SUPERIOR COURT OF CALIFORNIA

COUNTY OF MENDOCINO

Case No. SCUK CVPB-2017-26875

In the Matter of

THE MATTERN 2003 REVOCABLE TRUST AGREEMENT, AS AMENDED

Tentative Statement of Decision

Trial dates November 5-8 2018

CATHERINE JULE GOLDEN,

Petitioner

v.

JOHN R. MATTERN, and DOES 1-10 Inclusive

Respondents

_____/

The Petition of Catherine Julie Golden ("Julie") to Cancel the Third and Fourth Amendment to the Mattern 2003 Revocable Trust Agreement (the "Trust") was heard before the Court, in Department E, the Hon. Jeanine Nadel presiding, beginning on November 5, 2018. Michael G. Desmarais, Esq., of the Law Office of Michael G. Desmarais, and Steven P. Braccini, Esq., of Hopkins & Carley, appeared as counsel for Julie. Frank A. Cialone, Esq. and Roey Z. Rahmil, of Shartsis Friese, appeared as counsel for Respondent John R. Mattern ("John").

On November 8, 2018, the Parties completed the presentation of evidence and presented closing arguments. At the conclusion of closing argument on November 8, 2018, both parties requested a Statement of Decision. The Court directed counsel to present proposed Tentative Statements of Decision. The parties were to submit proposed Statements on or before December 14, 2018. The matter was deemed submitted as of December 14, 2018.

Having considered the oral and documentary evidence and the arguments of counsel, the Court now issues the following Tentative Statement of Decision. This Tentative Decision shall constitute the court's Statement of Decision subject to any party's objection pursuant to California Rules of Court 3.1590 (c), (g).

OVERVIEW

This is an action to cancel the Third and Fourth Amendments to the Trust. The principal change that the Third Amendment purported to accomplish was to allocate to John, ranch and vineyard property located at 2250 and 2300 Twining Road, Ukiah, California, APNs 182-170-04 and 11, and 2401 Tindall Road, Ukiah, California, APN 182-170-23, upon the death of Richard Mattern ("Richard"), who as of this writing is still living. (Ex. 5, Art. 11, B.) The principal change that the Fourth Amendment to the Trust purported to accomplish was to appoint John as Co-Trustee of the Trust with Richard. (Ex. 6, Art. 4, § 4.2.)

On September 1, 2017, Julie filed the Petition to Cancel the Third and Fourth Amendments to the Trust (the "Petition") on the ground that John procured those amendments through undue influence and that Richard executed those amendments at a time when he lacked testamentary capacity.

On September 14, 2017, John filed an Objection to Julie's Petition in which he asserted ostensible defenses to it, as well as a Cross-Petition to Surcharge Julie for alleged breaches of fiduciary duty as a trustee of the Trust ("Cross-Petition"). On October 6, 2017, Caron Schmierer ("Caron") was appointed as the temporary trustee of the Trust. On November 9, 2017, dismissed his Cross-Petition.

Between November 5, 2018 and November 7, 2018, during her case-in-chief, Julie called and examined the following five witnesses: John; Myrna Oglesby, Esq.; Jonathan Mueller, M.D.; Donna Gradek; and Jill Mattern. Between November 7, 2018 and November 8, 2018, John called and examined the following seven witnesses: Andy Mattern; Shari Brown; Jerry Beebe; Caron Schmierer; Floyd Ericson; Ernie Wipf; and Elliott Stein, M.D. The Court admitted the following 161 exhibits into evidence: Julie's Exhibit Nos. 1-12; 14-19; 21; 23-26; 28-29; 31-32; 34; 36-38; 40; 44-47; 49; 51-66; 69-74; 76; 79-87; 89-91; 96; 98-109; 114-122; 126-136; 138-171 and John's Exhibit Nos. 202-203; 205; 206; 212-214; 218; 222-223; 226; 239; 242; 244; 246-247; 248-249; 251-254.

FACTUAL FINDINGS

The Court considered all the evidence, oral and documentary, and gave close attention to the counsel's written and oral submissions. The Court's determinations below resolve all credibility issues in favor of those determinations. Based on the evidence adduced at trial, the Court finds as follows:

BACKGROUND

1. The Mattern Family

Richard and Donna Mattern ("Donna") were husband and wife. (Ex. 1, p. 1.) Richard and Donna had three children: Julie, the oldest; Jill M. Mattern ("Jill"), the middle child, and John, the youngest. (Reporter's Transcript ("RT"), Julie, 617:6-15.)

Julie obtained a Master's in Business Administration and worked for IBM for ten years. (RT, Julie

620:15-22.) Since 1997, she has managed Golden Vineyards, Golden Cellars (a winery business), and Golden Real Estate. (RT, Julie, 621:10-15.)

On November 11, 1995, Julie married Joseph Golden ("Joe"). (RT, Julie, 617:16-19.) Julie and Joe have four children: Connor, Ryan, Kaili, and Liya. (RT, Julie, 617:20-23.)

Jill obtained a Masters in Clinical Psychology and an MD; she also was board-certified in obstetrics and gynecology until she relinquished her licenses as a result of criminal conduct involving her drug addiction. (RT, Jill, 719:3-21.)

John obtained a Masters in music, and is a full time teacher in Larkspur, California. (RT, John, 53:2-4; 52:8-9.) In 1986, John married Inger Nyborg ("Inger"). (RT, John, 52:20-23; RT, Julie, 619:21-24.) John and Inger have three children: Tucker, Leif, and Shayne. (RT, Julie, 619:25-620:3.)

2. Richard and Donna's Property

Mattern Vineyards today consists of ultra-premium wine grape properties on Tindall Ranch Road and Twining Road in Mendocino County, as well as wine grape property on State Street and leased wine grapes on Plant Road, also in Mendocino County. (See Ex. 163.)

In 1994, John and Inger assumed the loan on a house owned by Richard and Donna that had been occupied by their vineyard manager, George Wood, on Tindall Ranch Road. (See RT, John, 223:1-10.) The house was located on a 7-acre parcel which made up a portion of the 32-acre Tindall Ranch property of Mattern Vineyards. (See RT, John, 73:22-25.) In order to accomplish this transfer of real property Richard and Donna had to effectuate a lot line adjustment and separate a 130-foot-by-150-foot lot from the 7-acre parcel. (RT, John, 74:1-5.)

In 2011, Donna retained a broker, located a vineyard, and made the down payment on a 32-acre vineyard that John and Inger purchased. John and Inger took title this vineyard and named it Split Rock Ranch ("Split Rock"). (RT, John, 61:8-62:11.) Split Rock consists of approximately 32 acres of vineyard property. (RT, John, 62:23-25; see also Ex. 164.)

3. The Trust

On March 25, 2003, Richard and Donna created and executed the Mattern 2003 Revocable Trust Agreement (the "Trust"), naming both of them as Trustors. (Ex. 1.) Attorney Scott Carter drafted the Trust. (See Ex. 1, p. 39.) The Trust provided, in essence, that upon death of the first spouse, the corpus of the Trust would be allocated between three subtrusts: a Survivor's Trust, a Qualified Terminable Interest Property Trust ("QTIP Trust"), and a Family Trust. (*Id.*, § 7.6(1).)

The Trust limited the Survivor's Trust to include only the surviving spouse's one-half of the community property and his or her separate property. (*Id.*, § 7.6(2).) The Trust also specified that after the first spouse's death, the surviving spouse could neither amend nor revoke the QTIP Trust nor the Family Trust. (*Id.*, § 7.6(3) [deceased spouse's share shall be irrevocable and shall be administered and distributed in accordance with the provisions contained in ARTICLE 9 of the QTIP Trust and ARTICLES 10 and 11 of the Family Trust].)

The Trust stated that upon the death of the surviving spouse, Richard and Donna's children were to be appointed as co-trustees (Ex. 1, § 4.2) and that the Trust's entire corpus, including Mattern Vineyards, was to be divided equally among Richard and Donna's children (*Id.*, §§ 8.4, 9.3, 11.2). In February 2014, (approximately one month after Donna died), Richard executed a First Amendment to the Trust which appointed Julie alone as a co-trustee and confirmed his and Donna's devise of the Mattern Vineyards to all three children.

In March 2015, Richard executed a Second Amendment to the Trust which he allocated property located in Hawaii to Julie. (See Exs. 3, 4.) Richard's devise of the Mattern Vineyards to all three children remained unchanged for fourteen years—from the time Richard and Donna created the Trust in 2003 until Richard executed the Third and Fourth Amendments to the Trust in August 2017.

4. Donna's Death And Events Thereafter

On January 26, 2014, Donna passed away. (RT, Julie, 617:2-5.) On February 28, 2014, Richard executed a First Amendment to the Trust. Myrna Oglesby ("Myrna"), Richard's Ukiah attorney, drafted that Amendment. (Ex. 3; RT, Myrna, 330:9-17.) As noted, the First Amendment appointed Julie, as co-trustee with Richard. (Ex. 3, § 4.2.) Accordingly, from February 28, 2014 forward, the Trust was to be administered only by both Richard and Julie. Myrna knew this. (RT, Myrna, 332:69.) Donna and Richard's children were aware of the First Amendment at or around the time it was signed. (See, e.g., RT, John, 95:19-96:3.) In fact, John testified that even though he was not a co-trustee he *"gave up"* his *"trusteeship"* at the time the First Amendment was signed. (RT, John, 95:19-96:3.)

Also on February 28, 2014, Richard executed a General Power of Attorney (POA) appointing Julie as his attorney in fact. (Ex. 10.) The POA authorized Julie to act on Richard's behalf concerning all of his business matters and to *"pursue litigation on [Richard's] behalf concerning all rights and benefits to which [Richard] may be entitled...."* (Ex. 10, ¶ 4.) Myrna drafted this document as well. (RT, Myrna, 331:4-9.)

Approximately one year later, on March 5, 2015, Richard also executed an Advanced Health Care Directive naming Julie alone as Richard's agent and, should it become necessary, as conservator of his person and estate. (Ex. 9.)

From the date the First Amendment was signed forward, and given the reasonable inferences from Myrna's conduct and Julie's conduct in response, Myrna represented both Julie and Richard as co-trustees of the Trust. (See, e.g., *Kane, Kane & Kritzer Inc. v. Altagen* (1980) 107 Cal.App.3d 36, 40.) For example, not only were Richard and Julie, as co-trustees, required to act together (Prob. Code, §15620), but Myrna's and Julie's correspondence from this point forward confirms that Myrna was acting as Julie's attorney because Myrna provided, and Julie received, legal advice. (See, e.g., Exs. 21, 23, 24, 29, 32, 40 and 54). Also, Julie both prepared, and sometimes signed, the checks that paid Myrna's bills for legal services out of the Trust. (See, e.g., RT, Julie 644:10-12.)

Julie also assisted Richard with his paperwork, books, and bills. (RT, Julie, 625:17-626:4.) Myrna continued to assist Richard and Julie with the administration of the Trust. On August 21, 2014, Myrna wrote Julie a letter (and copied Richard), *stating "[w]e need to get to work on matters concerning your parents' properties and trust."* (Ex. 24.) Myrna stated she needed *"all appraisal detail completed as soon as possible."* (*Id.*) She noted that a federal estate tax return needed to

be prepared and filed by late October and that *"much information is still missing";* she also enclosed an inquiry from the probate referee indicating the *"additional information"* he needed to complete appraisals of specified properties, noted that she had prepared *"numerous documents"* requiring Richard's signature to bring title to properties forward to the trust that he and Donna had changed to community property and joint tenancy, asked whether he should contact Richard directly to sign them, and inquired which accountant Julie wished to use to prepare the federal estate return. She asked Julie to *"get to work on these details"* and set a time for them to meet. (*Id.*) From that point forward, Myrna communicated primarily with Julie in connection with the Trust's administration. (See, e.g., Exs. 24-26, 28-29, 31, and 32.)

On August 30, 2014, Julie emailed Myrna details that John didn't have on his grape map for Mattern Vineyards and gave Myrna the calculations for the average annual tonnage per ranch. (Ex. 26.) On September 2, 2014, Julie emailed Myrna sales information about vineyard crop production. (Ex. 28.) The same day, Myrna responded, asking for a breakdown as to which vines were on which parcel. (Ex. 29.) On September 13, 2014, Julie emailed Myrna the last pieces of information necessary for Myrna to *"process the estate tax package."* (Ex. 31.)

On March 5, 2015, Richard executed a Second Amendment to the Trust, which Myrna also prepared. (Ex. 4.) The Second Amendment again appointed Julie as the sole co-trustee with Richard; it also stated that if for any reason Richard ceased to act as trustee, Julie *"shall serve as sole Trustee of the Trust."* (*Id.*, § 4.2.)

The Second Amendment again confirmed that Mattern Vineyards was to be distributed to all three children in equal shares. (Ex. 4, Art. 11.) Again, Donna and Richard's children were aware of this amendment at or around the time it was signed, and thus were aware of, among other things, Julie's appointment as sole co-trustee, the creation of a special needs trust for Jill's benefit, and the devise of Donna's and Richard's Maui condominium to Julie as part of her equal share. (See, e.g., RT, Myrna, 454:9-456:19; see also Ex. 4.) At his deposition which was read at trial, John testified that he thought Julie influenced Richard to sign the Second Amendment because *"dad wouldn't have thought of doing that on his own."*(RT, John, 96:22-97:9.) The court found this testimony important as it infers that John, in 2015, had concerns that Richard was subject to undue influence from Julie.

In August 2015, Richard had bladder cancer surgery at UCSF. (RT, Julie, 626:8-20.) After the surgery, Richard not only began exhibiting memory loss, but also became *"disoriented"* and *"changed."* (*Id.*, see also RT, Julie, 626:21-25.) This was two years before the Third and Fourth Amendments would be prepared and signed.

After Donna's death, Myrna instructed Julie, as a co-trustee, to open two bank accounts. (RT, Julie, 632:23-633:4.) One account would be for Donna's share of the community property allocated to the Family Trust, while the other would be for Richard's share of the community property allocated to the Survivor's Trust. (*Id.*) Julie followed these instructions and, while she was at the bank, the bank called Myrna to ensure the accounts were set up as Myrna had instructed. (RT, Julie, 633:5-14.) The Family Trust account was titled in Richard and Julie's names as trustees. (RT, Julie, 633:8-11.) The Survivor's Trust account was titled in the name of Richard and Julie as joint tenants, because they are "nominees" as allowed under section 5.1(a) of the Trust. (Ex. 1, § 5.1(a) ["hold securities or other trust property in Trustee's name as Trustee hereunder, or in the name of a nominee...."]; RT, Julie, 714:16-22.)

In addition, a vineyard account was opened in the name of Mattern Vineyards. (RT, Julie, 633:15-

21.) Richard, Julie, John, and Inger were co-signatories, so all four of them could sign on that account. (*Id.*)

In 2016, John and Julie's ability to work together to manage Trust assets began to wane. A sampling of such events follows.

On August 3, 2016, Julie replied to John's email, by email, stating as follows:

> *I just received a call from a woman that opened MV new account and said that she made one mistake on the paperwork and we all had to sign a new card. I'm going to go into the bank and talk with the bank manager to get clarification. Myrna had dad sign paperwork to ensure the new MV account was named in his trust. Do not worry, nothing will go into probate.*

(Ex. 36.)

Five days later, John responded:

> *[O]k*
>
> *But What is the general partner thing? When did that happen. And what does it mean?*

(Ex. 37.)

That same day (Aug. 8, 2016), Julie wrote John back, stating:

> *It's only for that 'business' bank account that isn't a corporation or LLC and it was that way the first time and the second time you signed the paperwork:-) This will be the third time you have to sign the same signature card. Their rules seem odd to me too, but this is only to keep the assets from being frozen upon dad's passing. I am able to fit their requirements for a 'business account' because I execute dad's trust. that's all it means.*

(Ex. 38.)

In November 2016, Julie discovered that John was writing checks on the Mattern Vineyard account to purchase expensive farm equipment for Mattern Vineyard that he was also using on his own vineyard, Split Rock. (RT, John, 77:7-11, see also Ex. 43; see also RT, John, 242:4-22.) On December 7, 2016, Julie wrote Myrna, informing her she had transferred $450,000 from the vineyard account into Richard's Survivor's Trust account for *"safekeeping."* (*Id.*)

When Myrna received Julie's email, she mistakenly thought the Survivor's Trust joint account was not a Trust account; Myrna thus instructed Julie to move those funds to the other Trust account that held the assets allocated to Donna's Family Trust. (RT, Julie, 633:22-634:3.) Julie did so. (*Id.*) Myrna did this even though the Trust gave Richard and Julie the authority to open a Trust account in a nominee's name. (See Ex. 1, § 5.1(a) [trustee or successor trustees have the power to, among other things, "hold securities or other trust property in Trustee's name as Trustee hereunder, or in the name of a nominee...."].)

5. Events Leading to The Execution Of The Third And Fourth Amendments

There were many conflicts between Julie and John regarding the management of the Mattern Vineyards. Without addressing all of the emails demonstrating this fact, needless to say the relationship further deteriorated to the point where John began to discuss the Trust and Julie's involvement in managing trust assets with Myrna. It was at this point that John began requesting that Myrna meet with his father to add John as an additional co-trustee. On January 2, 2017 John sent an email to Myrna, complaining about Julie's supervision. (Ex. 47.) Incensed about Julie's concern that he was using the same employees to work on his ranch and their father's ranch, John stated:

> *There are many details for us to work out. I am not hard to work with. However, SHE IS. I am certain she is not emotionally stable and fit to work with. But I made the mistake of making her executor, so I guess I am stuck with her irritatingly impatient and unreasonable manner. [¶] I am not about to give up control of Mattern Vineyards. I have worked it my entire life and this is what Donna and Richard wanted.*
>
> *I want to meet with you one on one Wednesday. Not sure where it will lead. But I believe it imperative that you know about how exceedingly difficult she is to work with. I would like to know how I could be listed as co-executor with her regarding Dad's estate.*
> *[¶] ... [¶] Last item to discuss:*
>
> *My being added as co-executor for dad. I am concerned about Julie's unstable behavior.*

(*Id.*)
On January 6, 2017, John again wrote Myrna, stating he would not agree to one company being solely responsible for employees who worked on both ranches. (Ex. 52.) He concluded by stating about Julie that, *"I fear her anger and resentment toward me. She is NOT easy to work with at all. Inger and I are DONE being bullied by her."* (*Id.*)

Instead of talking to Julie about John's complaints however, that same day (Jan. 6, 2017), Myrna e-mailed John, telling him she "plan[ned] to send to Julie" a statement that *"John Mattern had been doing the necessary planning and scheduling regarding Mattern Vineyards for many years" and that she would recommend that John have "current cards—debit or credit—whichever is desired to facilitate payment of expenses as needed" as well as "checks ... for his use concerning vineyard expenses."* (Ex. 53.)

In her email, Myrna also stated she would recommend that *"all bookkeeping and recordkeeping shall be through Joy Ward's office ...."* (*Id.*) (Joy Ward is the accountant who prepared the estate tax return. (See, RT, Myrna, 450:23-451:1.)) Myrna suggested providing Julie with a budget and then requiring her *to "deposit $60,000 back into the Mattern Vineyards account to cover the estimated expenses for the first quarter of 2017."* (Ex. 53.) She also proposed doing the same for the following quarter. (*Id.*) Finally, Myrna proposed *that "[p]ayment of real property taxes,*

insurance premiums, and accounting costs [would be] made when billed from moneys transferred by Julie to Richard's account." (*Id.*) Myrna concluded by asking John to let her know what he thought. (*Id.*) After obtaining John's approval, Myrna wrote Julie accordingly. (Ex. 54.)

Soon after Myrna emailed Julie, John wrote Myrna again stating:

> *I am requesting to be co-executor with her concerning Dad's trust. I would like to not involve Dad if we don't have to at any length. If he needs to sign forms for this to happen, I'm sure he would.*

(Ex. 55.)

Myrna responded shortly thereafter, reminding John:

> *There is no executor—this would be if there was a court proceeding. There is a trust that holds all of the properties. The trustee is Richard, and he has appointed Julie as co-trustee.*
>
> *We would need to talk to him before making any changes to that.... [¶] If you[r] dad is here with us on Thursday I think I can get him to make clear that you are in charge of the vineyard. (Emphasis Added)*

(Ex. 56.)

That same day, John responded to Myrna, stating:

> *I left you a voicemail re/ Dad. Maybe just you, Julie and I should meet first?*
>
> *I'll go with your instincts on this. His short term memory is not great. But he knows Julie and I well enough to know what's going on. He knows she can be difficult (Emphasis Added)*
>
> *.... [¶] Maybe you go by and visit briefly with him first?...*

(Ex. 57 (italics added).)
Myrna responded, *"You decide whether you want Richard to be here too."* (Ex. 58.)
John replied:

> [O]k. *[¶] I say it should just be the three of us Thursday, and see where we can get. We can bring in Dad later if she is not willing to settle down.*

(Ex. 59.)
That same day, John emailed Myrna, concerned about why she had not arranged a meeting between him and Richard. (Ex. 64) In his email, John stated:

> *I have left 4 voicemails. Not sure why I can't through.*

Last we talked, it seemed like you would move with me on those issues we discussed. Has something changed?

(Ex. 64.)

Later that same morning, Myrna e-mailed John, stating:

I can make some time for you at 2 pm today, but only for about half an hour. Will this work?

In the meantime, have you talked to Richard about naming you as a Trustee?

As I advised you, he is the only one who can make changes concerning his trust.

(Ex. 65.)

Still later that same morning, John arranged a meeting with Myrna at which only John, Richard and Myrna would be present. John scheduled the meeting for August 2, 2017. On that date, while Jill was out of town, John drove to Richard's house and took him to meet with Myrna. (RT, John, 140:9-25; RT, Myrna, 373:21-23.) John, Richard and Myrna met in her office. (RT, John, 140:9-141:20). John again said he wanted to be a co-trustee because Julie was giving him a hard time and he was having difficulty working with her. (*Id*).

On August 2, 2017, John e-mailed Myrna, stating:

Myrna, I did not send this to Julie.

But please keep this in your records for important questions.

(Ex. 69.)

In that same email, John also claimed Julie had not placed the vineyard checking account into the Trust and that she was still treating it as a partnership account:

One big point is... the Matt Vyds checking account is not in a trust. She still has not done that. It is a General Partnership. Which she said she would change,... but has not.

(*Id.*)

That same day (August 2, 2017), Myrna e-mailed Julie, stating she wanted to schedule a meeting with her and Richard *"to discuss the matters concerning the trust and other things."* (Ex. 70.) Myrna did not tell Julie about John's statement that he would not give up control of Mattern Vineyards or about his demand that he be made a co-trustee. Myrna sent John a copy of her e-mail to Julie, stating:

Following is email I sent to Julie. [¶] (All sweetness and light, right?) [¶] Myrna.

(Ex. 71.)

On August 4, 2017, Julie called Myrna's office and left her a voicemail asking if her father had been in to see Myrna. (See Ex. 72.) In response, Myrna emailed Julie, acknowledging her voicemail message, and stating:

Of course, Richard didn't sign anything. I simply told him that I wanted both you and him to come in and talk about some things and get an update on where we are on everything. John expressed some concerns, and Richard agreed that we should talk about them…

(Ex. 72.)

At trial, Myrna admitted that in her August 2, 2017 email, she did not inform Julie that while Richard had not yet signed anything, John and Richard had talked to her about signing an amendment in the future. Nor did she inform Julie that John had insisted that he would not give up control of Mattern Vineyards and needed to be made a co-trustee. (RT, Myrna, 379:10-382:4.)

Also on August 4, 2017, Julie's new attorney, Jeremiah Moffit, wrote a letter to Myrna (sending it by both email and by U.S. mail), informing her that Julie *had "elected to terminate any and all attorney-client relationships she currently maintains with you in her individual and representative capacities, including but not limited to as Trustee of the Mattern 2003 Revocable Trust …."* (Ex. 73.) He also asked that, in accordance with California Rule of Professional Conduct 3-700(D), Myrna make all client papers and property available to us on or before August 11, 2017…." (Ex. 73.)

Myrna did not immediately respond to Mr. Moffit's letter. (RT, Myrna, 386:12-19.) Instead, she arranged a meeting with John for August 4 or 5, 2017. (*Id.*, RT, Myrna, 387:1-389:24.) According to Myrna, Richard then *"rehired"* her as his attorney. (See, RT, Myrna, 382:25-384:2.)

Myrna testified that she and John met with Richard on August 8, 2017, at which time Myrna prepared and Richard executed the Third Amendment. (RT, Myrna, 395:3-396:7.) Unlike the First and Second Amendments, which all three children were aware of at or around the time of their execution, the creation of the Third Amendment's was without the involvement of Julie and Jill.

As Myrna testified at her deposition (which was read into the record at trial):

Q. Let's go back to August 8th. Where was that meeting?
A. At my office.
Q. And who said what to whom -- strike that. Who was present?
A. Richard.
Q. What did Richard say?
MR. KOHLS: Wait. I understood that John was present at that meeting also.
THE WITNESS: Early on, but then I met with just Richard.
MR. KOHLS: So let's break it down. Which part of the meeting are you talking about when you ask that question?
BY MR. DESMARAIS:
Q. You had two meetings on August 8th, correct, with Richard?
A. We were sitting in the same room. John was not present during part of the meeting.
Q. On August 8th did you have two separate meetings with Richard?
A. No. It was all on one occasion.
Q. They were all on the same occasion, right?

A. Yes.
(RT, Myrna, 395:3-396:7.)

On August 8, 2017, when Richard was in Myrna's office, Richard signed the Third Amendment. That Amendment added John as a co-trustee and separated out and devised the Twining Road and Tindall Road portions of Mattern Vineyards to him as part of his so-called *"equal share"* of the Trust estate. The Amendment stated that John's share "*shall include the ranch and vineyard property at 2250 and 2300 Twining Road, Ukiah, California, APNs 182-170-04 and 11 and 2401 Tindall Road, Ukiah, California, APNs 182-170-23.*" (See Ex. 5, ¶ B, p. 2)

Even though the Third Amendment continued to appoint Julie as a co-trustee, Myrna arranged for Richard to sign three additional documents. (Exs. 12, 74, & 76.) Collectively, those documents purportedly evidenced Richard's authority for Myrna to continue serving as his attorney for the Trust, stated that Julie had no power to terminate any such representation, permitted Myrna to retain Richard's files and prohibited their release to any other entity, required Julie to provide Richard and Myrna with an accounting, and revoked the power of attorney Richard had given Julie.

Specifically, those documents were as follows:

1. "EVIDENCE OF AUTHORITY TO CONTINUE REPRESENTATION," dated August 8, 2017. (Ex. 74.) This document stated:
    - *Richard "hereby agrees to retain (continue to retain) MYRNA L. OGLESBY as his attorney concerning the said Trust and concerning him individually";*
    - *"This shall evidence that CATHERINE J. GOLDEN shall have no power, now or in the future, pursuant to a power of attorney or otherwise, to take any steps to terminate my relationship with said attorney."*
    - *"I have never authorized her, nor do I authorize her in the future, to terminate the services of my attorney."*
    - *"My attorney is authorized and directed to retain all of my files she has in her office, and I direct that they shall not be delivered to any other entity."*

    (*Id.*)
2. "REQUEST FOR ACCOUNTING CONCERNING TRUST ASSETS," dated August 8, 2017. (Ex. 76.) This document stated:
    - *"RICHARD H. MATTERN hereby requests that CATHERINE J. GOLDEN provide him and his attorney, MYRNA L. OGLESBY, with an accounting of all assets, receipts, and disbursements concerning the property contained in THE MATTERN 2003 TRUST AGREEMENT DATED MARCH 25, 2003 for the period from February 1, 2014 to the present date."*

    (*Id.*)
3. "REVOCATION OF POWER OF ATTORNEY," dated August 8, 2017. (Ex. 12.) This document stated:
    - "On February 28, 2014, the undersigned, RICHARD H. *MATTERN, executed a General Power of Attorney appointing CATHERINE J. GOLDEN, also known as JULIE GOLDEN, as his attorney in fact, authorizing her to act on his behalf concerning unlimited business matters."*
    - *"The said power of attorney, and all powers therein granted, and any other*

power of attorney of any kind or nature given to CATHERINE J. GOLDEN at any time, are hereby collectively and entirely revoked effective as of the date hereof, and any previous nomination of CATHERINE J. GOLDEN as a conservator of my person or estate is also revoked as of the date hereof."

(*Id.*)

On August 9, 2017, Myrna talked to John about going to the bank to gain access to Richard's accounts. (RT, Myrna, 398:1-399:9.) John and Myrna went to the bank that day and examined the accounts; Richard did not accompany them. (*Id.*, RT, Myrna, 399:18-25.) According to John, the Mattern Vineyards account contained only two cents, *"there were several thousand dollars of checks being bounced against it,"* and there was $509,000 in Julie and Richard's joint checking account and $22,000 in the only trust account he noticed listed. (RT, John, 262:19-263:3.)

John then returned to Richard's house and told him, *"We need to see Myrna."* (RT, John, 159:15-18) John told Richard that Myrna *"saw things that she didn't like at the bank."* (RT, John, 159:19-160:1.) John then took Richard to see Myrna. (RT, John, 160:2-7.) That meeting culminated in Richard's execution of the Fourth Amendment, which removed Julie as a co-trustee and appointed John as the sole co-trustee of the Trust with Richard. (Ex. 6, § 4.2.) John saw Richard sign the Fourth Amendment. (RT, John, 160:2-161:10.) Unlike the First and Second Amendments, which, as noted, all three children were aware of at or around the time of their execution, they were not privy to the Fourth Amendment.

John and Myrna then drove to the bank again. (RT, John, 162:10-163:24.) While there, they attempted to withdraw $450,000 from Richard's Survivor Trust's account and deposit it into an account titled in John's and Richard's names as trustees. (*Id.*, RT, John, 162:10-163:24.) They took a deposit slip prepared it for Richard to sign, picked up Richard at his home, and took him to Myrna's office, where he signed it. (*Id.*, RT, John, 164:5-165:23.) Of note, at the time Richard signed the deposit slip, he had not yet executed the Fourth Amendment—and thus, Julie was still a co-trustee. (*Id.*, RT, John, 166:5-24.)

Myrna then took the signed deposit slip to the bank and opened a new account into which she deposited $450,000 taken out of Julie and Richard's joint account. (RT, John, 163:11-24; see also RT, Myrna, 405:19-23.) Although John understood the funds had been transferred (RT, John, 167:23-25), he testified the bank froze the account a week later (he stated the bank told John that the freeze was because of a *"family dispute"*), which effectively blocked the transfer. (*Id.*, RT, John, 168:1-169:3; RT, Donna Gradek, 596:13-19.)

6. Events After Execution Of Third And Fourth Trust Amendments

On August 14, 2017, John emailed Myrna, stating he had *"retained Frank Cialone as my attorney."* (Ex. 81.) John instructed Myrna to *forward "all trust documents and amendments" to Mr. Cialone "as soon as possible."* (Ex. 81.) He added, "*Julie needs to be notified immediately of the amendments that have been made" and "Mr. Cialone agrees with that." (Id.)* John concluded, *"I think you and Frank Cialone should talk ASAP."* (*Id.*) Myrna never sent the Third or Fourth Amendments to Julie's attorney, Mr. Moffit, before they were signed.

On August 17, 2017, John emailed Myrna, asking her to confirm that Richard had signed a trust amendment giving John the ranch and to send him a copy of the amendment:

> *[C]an I please get the document dad signed, stating I get the ranch upon his passing. I understand that is what you wrote…correct??". [¶.]*
>
> *Please make this all be known, that I was NOT in that meeting…and I NEVER prompted you to do that.*

(Ex. 83.)

Myrna emailed John back the same day, telling him that Richard's gift of the ranch to John *"was stated in both the Third Amendment dated August 8 and Fourth Amendment dated August 9."* (Ex. 84.) She did not state she would tell everyone that John had not prompted Richard to give him the ranch. (See *Id.*)
Apparently not satisfied with that omission, John emailed Myrna back, stating:

> *Please let [Julie's] attorney know that I did NOT prompt this action, that you did with Richard, and I was not present when this happened. State that I NEVER spoke about that with you during all of this….*

(Ex. 85.)

Myrna emailed John the next day, stating, "*I am not communicating with Julie's attorney. Your attorney needs to do this.*" (Ex. 86.)
John then emailed his attorney, Frank Cialone, stating:

> *Frank,*
>
> *please somehow include this*
>
> *Myrna asked Dad if he agreed that he wanted what Donna had written, so she added that I inherit the Ranch in an amendment. I did NOT ask for that. Myrna would attest to it. I never spoke with Dad about it either. I was shocked when she said she did that, knowing my sisters will never believe that I didn't ask for that. My ONLY request from the beginning of this, was that be added as co trustee. (Emphasis added)*
>
> JM

(Ex. 87.)

Although Myrna's communications with Richard remained attorney-client privileged, upon John's instructions, on August 21, 2017, Myrna wrote to Mr. Cialone, stating that *"John was not present and did not participate in the creation or content of either of the Third Amendment or the Fourth Amendment to Richard's trust. My meeting was solely with Richard."* (Ex. 89.) According to her testimony this statement was inaccurate as John was present for part of the meeting on August 8, 2017 and saw his father sign the Fourth Amendment on August 9, 2017.

On August 25, 2017, just over two weeks after the Third and Fourth Amendments had been signed, Dr. Jonathan Mueller, a neuro-psychiatrist, evaluated Richard. As set forth in his seven-page report admitted at trial (Ex. 102), Dr. Mueller determined that Richard "suffers from a dementia syndrome

that is characterized by disorientation, memory loss and visuo-perceptual skills," "does not have subtle or mild cognitive impairment," but, rather, "suffers from *severe-profound short term memory* loss," and has "***severe impairment of working memory.***" (Ex. 102, pp. 5-6, orig. italics and bold.) Dr. Mueller concluded that "[t]aken together with his baseline 8th grade education, a history of compliance and submissiveness vis-à-vis his deceased wife, these deficits cause [Richard] to lack testamentary capacity, contractual capacity, and the ability to resist undue influence." (*Id.*, p. 6.)

Dr. Mueller added, when Richard was asked who he believes would be in the best position to make decisions regarding his health care or finances, he "immediately answered, 'Julie, my oldest.'" (Ex. 102, p. 7.) When Dr. Mueller asked, "'what about your son John? He answered, 'I don't think he is capable.'" (*Id.*) When Dr. Mueller asked if Richard "has ever felt that any of his was pressuring or trying to influence him," he responded, "'No,' but then quickly added, 'If it was anyone, it would be John.'" (*Id.*) When Dr. Mueller asked Richard why he said that, Richard "answered, 'Well, he likes money.'" (*Id.*)

While the court was concerned with Dr. Muller's potential bias toward John due to his inclusion in his report of decade-old allegations regarding John, it nonetheless found Dr. Muller's testimony and credible and persuasive.

John's medical expert, Dr. Elliott Stein, a psychiatrist, never examined or tested Richard or arranged to have him examined or tested—even though Dr. Stein had more than eleven months to do so. Instead, he stated he "did not feel" that doing so would have been helpful. (RT, Stein, 932:15-21.) Dr. Stein acknowledged, however, that he regularly treats patients for events that have occurred months earlier than when he is consulted. (RT, Stein, 945:14-946:14.)

At trial, John introduced Dr. Stein's report into evidence. (Ex. 254.) The report contained five opinions. Upon cross-examination, Dr. Stein admitted he had withdrawn the fourth of those opinions—that there was no evidence Richard had been unduly influenced to execute the Third and Fourth Amendments. (RT, Stein, 927:21-928:7.) As to the issue of undue influence, the court found Dr. Stein's opinion persuasive.

After Caron Schmierer was appointed as temporary trustee, John repeatedly wrote her, attempting to enlist her aid. For example, on October 13, 2017, John wrote Caron, stating, *"I have done NOTHING wrong" and Julie "is NOT fit to be a Fiduciary in any way shape or form."* (Ex. 114.) The following day, John wrote Caron stating, *"I want Julie and Jill to know that I am NOT interested in speaking with them...."* (Ex. 115.)

One day later, John wrote Caron, stating:

> *Jill has been saved all her life through addiction, two failed marriages,... and several lost jobs by Mom and now Julie. My opinion has always been: let her suffer. She should live in a shitty apartment in Staten Island and get a job at Dunkin donuts. Sell her car,...whatever it takes....*
>
> *Summary: My sisters are sick twisted individuals. I don't care if I ever see them again....*

Julie is vicious enough to break me,... and her husband is a billionaire,... if not close to it. Venture capitol [sic] pig.

(Ex. 117.)

On November 13, 2017, John again wrote Caron, stating:

Caron,

I thought in the next week or so, it may be timely for me to come by your office and just go over how I have been managing things for Mattern Vineyards over the past several years,... Also, let me explain to you that I am deeply invested in those properties having spent my life working on them, re planting, developing acquiring great contracts etc....

(Ex. 124.)

And on November 28, 2017, John wrote Caron, stating:

I started driving tractor unsupervised at 11 years old (1974)....

John did ALL the tractor work, spraying, crew bossing etc... from 1990-1995. ALL of it.... I basically worked 7 days a week for several years. Julie knows nothing of those times....

I, would oversee all the vineyard operations....

Only things [Julie] ever did was allow her manager and employees to help me, and support her martyrdom type ego,...

On January 2014 Mom passed away. Nothing regarding vineyard operations changed. In continued to run it as I had in previous years....

(Ex. 126.)

John's multiple emails to Caron are inconsistent with his testimony that he never told his parents that he wanted Mattern Vineyards in general or the three Talmage Ranch properties in particular.

Since Jill moved in fulltime with Richard in August 2017, she began keeping a log. (Ex. 142.) That log documented John's interactions with his Father. (*Id.*) The court gave little weight to the testimony of Jill Mattern. The court found her to be hostile and evasive while testifying. The court also gave little weight to the logs/diary that Jill kept regarding John's visits.

John introduced the testimony of a number of people who knew Richard for years, including Andy Mattern, Jerry Beebe, Floyd Eriksen and Ernie Wipf. None, however, testified that Richard stated he intended to leave Mattern Vineyards or any part of it to John.

John also called Shari Brown, who testified that in 2006, Richard and Donna told her that their trust left Mattern Vineyards to John. (RT, Shari Brown, 773:13-22.) Both the original Trust document and the First and Second Amendments, however, refute that testimony, since all three documents

devised Mattern Vineyards to all three of their children.

John also introduced two unsigned sets of notes. One set consists of eight pages, dated December 2010 (Ex. 202), while the other set consists of four pages, dated January 13, 2011 (Ex. 203). Neither set was signed. Both contained the following at page 4:

> Julie, Jill & John
>
> | | |
> |---|---|
> | | Not our orders: |
> | Our wishes – | Attorney suggest we list them |
> | | |
> | 1st Wish – | John inherits Talmage Ranch
Julie and Jill inherit income prop – other with our wish re manages it as a Mattern ownership and no one else can own this property unless they are direct lineage from us. This is because I always wanted to live there & hope to thru my children, grandchildren & great... |

(Exs. 202, 203.)

One set of notes was discovered by John's wife, Inger. (RT, John, 278:4-280:21.) Julie and Jill deny ever having received them. (RT, Julie, 638:7-16; RT, Jill, 752:17-753:3.) The court did not find these notes persuasive or relevant as Donna passed in 2014 and her estate has been resolved.

John insisted that Richard told him "several times" he would inherit the Talmage Ranch; he also testified that Richard gave John permission to build a studio on the property because someday the property would be "his." (RT, John, 79:25-81:3, 85:15-86:12) But John admitted not knowing why the Trust as originally drafted in 2003 and as amended twice after Donna's death never mentioned this supposed promise and instead divided (and continued to divide) the Trust property into unspecified one-third equal shares. (RT, John, 90:7-91:5.) Indeed, John never asked Richard about this omission. (See RT, John, 91:4-5.)

LEGAL ANALYSIS

1. The Third and Fourth Amendments Should Be Cancelled Due To Undue Influence

"Undue influence" has the same meaning as defined in section 15610.70 of the Welfare and Institutions Code. (Prob. Code, § 86.) Welfare & Institutions Code section 15610.70(a) provides:

> (a) "Undue influence" means excessive persuasion that causes another person to act or refrain from acting by overcoming that person's free will and results in inequity. In determining whether a result was produced by undue influence, all of the following shall be considered:
>
> (1) The vulnerability of the victim. Evidence of vulnerability may include, but is not limited to, incapacity, illness, disability, injury,

age, education, impaired cognitive function, emotional distress, isolation, or dependency, and whether the influencer knew or should have known of the alleged victim's vulnerability.

(2) The influencer's apparent authority. Evidence of apparent authority may include, but is not limited to, status as a fiduciary, family member, care provider, health care professional, legal professional, spiritual adviser, expert, or other qualification.

(3) The actions or tactics used by the influencer. Evidence of actions or tactics used may include, but is not limited to, all of the following:

(A) Controlling necessaries of life, medication, the victim's interactions with others, access to information, or sleep.

(B) Use of affection, intimidation, or coercion.

(C) Initiation of changes in personal or property rights, use of haste or secrecy in effecting those changes, effecting changes at inappropriate times and places, and claims of expertise in effecting changes.

(4) The equity of the result. Evidence of the equity of the result may include, but is not limited to, the economic consequences to the victim, any divergence from the victim's prior intent or course of conduct or dealing, the relationship of the value conveyed to the value of any services or consideration received, or the appropriateness of the change in light of the length and nature of the relationship.

(b) Evidence of an inequitable result, without more, is not sufficient to prove undue influence.

(Welf. & Inst. Code, § 15610.70(a).)

Undue influence is neither duress nor menace. (*Odorizzi v. Bloomfield School Dist.* (1966) 246 Cal.App.2d 123, 127.) Rather, unlike duress or menace, undue influence constitutes conduct that causes someone to perform an act against his will and to adopt the will of someone else, seemingly voluntarily, but in fact as a result of the influence. (*Id.* at pp. 130-131.) Undue influence has been called "overpersuasion." (*Id.* at p. 130.) The essence of "overpersuasion" is that the victim is convinced that he is doing what he wants to do and that he fully understands what he is doing. (See *id.*)

"Direct evidence as to undue influence is rarely obtainable and hence a court or jury must determine the issue of undue influence by inferences drawn from all the facts and circumstances." (*Lintz v. Lintz* (2014) 222 Cal.App.4th 1346, 1355, citations omitted.) By its nature, undue influence is based on conduct that is subtle, insidious and often occurs behind closed doors in interactions solely between the influencer and the testator. Because the very nature of undue influence means that very few cases will involve direct evidence, circumstantial evidence alone is sufficient to prove

undue influence. (*Estate of Baker* (1982) 131 Cal.App.3d 471, 481; *Estate of Williams* (1950) 99 Cal.App.2d 302, 310-311.) Thus, it has long been held that "[u]ndue influence, obviously, is not something that can be seen, heard, smelt or felt; its presence can only be established by proof of circumstances from which it may be deduced." (*Estate of Peters* (1970) 9 Cal.App.3d 916, 923.)

The sufficiency of evidence to prove undue influence depends on the totality of the circumstances. No single circumstance or group of facts is the invariable mark of undue influence, nor is there any bright line test that applies. A party claiming undue influence need not prove any particular set of facts or circumstances; rather, she need only offer proof that sustains, in a reasonable mind, "a fair and proper inference of undue influence." (*Estate of Hannam* (1951) 106 Cal.App.2d 782, 786.)

In this case, the factors set forth in Welfare & Institutions Code section 15610.70, as applied to the totality of the circumstances below, demonstrate that John was a willing participant in procuring the Third and Fourth Amendments to the Trust.

Richard was and is vulnerable. This is evidenced by his need for full time care prior to the execution of the Third and Fourth Amendments**. In addition, both expert witnesses agreed that Richard was potentially vulnerable to undue influence.**

John possessed the apparent authority associated with undue influence. As explained above, evidence of apparent authority may include the person's status as a family member. (Welf. & Inst. Code, § 15610.70(a)(2).) John has that status as he is Richard's youngest child. (See, e.g., RT, Julie, 617:6-15.) From the testimony and email activity described above, it is clear that just prior to the execution of the Third and Fourth Amendments John was exasperated with Julie. John made no attempts to protect his father from the acrimonious relationship between the siblings. Instead, he put Richard squarely in the middle of the disputes and convinced Richard that changes needed to be made.

John's own email correspondence with Myrna and Caron corroborate that John had a strong desire for the Talmage Ranch portion of Mattern Vineyards. The original Trust as well as the First and Second Amendments—in effect, collectively, for more than 14 years-- devised all of Mattern Vineyards to Richard and Donna's children in equal shares, without specifying which portions would go to which child.

The court finds the conduct leading up to the Third and Fourth Amendment to be the most damaging. It was clear that John always thought that the ranch would be his upon the death of his father. *"[e]veryone knew I was going to get the ranch"* (RT, John, 152:6-25). But Myrna plainly did not "know" that because she drafted the First and Second Amendments to the Trust, both of which provided for equal distribution of "the ranch" to all three of Richard and Donna's children. (See, e.g., Exs. 3 & 4.) Indeed, unlike with the Third and Fourth Amendments, all three children were aware of the First and Second Amendments at or around the time they were executed. (See, e.g., RT, John, 95:19-96:3 [Third Amendment], RT, Myrna, 454:9-456:19 [Fourth Amendment].)

The circumstances surrounding the Third and Fourth Amendments also evidence that they were executed with a cloud of secrecy. (See, e.g., Ex. 83 and 85 [John's instruction to Myrna to say that he was not present during the execution of the Third and Fourth Amendments]). Although Myrna and John both testified that Myrna never represented John, John also used Myrna's "expertise" to procure the amendments. Beginning January 2, 2017, John repeatedly demanded

that Myrna make him a co-trustee and Myrna told him to talk to Richard to do this; in an e-mail on January 2, 2017, John stated that he was *"not about to give up control of Mattern Vineyards. I've worked it my entire life and this is what Donna and Richard wanted."* (Ex. 47.)

By early August 2017, John was frantic to amend the Trust. His August 1, 2017 email to Myrna stated he had left her *"4 voicemails,"* that he was *"[n]ot sure" why he couldn't "get through,"* and that *"[l]ast we talked, it seemed that you would move with me on those issues we discussed. Has something changed?"* (Ex. 64.) The following day, John went to Richard's home, picked him up, and drove him to Myrna's office, where they met with Myrna. (RT, John, 140:9-25.) When Julie attempted to find out what was going on, Myrna sent Julie an email (on Aug. 2, 2017, Ex. 70), but in it, failed to divulge what John and she were doing. (See *id.*) Then, on August 4 or 5, 2017, John and Myrna again met with Richard at Myrna's office. (RT, Myrna, 387:1-389:24.)

Myrna testified that John and she again met with Richard on August 8, 2017. Myrna testified she prepared the Third Amendment on August 7 or 8, but that *"[m]aybe it was the 8th."* (RT, Myrna, 394:6-23.) Richard was present at her office on August 8, as was John, *"[e]arly on,"* although Myrna then *"met with just Richard"; "John was not present during part of the meeting."* (RT, Myrna, 6-25) Myrna did not send a draft of the Third Amendment to Julie before Richard signed it, nor did she tell Julie about it before he did so, nor did she tell Julie she was preparing it; Myrna's explanation was that *"Julie had fired me by then."* (RT, Myrna, 396:20-397:11.)

Myrna's testimony to the contrary, John admitted he again met with Richard and Myrna on August 9, 2017 and saw Richard sign the Fourth Amendment. (RT, John, 160:2-161:10.) John also admitted taking Richard to Myrna's office and seeing him sign the Fourth Amendment. (*Id.*)

These circumstances were markedly different from the circumstances surrounding the execution of the First and Second Amendments, which all three children were aware of at or around the time they were executed. (See, e.g., RT, John, 95:19-96:3 [Third Amendment], RT, Myrna, 454:9-456:19 [Fourth Amendment].) Beginning February 28, 2014, when Richard executed the First Amendment that Myrna prepared, Myrna began corresponding and communicating regularly with Julie as a co-trustee of the Trust. (See, e.g., Exs. 21, 23, 24, 29, 32, 40, and 54.) Myrna sent Julie all of her emails in connection with the services she rendered in the administration of the Trust. (See *Id.*) Julie prepared, and sometimes signed, the checks that paid Myrna's bills out of the trust of which she was a co-trustee. (See, e.g., RT, Julie, 644:10-12.)

Notwithstanding her fiduciary duty to refrain from doing anything that would injure Julie, her client, and to disclose everything John was attempting to do, Myrna did not tell the Co-Trustee what she was doing. The court wonders why a simple email stating that, John wanted to be added as a co-trustee and perhaps we should discuss it, was not sent to Julie. She drafted the Third and Fourth Amendments—which, as noted, made John a co-trustee, removed Julie as a co-trustee, and a portion of Mattern Vineyards to John. (Exs. 5 & 6; see also Ex. 70.)

Not only did Myrna fail to disclose what was going on in August 2017, she did not engage Julie and advise her what John and she were doing in the seven months before then—from early January, when John started pressing her to make him a co-trustee. (See, e.g., Exs. 5, 6, 53-54, 56, 58, 65, 70, 71, & 72.)

Further, even though Myrna never represented John, and John admitted he was present in Myrna's office on August 9, 2017 and saw Richard sign the Fourth Amendment, Myrna

cooperated with John in response to his demand that she conceal these facts. (See, e.g., Ex. 82.) As noted, on August 17, 2017, John emailed Myrna and stated, *"Please make all this be known, that I was NOT in that meeting,and I NEVER prompted you to do that."* (Ex. 83.) And again on August 18, 2017, John emailed Myrna and stated: *"Please let her attorney know that I did NOT prompt this action that you did with Richard, and I was not present when this happened. State that I NEVER spoke about that with you during all of this."* (Ex. 85.) However, John also emailed his attorney and stated: *"Myrna asked Dad if he agreed that he wanted what Donna had written, so she added that I inherit the Ranch in an amendment."* It is also obvious to this court that John and Myrna had discussions about Myrna's conversations with Richard and/or he was in the room at the time the statements were made. In either event, the court finds John was involved in procuring the amendment. In addition, from Myrna's email to John stating: "*I think I can get him to make clear that you are in charge of the vineyard"* the court can infer there were ongoing discussions about potential changes to the Trust.

Even if John had been successful in concealing that he was present on both August 8 and August 9, 2017, this would not have enabled him to deny his undue influence. In *Estate of Greuner* (1939) 31 Cal.App.2d 161, for example, the Court of Appeal reversed a trial court's judgment of non-suit against the contestant, stating that "[t]he party using the undue influence need not be present in person at the time of the execution of the document if the influence is present to constrain the party from exercising his free will. The evidence of the use of undue influence need not be direct. It may be circumstantial...." (*Id.* at p. 163.)

After the Third and Fourth Amendments were signed, Myrna tried to assist John in changing the title of the trust bank accounts. (RT, John, 163:11-24; see also RT, Myrna, 405:19-23.) As Ms. Gradek testified, John attempted to change the trust bank account to remove Julie as a co-trustee and put the accounts in John's name as co-trustee. (RT, Donna Gradek, 596:13-19.) All of this was done without notice to Julie, the co-trustee. (See, e.g., RT, Myrna, 405:24-25.)

As to the equity of the result, the Third and Fourth Amendments constituted a complete divergence from Richard's previous iterations of the Trust that Richard and/or Donna executed. While making John a co-trustee may not have been significant, the distribution of the ranch properties is problematic. This is particularly so given the revenue generated from the vineyards. The Third Amendment separates out and *"gives"* John *"the ultra premium wine grapes that were really basically the revenue-producing assets for Mattern Vineyards...."* (RT, Julie, 680:5-11.) There was no evidence presented to the contrary. Curing this distribution with an equalizing payment is purely speculative at this point.

Perhaps the most persuasive evidence that the Third and Fourth Amendment were procured by undue influence comes from John's own expert, Dr. Stein. As noted, Dr. Stein *withdrew* his "opinion four" in which he had opined that there was no undue influence in the preparation and the execution of the Third and Fourth Amendments. (RT, Stein, 927:21-928:7.)

Accordingly, the Court finds, by clear and convincing evidence that the Third and Fourth Amendments were the product of undue influence.

2. Richard Lacked Testamentary Capacity At The Time He Executed The Third and Fourth Amendments

Testamentary incapacity and undue influence are separate but related grounds in an action contesting a will or cancelling a trust. Proof of undue influence is relevant to the decedent's ability to "understand," "recollect," and "remember" the central elements necessary to determine testamentary capacity. (Prob. Code, §§6100.5, 810-813.) Proof of testamentary incapacity is relevant to the decedent's ability to resist undue influence. (See Prob. Code, §86; Welf. & Inst. Code, §15610.70(a)(1).)

Probate Code section 6100.5, states:

> (a) An individual is not mentally competent to make a will if at the time of making the will either of the following is true:
>
> (1) The individual does not have sufficient mental capacity to be able to (A) understand the nature of the testamentary act, (B) understand and recollect the nature and situation of the individual's property, or (C) remember and understand the individual's relations to living descendants, spouse, and parents, and those whose interests are affected by the will.
>
> (2) The individual suffers from a mental disorder with symptoms including delusions or hallucinations, which delusions or hallucinations result in the individual's devising property in a way which, except for the existence of the delusions or hallucinations, the individual would not have done.
>
> (b) Nothing in this section supersedes existing law relating to the admissibility of evidence to prove the existence of mental incompetence or mental disorders.
>
> (c) Notwithstanding subdivision (a), a conservator may make a will on behalf of a conservatee if the conservator has been so authorized by a court order pursuant to Section 2580.

(Prob. Code, §6100.5.)

In 1995, the Legislature enacted the Due Process in Competence Determinations Act (the "Act") to more specifically address whether a person was capable on contracting, conveying, marrying, making medical decisions, executing Wills or trusts, and performing other actions. Probate Code section 811 of the Act provides:

> (a) A determination that a person is of unsound mind or lacks the capacity to make a decision or do a certain act, including, but not limited to, the incapacity to contract, to make a conveyance, to marry, to make medical decisions, to execute wills, or to execute trusts, shall be supported by evidence of a deficit in at least one of the following mental functions, subject to subdivision (b), and evidence of a correlation between the deficit or deficits and the decision or acts in question:

(1) Alertness and attention, including, but not limited to, the following:

(A) Level of arousal or consciousness.

(B) Orientation to time, place, person, and situation.

(C) Ability to attend and concentrate.

(2) Information processing, including, but not limited to, the following:

(A) Short- and long-term memory, including immediate recall.

(B) Ability to understand or communicate with others, either verbally or otherwise.

(C) Recognition of familiar objects and familiar persons.

(D) Ability to understand and appreciate quantities.

(E) Ability to reason using abstract concepts.

(F) Ability to plan, organize, and carry out actions in one's own rational self-interest.

(G) Ability to reason logically.

(3) Thought processes. Deficits in these functions may be demonstrated by the presence of the following:

(A) Severely disorganized thinking.

(B) Hallucinations.

(C) Delusions.

(D) Uncontrollable, repetitive, or intrusive thoughts.

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

(b) A deficit in the mental functions listed above may be considered only if the deficit, by itself or in combination with one or more other mental function deficits, significantly impairs the person's ability to understand and appreciate the consequences

of his or her actions with regard to the type of act or decision in question.

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

(d) 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.

(e) This part applies only to the evidence that is presented to, and the findings that are made by, a court determining the capacity of a person to do a certain act or make a decision, including, but not limited to, making medical decisions. Nothing in this part shall affect the decisionmaking process set forth in Section 1418.8 of the Health and Safety Code, nor increase or decrease the burdens of documentation on, or potential liability of, health care providers who, outside the judicial context, determine the capacity of patients to make a medical decision.

(Prob. Code, § 811.)

Probate Code section 812 (of the Act) provides:

Except where otherwise provided by law, including, but not limited to, Section 813 and the statutory and decisional law of testamentary capacity, a person lacks the capacity to make a decision unless the person has the ability to communicate verbally, or by any other means, the decision, and to understand and appreciate, to the extent relevant, all of the following:

(a) The rights, duties, and responsibilities created by, or affected by the decision.

(b) The probable consequences for the decisionmaker and, where appropriate, the persons affected by the decision.

(c) The significant risks, benefits, and reasonable alternatives involved in the decision."

(Prob. Code, § 812.)

In *Anderson v. Hunt* (2011) 196 Cal.App.4th 722, the Court of Appeal partly reconciled Probate Code section 6100.5 with Probate Code sections 810 to 813. It held that a trustor's capacity to execute a simple trust amendment should not be evaluated according to the standard for contractual capacity. The Court of Appeal stated:

> Accordingly, sections 810 to 812 do not set out a single standard for contractual capacity, but rather provide that capacity to do a variety of acts, including to contract, make a will, or execute a trust, must be evaluated by a person's ability to appreciate the consequences of the particular act he or she wishes to take. More complicated decisions and transactions thus would appear to require greater mental function; less complicated decisions and transactions would appear to require less mental function.
>
> When determining whether a trustor had capacity to execute a trust amendment that, in its content and complexity, closely resembles a will or codicil, we believe it is appropriate to look to section 6100.5 to determine when a person's mental deficits are sufficient to allow a court to conclude that the person lacks the ability 'to understand and appreciate the consequences of his or her actions with regard to the type of act or decision in question.' (§ 811, subd. (b).) In other words, while section 6100.5 is not directly applicable to determine competency to make or amend a trust, it is made applicable through section 811 to trusts or trust amendments that are analogous to wills or codicils.

(*Anderson v. Hunt*, *supra,* 196 Cal.App.4th at pp. 730-731.)

In this case, contrary to his own opinions, John's own expert, Dr. Stein, identified the key evidence in determining testamentary capacity in the 2011 article he wrote for the California Trusts and Estates Quarterly, entitled *Does Your Client Have Testamentary Capacity? Mental Health and Memory Issues That Effect Estate Planning.* (RT, Stein, 958:25-959:15.) After quoting from Probate Code sections 6100.5, 811 and 812, in that article, Dr. Stein stated, "to determine mental capacity, functions such as understanding,' 'comprehension,' 'memory,' 'awareness,' and 'mood' must be observed and assessed to ascertain whether and to what extent the subject knows what is happening around him or her, whether the client can relate that knowledge to past information and experience, and whether the client can utilize that knowledge to make decisions or to direct behavior that is not severely distorted by an emotional state or delusion."

This article continues:

> **IV. OBSERVING AREAS OF MENTAL FUNCTION**
>
> **A. Alertness, Attention and Orientation**
>
> Alertness, attention and orientation comprise an aspect of capacity which the practitioner may readily observe.
>
> * * *
>
> **B. Memory**
>
> Memory is a critical factor of capacity.
>
> * * *

C. Comprehension, Understanding and Judgment

> The area of comprehension, understanding and judgment addresses the degree to which the person "gets" what is going on.
>
> * * *
>
> The practitioner can engage the client in a discussion of such seemingly ordinary concerns as the sequence and approximate ages of children and grandchildren, his or her current household situation, expenses, debts, and liquid and tangible assets. The degree to which the client is able to comprehend and communicate such facts, numbers and information is relevant to the client's understanding of the extent of his or her estate and to the client's allotment and distribution to his or her heirs.
>
> The client with requisite capacity should be able to explain what he or she wishes to do. The client should be able to do so without significant prompting....
>
> The practitioner can assess comprehension and understanding by asking the client to repeat back what the practitioner has said to the client....
>
> Further, the client with requisite capacity will be able to explain why he or she wants to create the specific plan he or she directs. The practitioner can assess understanding and judgment by exploring the rationale behind the client's current distributive plan and choice of administrators...."

(See RT, Stein, 958:25-959:21.)

It is against this backdrop that the Court determines that Richard lacked testamentary capacity at the time he executed the Third and Fourth Amendments to the Trust.

As noted, Dr. Jonathan Mueller, a neuropsychiatrist, examined and tested Richard for four to five hours on August 25, 2017, seventeen days after he executed those Amendments. Dr. Mueller opined that (1) Richard was so cognitively impaired that he did not have the capacity to execute the amendments; and (2) he was so cognitively impaired that he could not resist undue influence to execute them. (RT, Mueller, 496:3-12 and 522:22-523:10; see also Ex. 102, pp. 5-6.)

John's expert, Dr. Stein, a psychiatrist, never examined or tested Richard or arranged to have him examined or tested—even though Dr. Stein had more than eleven months to do so. (See RT, Stein, 932:15-21.) His explanation for that omission was that he "did not feel" doing so would have been helpful. (RT, Stein, 932:22-24.) That explanation, however, is inconsistent with his acknowledgement that he regularly treats patients for events that occur more than four months earlier. (RT, Stein, 945:14-946:14.)

Moreover, Dr. Stein's opinion that Richard possessed testamentary capacity is based on Dr. Mueller's statements in his (Dr. Mueller's) report that Richard said that he had three children, owned vineyards and rental properties, wanted them to go equally to his children, and wanted Julie to be the trustee. But Dr. Stein's opinion is a mere conclusion of law not entitled to the weight John claims. Rather, it is impermissibly based on his interpretation of Probate Code section 6100.5. As *Downer v. Bramet* (1984) 152 Cal.App.3d 837, 841, explains, Evidence Code section 805, which allows an expert to opine as to an ultimate issue, "does not, however, authorize an 'expert' to testify to legal conclusions in the guise of expert opinion."

Indeed, Probate Code section 6100.5 requires a finding that the individual "understands," "recollects," and "remembers," the individual's relation to his living descendants, the nature and situation of his property, and the nature of the testamentary act. (Prob. Code, § 6100.5.) Dr. Stein could not properly testify to the legal conclusion of testamentary capacity. He could testify, as he did, that Richard suffered from a major neuro-cognitive disorder. (RT, Stein, 929:20-930:1.)

Dr. Stein's interpretation does not meet with the requirements in Probate Code section 6100.5 because his opinions are inconsistent with the statute. For example, Dr. Stein testified there a difference between simply knowing the names of one's children and recalling the nature of one's evolving relationship with each of them. Yet Dr. Stein based his opinion that Richard was competent to execute the Third and Fourth Amendments, in part, only on the fact that Richard was aware he had three children. (RT, Stein, 953:5-8, 910:20-911:4.) Further, Dr. Stein's opinions fail to take into account the Due Process in Competence Determinations Act. They also fail to take account of his own article's description of how a physician must assess an individual's cognitive impairment to determine testamentary capacity. (Prob. Code, §§ 810-812.)

Dr. Stein's testimony on cross-examination underscored the accuracy of Dr. Mueller's opinions:

- Dr. Stein did not adjust Dr. Mueller's MoCA score as a result of the factors that Dr. Mueller may not have taken into account, presumably because Richard's score would still have shown that he was severely impaired. (See, e.g., Stein, 935:18-21, 936:12 and 939:11-25.)
- Dr. Stein conceded that Richard suffered from a major neurocognitive disorder, the definition of the term "dementia." (RT, Stein, 929:20-930:17.) This is consistent with Dr. Mueller's conclusions because Dr. Mueller found that:
    - Richard could not remember that he executed trust amendments (RT, Mueller, 513:21-23);
    - Richard could not remember the name of John's wife or that John even had any children (RT, Mueller, 515:8-12); and
    - Richard could not recall a single thing out of the two stories Dr. Mueller read to him 30 minutes before he was asked about either of the stories. (RT, Mueller, 516:9-21.)

Further, Dr. Stein's opinions are inconsistent with the argument that the terms of the trust define testamentary capacity. Paragraph 2.1 of the Trust which addresses the "Disability" of a trustee does not and cannot supersede the law of testamentary capacity. (Ex. 1, § 2.1.) and (See Prob. Code, § 6100.5.)

Accordingly, the Court finds that Richard lacked the necessary testamentary capacity to execute the Third and Fourth Amendments.

Appointment of Permanent Trustee

In spite of the findings made above, the court has concerns regarding Julie Golden's current ability to administer the trust. Ms. Schmierer shall remain as interim trustee pending a hearing to determine whether the court shall remove Julie Golden as the co-trustee. In that regard, the parties are ordered to appear at a case management conference on February 15, 2019 at 9:30 am in Department E to schedule the hearing. (Probate Code Section 15642.)

ORDER

Having considered and weighed the evidence, the parties' arguments, and the relevant legal principles as discussed above, the Court orders that judgment shall be entered in favor of petitioner Catherine Julie Golden as follows:

1. The Third Amendment to the Trust is cancelled;
2. The Fourth Amendment to the Trust is cancelled; and
3. The matter is set for a case management conference on February 15, 2019, at 9:30 am in Department E.

Dated: January 29, 2019

Jeanine B. Nadel
Judge of the Superior Court

cc: all counsel