide to not need such a thing in signing that or any other document."

On May 25, 2008, according to EMC records, William was "awake, alert and oriented times person, place, month and year," "follows commands," and "has some expressive aphasia," i.e., inability to speak fluently.

On May 28, 2008, Social Worker McGowan made a report to Adult Protective Services (APS) because she (1) believed that Michael and Holly had been "attempting to make [William] sign...legal documents to amend [his] will and trust" and have been "very insistent on obtaining their father's signature"; (2) believed that Michael "drew up" the documents in question; (3) believed that the documents would take William's "two other children," Patrick and Marjorie, "out of the will"; (4) believed that Michael "had" William "sign blank checks written to...Michael's children, [William's] grandchildren"; (5) believed that Holly said that William "told everyone that he wanted to put Michael (son) back in the will"; (6) believed that Michael and Holly said that William was "worth millions," and that they "hope that he wakes up long enough to sign the documents, before he goes"; and (7) believed (correctly) that Holly "believes that her brother Michael will 'care take of her if he

gets the money.'"

Nothing, however, came of Social Worker McGowan's report. As she later testified in deposition, "it's not usual for me to file a report"; "all you need to file a report is, you know, possible suspicion"; "[t]hat's always a red flag" "when someone's trying to change legal documentation, trust documents at the bedside." At her deposition, Holly testified that the impetus for that change came from William, not Michael: "I told Tracie McGowan that my father wanted Mike back in the will."

On June 2, 2008, William was discharged from EMC and admitted to the acute rehabilitation unit at Desert Regional Medical Center (DRMC) in Palm Springs. At that time, as noted in the EMC discharge summary, William "required minimal assistance for memory" or "supervision with problem solving," and was "modified independent for social interaction" and "in stable condition."

On June 3, 2008, according to David Wilgarde, M.D., a DRMC physician, William was "awake and alert" and was "fluent" in "speech," even though he had "some difficulty" with stating the "day, date, and year" and with "naming," and was unable to identify "which city he lives in." According to Dr. Wilgarde's contemporaneous notes, William was a "good candidate for the acute rehabilitation unit" because he suffered from "multiple medical problems" associated with his advanced age, had "significant expressive aphasia" associated with the blood clot, and "lives by himself." At his deposition, Dr. Wilgarde later admitted he did not perform any cognitive assessment of William and did not know what "testamentary capacity" meant. According to another unidentified DRMC physician's contemporaneous notes, William was "confused and unable to give any good [medical] history," exhibited "[a]ltered mental status with decreased cognitive functions at this time," and was "unclear" whether he "may have some baseline dementia."

On June 4, 2008, Dr. Wilgarde observed William "working with the occupational therapist" at DRMC and "having difficulty identifying the proper technique to don his shirt." That same day, when Michael was visiting William at DRMC, William asked him if all the paperwork had been taken care of to amend his estate planning documents. Michael told

William that it had, but that it still required his signature and notarization. William told Michael: "Let's get this thing done."

Bennett's own exhibits, including the Desert Regional Medical Center records for June 4, 2008, from "7 p.m. to 7 a.m." and the Desert Regional Medical Center records for June 5, 2008, from "7 a.m. to 7 p.m.", state the following:

> "Neuro
> Orientation / Awareness: Alert and Oriented X3
> Speech: Speech is Clear
> Behavior: Cooperative."
> (Exhibit 42, page 4619; Exhibit 50, page 4626)

At trial, Holly herself testified that William was competent to sign a Will appointing Michael as his executor.

On June 5, 2008, William executed the 2008 Amendment at DRMC. Four persons were present: a notary; William Porter, William's best friend; another friend; and Michael. In drafting the 2008 Amendment, Attorney McGowan mistakenly entitled it the "*Second* Amendment to Restatement in Entirety of Trust 'B'" (in fact, it was the *fifth* such amendment). In executing the 2008 Amendment, William himself discovered and corrected McGowan's typographical error in the spelling of Janice's surname, striking out the second "g" in "Huggill."

Also on June 5, 2008, William executed the "First Codicil to Last Will and Testament of William B. Hugill" (First Codicil). (William had executed the "Last Will and Testament of William B. Hugill" (the Will) itself in 2000). The next day, William executed the "Second Codicil to Last Will and Testament of William B. Hugill." The only difference between the two codicils was that the Second amended the Will to nominate Michael, Marjorie, Holly, and Patrick, in that order, to serve as his personal representative or executor-a clause McGowan had mistakenly omitted in the first codicil.

In the last week of June 2008, William was discharged from DRMC.

In the first week of August 2008, William flew, unaccompanied, from Los Angeles to Paris. There, he met Rose Marie Lamy, an old girlfriend from World War II, and traveled

with her in France for three weeks. They then flew to Ireland, where they traveled for a week, and then flew to France, visiting the Riviera.

In the first week of September 2008, William flew, again unaccompanied, back to Los Angeles. After Michael picked William up at the airport, they went out to dinner with Michael's son Cameron and Cameron's girlfriend. At dinner, William said he had a wonderful time; spoke about the Irish castles he had visited; complained that it had been cold and rainy in Ireland and that he could not climb the castle stairs as well as he could when he was young and before he had two artificial knees; and said he was happy to get back to the warmth of the Riviera.

In November 2008, William spent Thanksgiving with Michael, Marjorie, and Holly.

In December 2009, William resigned as trustee and Michael accepted and assumed the position of successor trustee. Bennett has never challenged this document, let alone filed a timely challenge to it.

Almost two years later, in November 2011, William died. In the almost three years that passed between William's execution of the 2008 Amendment and his death, William never again amended Trust B and never indicated he wished to do so.

In May 2012, Michael filed his first account and report as trustee in the Santa Clara Superior Court, sitting in probate. The trust estate amounted to almost $4.9 million. Since the Grandchildren's Subtrust consisted of the fixed sum of $900,000, the residue of the trust estate consisted of almost $4 million.

Bennett filed this Petition to Determine Validity of June 25, 2008 Trust Amendment under Probate Code Section 17200. In it, he, claimed that William had lacked testamentary capacity and that Michael had unduly influenced William and had committed elder abuse.

Bennett made these allegations even though: (1) Bennett admitted that William "didn't really discuss it [i.e., his trust] with me too much"; (2) Bennett claimed that the last time he spoke with William about his trust was around 2002, when Bennett was 18-i.e. more than six years before William amended his trust in 2008 and more than nine years before William died in 2011; (3) Bennett admitted that he did not visit William in May 2008 while

William was in the hospital, before he executed the 2008 Amendment; (4) Bennett admitted that he did not visit William in June 2008 while William was in the rehabilitation facility where he executed the 2008 Amendment; (5) Bennett never read the hospital records nor the rehabilitation records attached to his petition; (6) Although Bennett claimed he saw William at Thanksgiving 2008, he did not speak with him about his trust; (7) Bennett never saw William at any time during the last three years of his life; and (8) While Bennett claimed he spoke with William by phone around 2010, he admitted it was for "only a few minutes" and he did not speak to him about his trust.

In June 2012, Michael filed an objection to Bennett's section 17200 petition. Michael denied Bennett's allegations of lack of testamentary capacity, undue influence, and elder abuse.

In July 2013, Patrick and Marjorie, represented by their own counsel, filed an objection of their own to Bennett's section 17200 petition. They, too, denied Bennett's allegations of lack of testamentary capacity, undue influence, and elder abuse.

Petitions for an order declaring a trust or trust amendment to be void, like will contests and other types of estate litigation, are tried in conformity with the rules of practice in civil actions, except to the extent that the Probate Code provides applicable rules (Prob. Code §1000). The petitioner or contestant has the burden of proof on the issues of lack of testamentary capacity and undue influence (See Prob. Code 8252(a)).

Testamentary capacity is always presumed to exist until the contrary is established. The ultimate consideration is the settlor's or testator's mental state at the time of the testamentary act, not what it might have been before or after that (Estate of Fritschi (1963) 60 Cal.2d 367, 372; accord: Rice v. Clark (2002) 28 Cal.4th 89, 96; American Trust Co. v. Dixon (1938) 26 Cal.App.2d 426, 431 (trust)).

Bennett has the burden to prove by a preponderance of the evidence that at the time of the execution of the last amendment to Trust B, William was incompetent. (Estate of Fritschi, supra; Estate of Goetz (1967) 253 Cal.App.2d 107). The standards applicable to

testamentary capacity for a will also govern William's capacity to execute the 2008 Amendment to Trust B. (Andersen v. Hunt (2011) 196 Cal.App.4th 722, 731).

In Andersen v. Hunt, the court of appeal held that the same testamentary capacity standards apply in determining the capacity to exercise a will or codicil or trust amendments. In that case, the trial court found that the settlor lacked capacity to execute the trust amendments according to the higher standard for evaluating capacity applicable to contracts. The court of appeal reversed the trial court's judgment and directed it to enter a new and different judgment affirming the validity of the trust amendments. The court of appeal said:

> "In the present case, while the original trust document is complex, the amendments are not. Indeed, none of the contested amendments does more than provide the percentages of the trust estate Wayne wished each beneficiary to receive . . .
>
> 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."

Marriage of Greenway (2013) 217 Cal.App.4th 628, 639-642, recently summarized the standards for determining testamentary capacity:

> "[M]ental capacity can be measured on a sliding scale, with marital capacity requiring the least amount of capacity, followed by testamentary capacity, and on the high end of the scale is the mental capacity required to enter contracts. The burden of proof on mental capacity changes depending on the issue; there is a presumption in favor of the person seeking to marry or devise a will, but not so in the context of a person executing a contract.
>
> The basic starting point for any mental capacity determination is Due Process in Competence Determinations Act found in Probate Code section 810 to 813, 1801, 1881, 3201, and 3204 (the Act). In 1995, the Legislature created the Act to clarify the legal capacity of a person who has a mental or physical disorder. The Act expressly states it broadly covers the capacity of such persons to perform all types of actions,

"including, but not limited to", contacting, conveying, executing wills and trusts, marrying, and making medical decisions. (Prob. Code, §810, subd. (b).) "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." (Prob. Code, §811.) Moreover, the Act declares there "exists 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." (Prob. Code, §810, subd. (a), italics added.)

[U]nder this statutory scheme, incompetency due to an "unsound mind" cannot be based on the diagnosis of a medical or physical disorder, and it is not enough to identify a few mental deficits. There must be a causal link between the impaired mental function and the issue or action in question. Moreover, in considering the causal link, courts should also consider "the frequency, severity, and duration of periods of impairment." (Prob. Code, §811, subd. (c).)

Whereas Probate Code section 811 defines "unsound mind" deficit criteria, Probate Code section 812 provides additional criteria to be considered when deciding whether a person lacks "capacity to make decisions." . . .

Simply stated, the required level of understanding depends entirely on the complexity of the decision being made. There is a large body of case authority reflecting an extremely low level of mental capacity needed before making the decision to marry or execute a will. . . .

[T]he standard for testamentary capacity is exceptionally low. Probate Code section 6100.5, lists criteria stating an individual is not mentally competent to make a will if unable to understand the nature of the testamentary act, understand and recollect the nature of his or her assets, or remember and understand his or her relationship to family members, friends, and those whose interests are affected by the will. Prob. Code, § 6100.5, subd. (a)(1).) In addition, an individual lacks mental competence if he or she suffers from a mental disorder with symptoms such as delusions or hallucinations that cause him or her to devise property in a way the individual "would not have done." (Prob. Code, § 6100.5, subd. (a)(2).) Interestingly, this seemingly clearly written statutory authority has been interpreted by the courts to create a very low standard for testamentary capacity. As noted by Lyle's counsel, it is well settled, "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, supra,* 84 Cal.App.2d at p. 49, 190 P.2d 277.) Indeed, even hallucinations and delusions do not demonstrate lack of capacity if they are not related to the testamentary act. (Estate of Perkins (1925) 195 Cal. 699, 704, 235 P. 45; see also *Estate of Fritschi* (1963) 60 Cal.2d 367, 372, 33 Cal.Rptr. 264, 384 P.2d 656 [testator in hospital with fatal cancer, physically weak, disturbed and under heavy dosage of drugs possessed testamentary capacity].) . . .

The general rule remains that testamentary incapacity because of unsound mind is either (1) insanity of such broad character as to establish mental incapacity generally or (2) a more specific and narrower form under which the testator is a victim of a hallucination or delusion that directly affected his acts (Estate of Lingenfelter (1952) 38 Cal.2d 571). Mere proof of mental derangement is not sufficient to invalidate the testamentary act. The petitioner is required to prove either such complete mental deterioration as to denote utter incapacity to know and understand those things that the law prescribes as essential to performing the act or the existence of a specific insane delusion that affected the act (Estate of Wynne (1966) 239 Cal.App.2d 369).

Moreover, testamentary incapacity must be shown to exist at the moment the disputed instrument is signed. (Estate of Fritschi, supra; Estate of Fosselman (1957) 48 Cal.2d 179.) And when the testator has a mental disorder in which there are illucid periods, it is presumed that the act was done during a time of lucidity (Estate of Goetz, supra).

Furthermore, the mental disorder must be shown to have directly affected the testamentary act. (Estate of McDonough (1926) 200 Cal. 57). Thus, in Estate of Llewellyn (1948) 83 Cal.App.2d 534, the 78-year-old decedent was admitted to the hospital where he remained continually until his death. While at the hospital, he was under the care of three special nurses, each working an eight hour shift, and was treated by three physicians. Following a jury trial, the court entered judgment in favor of the contestant based on a special verdict finding mental incapacity and undue influence. Ruling that the contestant did not prove that the testator's "alleged infirmities of mind or body" caused him to "bequeath his property in a manner that he otherwise would not have done," the court of appeal reversed and remanded with directions to enter judgment admitting the will to probate. (Id.

at p. 555.)

Bennett was not able to rebut the presumption that William had testamentary capacity. First, there is no hint that William was afflicted with insanity of such broad character as to establish mental incompetency generally. Both before and after the 2008 Amendment, William lived independently, with the exception of the first few weeks after he was discharged from Desert Regional Medical Center. Notably, between the first week of August 2008 and the first week of September 2008, William flew, unaccompanied, on a round-trip flight from Los Angeles to Paris; he traveled in France for three weeks with his World War II girlfriend; then traveled in Ireland for one week with her, visiting castles and climbing castle steps; and then traveled to the Riviera.

The Court finds the testimony of William Porter, William's neighbor and golf buddy to be very persuasive. Porter testified that William was strong willed and stubborn. Porter had been to see William on June 5th and 6th and found him intelligible and able to talk about golf scores. He witnessed William signing document and saw nothing unusual.

Also significant was the fact that William had modified his trust on numerous occasions. This is important because it is a strong indication that William was familiar with the process that occurred on June 5th. It also suggests that if William was dissatisfied with the documents signed on June 5th, he could easily have had them changed yet again. There was no evidence that William was dissatisfied and if fact told Porter that he was pleased with the help that Michael was providing to him with bookkeeping.

The fact that William was able to travel to Europe one month after his hospitalization indicates that he was able to return to the life of a fairly vibrant 90 year old. He met with Michael upon his return evidencing no dissatisfaction with the amended trust.

Second, there is no hint that "at the very time" he executed the 2008 Amendment, William suffered from any specific and narrower form of "insanity" resulting in some hallucination or delusion that caused him to execute the 2008 Amendment.

Bennett nevertheless claims that in the days immediately before and after May 23, 2008 removal of William's blood clot, William was intermittently unable to think or

communicate and that on June 5, 2008, William (1) executed the 2008 Amendment even though Attorney McGowan had mistakenly entitled it the "*Second* Amendment to Restatement in Entirety of Trust 'B'" instead of the "*Fifth* Amendment"; (2) executed the First Codicil to the Will even though Attorney McGowan had mistakenly omitted the sole intended substantive clause nominating Michael as personal representative or executor; (3) apparently did not "recognize" an unidentified physician who had seen him "about two to three months back" who said William exhibited "significant cognitive decline"; and (4) did not have a physician "certify" his "capacity."

The things do not prove that William lacked testamentary capacity when he signed the amendment and codicil on June 5, 2008. William's condition in the days immediately before and after May 23, 2008 is immaterial. What mattered was his condition two weeks later, on June 5, 2008, when he executed the 2008 Amendment. And William's condition on that date did not suggest the requisite "insanity." Indeed, in executing that amendment, William corrected attorney McGowan's typographical error in the spelling of his deceased wife Janice's surname, striking out the second "g" in "Huggill."

It is also irrelevant that William did not recognize the unidentified physician who had seen him months earlier and that the physician believed William showed "significant cognitive decline." At most, this suggested old age, forgetfulness, failure to recognize acquaintances, absent-mindedness, and mental confusion on William's part, which were legally insufficient to prove lack of capacity. And that no physician "certified" William's capacity is irrelevant since he did not need any such "certification": he is *presumed* to have testamentary capacity, not to lack it.

None of the evidence that Bennett introduced, including the testimony of his own experts, shows that at the time of the execution of the trust amendment, William's alleged cognitive impairments were so debilitating that he could not remember his issue, recollect his property, and understand that he wanted to treat his children and grandchildren equally. The Court did not find the evidence submitted by Plaintiff's experts Misset and Lynch to be helpful. None of the evidence that Bennett introduced shows that any cognitive impairment

suffered by William caused him to devise his estate equally to all of his children and grandchildren, instead of disinheriting his son Michael and his grandson Cameron.

Bennett also has to carry the burden of proving that Michael unduly influenced William. (See Marriage of Burkle (2006) 139 Cal.App.4th 712, 736 (party alleging undue influence bears the burden to prove agreement's invalidity)). The law of undue influence regarding trusts is the same as the law of undue influence regarding wills. (Rice v. Clark, supra, at 96). As with testamentary capacity, Michael is presumed to not to have undue influenced William. (See Estate of Lingenfelter, supra, at 586-87 (courts "must refuse" to find undue influence without requisite proof)). To rebut the presumption, Bennett must show more than merely that Michael had an "'opportunity to influence [William's] mind..., even coupled with an interest or motive to do so.'" (Estate of Fritschi, supra, at 373-74). Instead, Bennett has to prove that Michael brought "pressure... to bear directly on [William's] testamentary act"-William's execution of the 2008 Amendment-"sufficient to overcome [his] free will, amounting in effect to coercion destroying [his] free agency." (Rice v. Clark, supra, at 96).

A strong showing and "clear" proof is required that one was acting under the undue influence of another." (Estate of Fritschi, supra; Accord: Rice v. Clark, supra, at 96; Estate of Ventura (1963) 217 Cal.App.2d 50). That proof requires evidence of both a certain kind of activity on the beneficiary's part and that the activity in effect destroyed the settlor's or testator's free agency and substituted another person's will for his own. (Estate of Ventura, supra). The evidence must show that pressure was brought to bear directly on the testamentary act (Estate of Bryson (1923) 191 Cal. 521)—that is, that the undue influence overpowered the settlor's or testator's mind and destroyed his volition at the time the act was done (Estate of Fritschi, supra; accord: Rice v. Clark, supra, at 96). The mere opportunity to influence the settlor or testator, even when the beneficiary had an interest or motive to do so, is not sufficient (Estate of Lingenfelter, supra).

Furthermore, influence gained by kindness and affection that induces the settlor or testator to make an unjust disposition of property in favor of those who contributed to her

comfort and took care of her wants is not undue influence as a matter of law. Undue influence requires proof that the influence amounted to wrongful imposition or fraud. (Estate of Bould (1955) 135 Cal.App.2d 260.)

Circumstantial evidence cannot invalidate a bequest unless it is inconsistent with the absence of undue influence. It is not sufficient merely to prove circumstances consistent with the exercise of undue influence; the circumstances proved must be inconsistent with the testator's voluntary action (Estate of Peters (1970) 9 Cal.App.3d 916).

The indicia of undue influence are:

(1) Provisions of the document are unnatural;

(2) Dispositions in the document are at variance with the decedent's intentions, expressed both before and after its execution;

(3) Relations existing between the chief beneficiaries and the decedent afforded the beneficiaries an opportunity to control the testamentary act;

(4) The decedent's mental and physical condition was such as to permit a subversion of the decedent's freedom of will; and

(5) The chief beneficiaries were active in procuring the instrument to be executed (Estate of Callahan (1967) 67 Cal.2d 609).

The evidence does not even hint that Michael pressured William, let alone pressured him to the extent the pressure amounted to coercion that overcame William's free will. Bennett focuses on what Social Worker McGowan took to be Michael's "insistence" that William sign the documents Attorney McGowan drafted, but he overlooks that, according to Social Worker McGowan, it was Bennett's own mother, Holly, who was "insistent" that William sign the documents before his surgery. Moreover, neither Holly's nor anyone else's claimed pressure caused William to sign anything before his surgery.

Moreover, the fact that William's trust amendment devised his estate equally to all of his children and his grandchildren—a "natural" disposition—weighs strongly against any conclusion that Michael unduly influenced William to sign his trust amendment. Bennett not only ignores that fact—and the fact that William himself expressed the desire to make

"everything equal" for all of his children and grandchildren—but also ignores that all the conduct he relies on occurred almost two weeks before William executed the 2008 Amendment at his own insistence.

Bennett was unable to raise a presumption of undue influence—i.e., prove all of the following: that (1) William and Michael had a "confidential relationship"; (2) Michael engaged in "activity" in procuring the 2008 Amendment; and (3) Michael "unduly profited" as a result. (Estate of Goetz, supra, at 115-16).

It is not sufficient to show merely that Michael procured the attorney or other professional who prepared the document, accompanied William to his office or was present in the professional's office, procured witnesses, or was present during the giving of instructions for the document's execution (Estate of Fritschi, supra at 376; accord: Rice v. Clark, supra, at 96; Estate of Bould, supra at 275-276). Again, there is not even a hint of evidence that Michael engaged in any "activity" in procuring William's execution of the 2008 Amendment.

The undue benefit or profit element cannot be satisfied merely by proof that a beneficiary takes substantially more under the will than he or she would take without the will. In Estate of Sarabia (1990) 221 Cal.App.3d 599, 607, the Court of Appeal rejected a quantitative approach to undue benefit and held that a qualitative assessment of the relationships between the decedent, the contestant, and the beneficiary is necessary, as well as the decedent's prior expressions of intent.

Here, William devised the residue of his estate equally to all four of his children and his Grandchildren's Subtrust equally to all seven of his grandchildren. By no stretch does the evidence show that the amendment "unduly profited" any of them.

It is true that before executing the 2008 Amendment, William had deleted Michael and Cameron as beneficiaries. William, however, left no doubt that he did this only because of his antipathy to Laurie, Michael's wife and Cameron's mother. By the time of the 2008 Amendment, Michael and Laurie had separated and Laurie had petitioned to dissolve their marriage. By that time, William no longer had any reason to treat Michael and Cameron

differently than his other children and grandchildren.

Under such circumstances, William's inclusion of Michael and Cameron as equal beneficiaries with his other children and grandchildren was not unnatural, and their inclusion did not "unduly benefit" either of them. (Estate of Goetz, supra, at 117-118 (natural disposition of property inconsistent with undue profit)).

Even if Bennett had standing to sue anyone for elder abuse, he did not prove that William was the victim of Michael's elder abuse.

Welfare and Institutions Code section 15657.3(d) extends standing to file an elder abuse suit to the personal representative or the residuary beneficiary of the estate or their successors. (Estate of Lowrie (2004) 118 Cal.App.4th 220). Bennett is none of these. To the contrary, the next person in order that has standing to sue Michael for elder abuse is Marjorie, the named successor personal representative of William's estate. As set forth above, Marjorie opposes Bennett's petition.

Even if Bennett had standing, Bennett did not prove that Michael committed elder abuse because Michael did not take William's property while he lacked capacity nor unduly influenced him to give him his property. (Welf & Inst. Code §15610.30). Social worker McGowan's report to APS amounted to nothing because there was nothing to back it up. As McGowan testified, Michael was very caring.

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ORDER

The court, therefore, orders judgment to be entered as follows:

1. Edward Bennett Gregg's Petition to Determine Validity of June 25, 2008, Trust Amendment under Probate Code Section 17200 file May 18, 2012, is DENIED.

2. Costs of suit are awarded to Michael Hugill, the trustee of the Janice E. Hugill and William B. Hugill Trust dated August 13, 1990, as amended and restated.

3. Petitioner's claim of elder abuse is DENIED because the Petitioner lacks standing pursuant to Welfare and Institutions Code Sec 15657.3(d).

Dated: JUN 13 2017

HON MARK H. PIERCE
JUDGE OF THE SUPERIOR COURT