

In The Supreme Court of the State Of Nevada

Supreme Court Case No. 75053

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Elizabeth A. Brown
Clerk of Supreme Court

JAMES J. COTTER, JR., Individually
And Derivatively on Behalf of
READING INTERNATIONAL, INC.,

Petitioner,

v.

DOUGLAS McEACHERN, EDWARD
KANE, JUDY CODDING, WILLIAM
GOULD, MICHAEL WROTONIAK, and
Nominal Defendant READING
INTERNATIONAL, INC., a Nevada
Corporation,

Respondents.

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) District Court No. A-15-719860-B,
)
) jointly administered with
) No. P-14-082942-E and
) No. A-16-735305-B
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Appeal

Eighth Judicial District Court, Dept. XI
The Honorable Elizabeth G. Gonzalez

RESPONDENTS' APPENDIX

VOLUME III (RA501-RA750)

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RESPONDENTS' APPENDIX IN SUPPORT OF ANSWERING BRIEF

CHRONOLOGICAL APPENDIX

Date	Document	Vol.	Pages
2015-08-10	Motion to Dismiss Complaint filed by Margaret Cotter, Ellen Cotter, Douglas McEachern, Guy Adams, and Edward Kane	I	RA1–RA57
2015-08-10	Reading International, Inc. (“RDI”)’s Motion to Compel Arbitration	I	RA58–RA79
2015-08-28	Verified Shareholder Derivative Complaint filed by T2 Partners Management, LP, <i>et al.</i> (“T2 Plaintiffs”)	I	RA80–RA97
2015-09-01	Transcript of Proceedings re: Hearing on RDI’s Motion to Compel Arbitration	I	RA98–RA108
2015-09-15	Transcript of Proceedings re: Hearing on Defendants’ Motion to Dismiss and Plaintiff’s Motion for Preliminary Injunction	I	RA109–RA127
2015-10-20	RDI Schedule 14A Proxy Statement	I	RA128–RA175
2016-01-19	Events and Orders of the Court on All Pending Motions	I	RA176–RA177
2016-02-12	T2 Plaintiffs’ First Amended Complaint	I	RA178–RA216
2016-07-13	RDI Form 8-K	I	RA217–RA234
2016-08-04	Notice of Entry of Order Granting Preliminary Approval of Derivative Claim Settlement	I	RA235–RA242
2016-08-04	Notice of Pendency and Settlement of Action	I; II	RA243–RA257
2016-09-20	Objection of Diamond A Partners, L.P., and Diamond A Investors, L.P., to Settlement	II	RA258–RA267
2016-09-22	Plaintiff James J. Cotter, Jr.’s Notice of Intention to Appear and Statement of Objections re Final Approval of Settlement	II	RA268–RA394
2016-09-22	Objections of RDI Shareholder Mark Cuban to Settlement	II	RA395–RA411

Date	Document	Vol.	Pages
2016-09-23	Defendant William Gould's Joinder in Individual Defendants' Motion for Partial Summary Judgment (No. 3) on Plaintiff's Claims Related to the Purported Unsolicited Offer	II	RA412–RA414
2016-10-03	RDI's Omnibus Reply to Objections to T2 Settlement Filed by James J. Cotter, Jr., Mark Cuban, and Diamond A Partner, L.P.	II	RA415–RA433
2016-10-03	T2 Plaintiffs' Joinder to RDI's Omnibus Reply to Objections to Settlement	II	RA434–RA444
2016-10-10	Plaintiff James J. Cotter, Jr.'s Motion to Vacate and Reset Pending Dates and to Reopen Discovery on Shortened Time (Fourth Request)	II	RA445–RA465
2016-10-21	Notice of Entry of Order Granting Settlement with T2 Plaintiffs and Final Judgment with Exhibit 1 Attached	II	RA466–RA484
2017-11-08	Renewed Motion <i>in Limine</i> to Exclude Expert Testimony of Myron Steele Based on Supplemental Authority	II; III	RA485–RA553 (Under Seal)
2017-12-12	Statement of Decision in <i>In re: James J. Cotter Living Trust</i> , Case No. BP159755 (Sup. Ct., L.A. Cnty.)	III	RA554–RA571
2018-03-22	Judgment and Order re: Petition for an Order Determining Validity of Trust Amendment and Forgiveness of Loan Filed February 5, 2015 in <i>In re: James J. Cotter Living Trust</i> , Case No. BP159755 (Sup. Ct., L.A. Cnty.)	III	RA572–RA574
2018-06-01	Ellen Cotter, Margaret Cotter, and Guy Adams' Motion for Summary Judgment	III	RA575–RA679 (Under Seal)
2018-06-19	Remaining Director Defendants' Motion for an Evidentiary Hearing	III, IV	RA680–RA928 (Under Seal)
2018-11-13	RDI Form 8-K	IV	RA929–RA932

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ALPHABETICAL APPENDIX

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DEC 12 2017

Sherri R. Carter, Executive Officer/Clerk
By: Sharon McKinney, Deputy

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

In Re: JAMES J. COTTER LIVING TRUST)	Case No.: BP159755
ELLEN MARIE COTTER)	
MARGARET COTTER)	
Petitioners,)))) STATEMENT OF DECISION
vs.))))
JAMES J. COTTER Jr.,))))
Respondent.))))

The court makes the following findings in this case:

The "hospital amendment" is invalid due to the lack of capacity of James Cotter, Sr. and undue influence when he signed this document.

The significant assets of Sr.'s estate begins with the company that the parties state Sr. built, RDI, and specifically the company stock. RDI was his family business and he owned the majority at the end of his life. RDI has a dual-class stock structure with non-voting (Class A) and voting (Class B) stock. At his death, Sr. owned roughly 1.2 million voting shares (70% of the voting stock), which are not actively traded, and about 2.2 million non-voting shares.

His assets also included citrus farms in Tulare and Fresno counties, consisting of over 2000 acres of orchards and a packaging house, Cecelia Packing, that processed citrus both from the its own orchards and other farms. The court does not sense that Sr.'s children have a sentimental attachment to these Central Valley orange groves as with a traditional family farm or ranch.

Sr. owned numerous private investments and real estate, often as partnership shares of real-estate ventures. These investments include, among others, the properties known as Sutton Hill,

Shadow View, Sorento, and Panorama, and a Laguna Beach condominium. Sr. owned 100% of the 120 Central Park South Cooperative Apartment that his daughter Margaret has lived in for over 20 years. Sr.'s Supplemental Executive Retirement Plan ("SERP") from RDI is worth approximately \$7.5 million.

Timeline of Events

The court incorporates most of the petitioners' "timeline of events" preceding the death of Sr.:

June 2013 Sr. executes 2013 Trust, drafted by Charles Larson

Fall of 2013 Guy Adams and Scot Kirkpatrick become involved in Sr.'s estate planning

February 24, 2014 Scot Kirkpatrick has a meeting with Sr. regarding estate planning

April 4, 2014 Scot Kirkpatrick sends Sr. technical changes to the trust and an amendment to his trust

Last week of May 2014 Jr. sees 2013 Trust for first time

May 28 Sr. and Scot Kirkpatrick in a phone conversation; Sr. instructs Kirkpatrick to revise his trust and divide the voting stock 1/3-1/3-1/3

June 6 Scot Kirkpatrick sends Sr. a complete restatement of his trust

June 11 The "Capital Grille Dinner"

June 16 Sr. falls at his Los Angeles apartment, and is admitted to Cedars Sinai

June 17 Sr. undergoes a brain MRI which reveals multiple strokes; Sr. and the family is told the next day

June 18 Jr. videotapes discussion of estate plan with Sr. and Margaret in the evening

June 19 (7am) Jr. has Larson prepare the Hospital Amendment

June 19 (12:30 pm) Jr. and Margaret have Sr. sign the Hospital Amendment, videotapes signing

June 19 (1:45 pm) Sr. undergoes procedure; consent form signed by Jr. in lieu of S.

June 19 Scot Kirkpatrick sends Jr. the "June 19 Draft."

June 24 Sr. sent to rehab unit at Cedars Sinai

June 25 Sr. diagnosed with "Major Neurocognitive Disorder"; parties stipulate Sr. has lost capacity and all documents after this point are invalid

June 25 Jr. sends Hospital Amendment to Scot Kirkpatrick and requests that Kirkpatrick conform his June 19 draft to Hospital Amendment

June 26 Scot Kirkpatrick sends JR. a revised draft, conforming to the Hospital Amendment (except for Rotating Trustee Provision)

July 9, 2014 Sr. discharged from Cedars Sinai rehab unit

July 26, 2014 Sr. readmitted to Cedars Sinai

July-August 2014 Jr., Ellen, and Margaret have their father execute or themselves execute a series of documents principally related to transferring the citrus properties out of Sr.'s estate into Cotter Family Farms

September 73, 2014 Sr. passes away

CAPACITY

Capacity to make or amend a trust or will is evaluated under California Probate Code, Section 6100.5 standards rather than California Probate Code, Section 810, which sets forth standards for capacity to enter into contracts. (See, *Anderson v. Hunt* 196 Cal.App.4th 722, 730-31 (2011))

“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(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.”

Pursuant to California Probate Code, Section 6100.5, a person is not mentally competent to make a will if at the time of making the will either of the following is true:

- (1) The individual does not have sufficient mental capacity to be able to (A) understand the nature of the testamentary act, (B) understand and recollect the nature and situation of the individual's property, or (C) remember and understand the individual's relations to living descendants, spouse, and parents, and those whose interests are being 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.

Even if someone has a mental disorder in which there are lucid periods, it is presumed that his or her will has been made during a time of lucidity. (*Estate of Goetz* 253 Cal.App.2d 107, 114 (1967).) A finding of lack of testamentary capacity can only be supported if the presumption of execution during a lucid period is overcome. (*Estate of Mann* 184 Cal.App3d 593, 603-04 (1986))

The court believes that the evidence at trial established that James Cotter Sr. ("Sr."), had suffered several recent strokes before June 19, 2014, the date of the Hospital Amendment. The court finds by a preponderance of evidence that Sr. did not have either testamentary capacity, whether it be understanding the effect of his testamentary acts, or the higher standard to understand the consequences and legal effects of the hospital transactions. There may be isolated entries in the medical records indicating possible slight improvements in his condition at times, but the overall review of the records, most importantly combined with the compelling videos, supports the court's conclusion that Sr. lacked capacity to execute a testamentary document of this complexity.

Several significant facts establish Sr.'s incapacity. When the video of Sr. on November 13, 2013 is viewed with the June, 2014 videos, there is a substantial difference in awareness, affect, and ability to converse. An hour after the Hospital Amendment was signed, the Cedars Sinai staff determined Sr. could not sign a consent to a medical procedure. Jr. signed this document. Dr. Wertheimer, a neuropsychologist, evaluated Sr. six days after the Hospital Amendment was signed. There was no evidence of any new strokes or other significant medical developments. The diagnosis was "major neurocognitive disorder," which is circumstantial evidence that his condition on June 25th would not have declined from June 19th. The videos taken on June 18 and 19 show a Sr. that was inattentive, minimally responsive, and possibly confused, supporting the court's finding that Sr. lacked capacity on June 19.

There was conflicting testimony by two very qualified geriatric psychiatrists. Dr. James Spar, after Sr.'s strokes, concluded that he was substantially unable to manage his financial resources or resist fraud or undue influence. Dr. Spar further did not see any positive evidence that Sr. had capacity; however, he does not believe a lack of "positive evidence" leads to a conclusion that someone lacks capacity. This court did comment that experts in other cases have

stated that they did not administer various diagnostic tests on a patient, because it would be unnecessary and wasteful when the patient was clearly stable, clear thinking, non-delusional, etc. As Dr. Spar testified, "positive evidence" is not necessary to determine levels of impairment, to which this court concurs. However, with Sr., the court believed there was substantial evidence of impairment, as summarized in this decision.

The court believes that the evidence at trial established that Sr.'s mental function was impaired on June 19th. Sr. was videotaped during discussions of the trust and its subsequent signing. Sr. states that Ellen should be included in the rotation as chairman with control of the voting stock-which is not included in the Hospital Amendment. For the remainder of the discussion, Sr. either makes irrelevant statements or is disengaged about other matters.

In addition to the June 25th exam, a doctor the next day on June 26th concluded: "Not currently able to make major decisions/financial decisions." Dr. Posadas's medical notes from Sr.'s admission document that on Tuesday and Wednesday of the preceding week, Sr. had "collapsed from fatigue," on Friday Sr. had difficulty walking, and on Saturday Sr. was "disoriented." On June 14, Sr. left a voicemail message for Scot Kirkpatrick in which Sr. had difficulty recalling his home phone number that he had for thirty years.

On the morning of June 17, Dr. Posadas referenced the "problem" of "confusion." which was "worsening" and commented that he "[a]gree[d] with the neurology workup. Later on June 17, Dr. Susan Lee, a neurologist, saw Sr. She learned about Sr.'s medical history from Margaret, because Sr. was unable to provide the necessary facts. Dr. Lee observed that although Sr. was "oriented to self, year and hospital" and knew his date of birth, he had several severe deficiencies; he did not know the name of his prominent hospital, the month, and his occupation, and had difficulty following instructions. His failure to know his job is especially disconcerting as he was very involved with his business.

His physical therapist on June 18 commented on his "delayed processing", requiring 10 seconds to answer simple questions, such as if he is "working or retired." He needed "constant verbal and tactile cuing and maximal assist" throughout the session. Later on June 18, Dr. Lee observed cognitive difficulty, including difficulty naming his own grandchildren. The videos taken by JR. that night corroborate Sr.'s impairment. Margaret has to feed Sr. Guy Adams called the Jim Cotter Sr. in the June 18 videos "a shadow of the Jim Cotter I knew," and saw only "sparks" of the

old Jim Cotter. Although Guy Adams is not medically trained, the court found this comment persuasive, as unlike the doctors, Guy Adams could compare a person he knew well at different times. The court recognizes that Guy Adam's income greatly depends on the current RDI management.

The results of Sr.'s June 17th brain MRI showed "multiple small acute ischemic infarctions", strokes, and fragments circulating from a blood clot. Dr. Lee told Sr., Margaret, and JR. about the strokes, and they continued to discuss these estate planning issues. Neither Jr. nor Margaret appear to make any serious attempts to determine if their father understands what is happening.

On June 19th when the Hospital Amendment was signed, an occupational therapist conducted an assessment, stating that Sr. had impaired cognition." The therapist mentioned that Sr. needed strong encouragement to participate in therapy, and "delayed" answering questions. Later that morning, Dr. Ng noted that Sr.'s "mental status appeared to be improving" overnight, but included "altered mental status" to Sr.'s list of problems.

On June 19th, Sr. did not appear to read the Hospital Amendment, but simply listens in his bed as the seven bullet points are read to him by Margaret. As Margaret recites the bullet points, a nurse interrupts them to change some batteries. Margaret continues to read the bullet points about 90 seconds later. When Sr. signs the Hospital Amendment, in the video Sr. needs help with his pen.

About an hour after Sr. signed the Hospital Amendment, a nurse asked who would consent for a procedure with Sr. and his family. Two and a half hours after the Hospital Amendment is signed, a hematologist, based on a resident's exam, states Sr. is "overall disoriented". That night, Sr. refused to take his medication and asked to go home. He believed that he was in Chicago. At his deposition, Dr. Wertheimer testified that Sr. answered 11 out of 30 questions correctly on an orientation test versus a normal score of over 25. Dr. Nasmyth concluded that Sr.'s "[c]ognition remained] significantly impaired" and that Sr. could not make major financial decisions."

Under the Probate Code, Sr. lacked the capacity to execute legal documents on June 19. The parties have agreed that in this case, capacity should be judged by the standards governing contractual capacity. As a result, Sr.'s capacity accordingly must be evaluated under Probate Code

section 812, although the court would make the same decision if section 6100.5 governed in this case.. See *Andersen v. Hunt*, 796 Cal. App. 4th 722 (2011). Under Section 812, "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 decision maker and, where appropriate, the persons affected by the decision.
- (c) The significant risks, benefits, and reasonable alternatives involved in the decision.

The rebuttable presumption in California Civil Code section 39(b) applies if a person is substantially unable to manage his or her own financial resources or resist fraud or undue influence. Dr. Spar stated that Sr., would have been substantially unable to manage his finances and resist fraud and undue influence . . . " Dr. Spar also said that Sr. could not have read the Hospital Amendment because he could not concentrate for more than 10 seconds. Although reading a testamentary document is not a prerequisite for capacity, it can be a relevant factor. Sr. also had several deficits according to Dr. Read. A significant impairment was his ability to concentrate, demonstrated on the June 19th video.

His memory for basic facts was poor, which the court has previously summarized. Sr. had difficulty repeating the estate plans that Jr. had described, and understanding or communicating with others. Regarding abstract concepts, Sr. was unable to appreciate, hence consent, for the risks of a medical procedure. He lacked the ability to act in his self-interest with the occupational therapist on June 19. Regarding Sr.'s logical processing, Dr. Wertheimer suggested that Sr. be given him no more than two options because Sr. had difficulty with more complex information.

Sr. was asked to make some significant changes to his trust, including his considerable business holdings, and he was presented with several options relating to his children. This involved their cooperation in exercising control of RDI. Sr. could not remember basic facts about his life, such as his job, which raises the question of how could he remember more complicated facts such as his ownership of RDI, whether his kids even worked there, what constituted the "Citrus Operation", and how the Hospital Amendment changed his 2013 estate plan regarding the

future of RDI and the citrus farms. Sr. could not appreciate or understand the changes from the 2013 Trust, which he did not have in his room. All of these factors support the court's finding that he lacked capacity. Even with a presumption of capacity, if applicable, the evidence is sufficient to overcome this presumption and proves a lack of capacity on June 19, 2014.

PARTIAL INVALIDITY

JR. has suggested that the Court could save the Hospital Amendment by voiding only parts. This would not apply if Sr. lacked capacity. The petitioner cites *In re Baker's Estate*, 176 Cal. 430, 435. "The invalidity which attaches to a will on the ground of insanity in the testator at the time of its execution attaches to all of its provisions." In this case, we do not have evidence of insanity, and some of the bullet points are less complex, and thus pursuant to the sliding scale of *Anderson*, may involve a lesser standard of capacity than contractual. However, this court does not believe the Hospital Amendment can be divided up and considered in part and incorporate Sr.'s intent, when combined with the 2013 trust. The provisions of this complex estate plan are sufficiently interrelated that selecting some of the parts and eliminating others is not practical, and there has been insufficient evidence in this hearing on the effect on the overall trust of permitting specific gifts for the residuary beneficiaries.

UNDUE INFLUENCE

Notwithstanding a finding of capacity, the petitioners have also proven there was undue influence, regardless of the applicability of any presumption under California law.

Regarding such a presumption of undue influence, it arises when there is a concurrence of the following elements: (1) the existence of a confidential or fiduciary relationship between the testator and the person alleged to have exerted undue influence; (2) active participation by such person in the preparation or execution of the will; and (3) an undue benefit to such person or another person under the will thus procured. (*Estate of Gelonese* 36 Cal.App.3d 854, 861-862 (1974); *Estate of Peters* 9 Cal.App.3d 916, 922 (1970); *Estate of Morgan* 148 Cal.App.2d 811, 814 (1957).)

Jr. and Sr., as father and son, had a confidential relationship. See, e.g., *Estate of Gelonese*, 36 Cal. App. 3d 854, 863 (1974) (explaining that a "confidential relationship is present as a matter of law because [s]uch a relation is presumed to exist between parent and child"). Second, JR.

"actively participate[]" in procuring the Hospital Amendment. Third, JR. unduly benefitted from the execution of the Hospital Amendment by increasing his power over the voting stock and the citrus operations, and by getting the rotating trusteeship.

The petitioners have established that Jr. participated in the preparation and execution of Hospital Amendment. Case law, on admittedly different yet relevant facts, state that neither urging a testator to make a will nor procuring an attorney to prepare the will are themselves sufficient to trigger the presumption of undue influence. To sustain an undue influence finding, the court looks for additional evidence such as deception, overreaching or excessive persuasion. (*Estate of Swetmann* 85 Cal.App.4th 807, 821 (2000); *Estate of Beckley* 233 Cal.App.2d 341, 346-348 (1965).) In the present case, there was credible evidence presented that Jr. was involved in overreaching or excessive persuasion. Sr. was isolated in his hospital room, although friends and relatives were free to visit him, and lawyers. As such, the additional element has been satisfied.

The evidence demonstrates that many of the Hospital Amendment terms were never dictated or discussed with Sr., whose intent, according to Scot Kirkpatrick, was to leave a trust that would have divided control of Sr.'s estate equally between his three children. Jr. was concerned about such a possibility, which would result in his loss of any meaningful role in the management of his father's company. The hospital amendment is inconsistent with Sr.'s intent as was discussed with Scot Kirkpatrick and Guy Adams, but also different from Sr.'s intent discussed with Jr. on the June 18 tapes.

Neither Margaret nor Junior's explanations for their conduct on June 19th are credible, that they were tired, rushed, relying on others, sacrificing personal interests for the greater good of RDI, etc. They knew their father was dying, and they wanted to get him to sign what they perceived at the time to be a better trust instrument. Undue influence consists of conduct which subjugates the will of the testator to the will of another and causes the testator to make a disposition of her property contrary to and different from that which he would have done had he been permitted to follow his own inclination or judgment. (*Estate of Franco* 50 Cal.App.3d 373, 382 (1975).) Evidence of some pressure on the testator is not enough. Rather, there must be proof that the testator's free will was completely overborne by the pressure of the undue influencer. (*Hagen v. Hickenbottom* 41 Cal.App.4th 168, 204-05 (1995).)

After 2013, Sr. initially considered revising his trust to incorporate a parent's natural split of his estate evenly between his three children. After the 2013 trust was signed, Sr. contemplated additional estate planning during the fall with Guy Adams instead of Charles Larson, who had prepared the 2013 Trust. Sr. then hired an Atlanta lawyer Scot Kirkpatrick to change the voting stock distribution. Under the 2013 Trust, Margaret had sole control of the voting stock. Sr. wanted his three children to work together, which unfortunately is now impossible.

According to Scot Kirkpatrick, on May 28, Sr. asked him to divide his estate, including control of the voting stock, into thirds for his three children. On June 6, 2014, Kirkpatrick sent Sr. a draft revision of his trust and will. The June 6 draft split control of the voting stock 1/3-1/3-1/3 between Ellen, Margaret, and Jr. and would result, in Kirkpatrick's words, in "Majority rule." This meant that the sisters would outvote Jr., and thus run RDI. Jr. saw that the 2013 Trust gave Margaret sole control of the voting stock, and thus control of RDI. Jr. believed he was destined to assume the management of RDI based on promises by Sr. Hence, Jr. wanted that Hospital Amendment.

There is the much discussed "Capital Grille dinner" on June 11, 2014, five days before Sr.'s hospital admission, when Jr. discusses his concerns with Sr.. There are, of course, different accounts of the conversation, and as with much of the testimony in this case, each corresponds with the self-interest of the participant. As the court has stated, the credibility of both Jr. and Margaret is lacking due to other testimony of both of them regarding Sr.'s capacity at different times, incorrect statements to Sr. at the hospital, subsequent comments to the estate lawyers, and the signing of the later testamentary documents. Margaret may have stated at her deposition that she was "zoned out" at this dinner, but it does not necessarily follow that she recalled nothing about the content of any conversation, and the court must still assess the accuracy of Jr.'s recollection about what was discussed.

According to Scot Kirkpatrick, Sr. did speak with Kirkpatrick on June 14, three days after the Capital Grille dinner, and apparently did not request any changes to the June 6th draft, such as excluding Ellen. At Jr.'s request, Kirkpatrick inserted Article IX (requires unanimous consent) into his June 6 draft, and circulated a revised draft on June 19, when Sr. was in the hospital. This may indicate Sr.'s intent that Ellen be included, yet she was not included as a trustee of the grandchildren's trust which had been recently executed. However, Ellen did not have children.

On June 18th, Jr. recorded what he says was the majority and most important of the conversation. The rotating trustee provision is not discussed on the tapes. Sr. is virtually silent except for some affirmative responses. Sr. does comment that Ellen would have a year as the chair, which she does not get in the hospital amendment. There is no clear explanation of this request on the tape.

Jr. then asks for Chuck Larson to rejoin the drafting of the Hospital Amendment on June 19th. Kirkpatrick does not know of Sr.'s strokes, and does not believe he received the video supposedly stating Sr.'s intentions. Larson drafts the alternating chair provisions excluding Ellen, and drafts the 7 bullet points.

On the June 19th video, Jr. inexplicably tells his father that the Hospital Amendment only made "minor changes", an ironic statement in view of the extensive litigation about this amendment. This statement alone supports a finding of undue influence, as it grossly misstates the effect of the hospital amendment. Jr. says the Hospital Amendment "reflect[s] exactly what we talked about yesterday," notwithstanding it did not, and the final version was drafted by Larson, not the attorney ultimately hired by Sr. Margaret says the version reflects what Scot is drafting, which she later admits she did not read. Margaret's explanation for her misstatements, blaming a lack of sleep and relying on Jr., is unconvincing in view of her later quickly handing documents to an incapacitated Sr. to make sure she got her Manhattan apartment. Sr. says before signing, "If it works, so let it be." Jr. confuses the rotating trustee section with rotating chairs in describing the amendment to his father.

When Margaret reads the bullet points to her father, he doesn't ask a single question. In fact, when Margaret reads to her father the bullet point about rotating the chairmanship between the three children, she asks her father: "Is that what you wanted? Dad?" Sr. never responds.

Jr. is visibly agitated in this tape. He exaggerates that without the Hospital Amendment, the family will be facing financial disaster, and that practically every asset will go to the foundation. Again, this threat of financial ruin to Sr.'s family legacy alone could be undue influence. Margaret first says he has no will, then says it is old, also untrue. The videos repeatedly demonstrate Margaret's ignorance of her father's estate. She wishes to blame her brother. If she did not know the facts, she shouldn't be guessing and supplying false information to her sick father. Margaret dishonestly assures her father she has read it to persuade him to sign the papers, which apparently she did not.

Jr. even swears to a dying grandfather on his grandchildren's lives. Jr. says this document, which is signed and thus has legal effect if Sr. had capacity, can be completely modified, but "we need to get something on the books, dude." It has been described as just a "placeholder" and a "temporary fix", also a misstatement. If this is what Sr. wanted, why would it be temporary, to be "completely modified" in the immediate future. Again, there are specific acts supporting a finding of undue influence. All of this takes place in ten minutes, including another issue involving the forgiveness of a \$1.5 million dollar loan to Jr.

Kirkpatrick testified that as an attorney, he would not be able to understand the Hospital Amendment from the bullet points without some guesswork. There are significant changes, specifically the rotating chair excluding Ellen, unanimous votes for the orange farms, and generating skipping shares. As discussed at the trial, there are several unworkable and ambiguous provisions with the rotating chair, such as who begins as the chair, what is an "important" issue, and what happens if there is a major conflict on January 2nd. Furthermore, it is difficult to assess the impact of these changes without Sr. having some briefing of the 2013 trust which would be superseded.

Undue influence . . . is the legal condemnation of a situation in which extraordinary and abnormal pressure subverts independent free will and diverts it from its natural course in accordance with the dictates of another person." *Estate of Sarabia*, 221 Cal.App. 3d 599, 605 (1990). Probate Code section 86 defines undue influence as "excessive persuasion that causes another person to act or refrain from acting by overcoming that person's free will and results in inequity." "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." *In re Hannam's Estate*, 106 Cal. App. 2d 782, 786 (1951). However, in this case, the videos presented direct evidence.

Welfare & Institutions Code section 15610.70(a) provides criteria to assess whether there is undue influence. Sr. was obviously vulnerable due to his medical condition. The tapes support that he is virtually helpless with tasks as simple as using the correct point of his pen. Jr. was exercising whatever authority he had over his father. He used affection or coercion, citing a potential loss for his estate with everything going to the foundation, and the family getting "screwed". He clearly said it had to be done in haste. He, in effect, represented he had some

expertise, as he was the principle family member working with the lawyers with the drafting of the trusts. Jr. controlled most of the access to information, as Sr. was in the hospital. He changed lawyers.

The result is inequitable to the extent the court can discern Sr.'s intended estate plan. The Hospital Amendment is different than the 2013 Trust, but Sr. was working on changes. Kirkpatrick's June 6 draft may have been moot with Sr. after the Capitol Grille dinner if one accepts Jr.'s account of the conversation.

In his June 14 call with Kirkpatrick, Kirkpatrick says that Sr. told him that he was satisfied with his June 6th draft, and was ready to sign but for a few technical changes. Sr. then suffers falls, strokes, and his admission to Cedars. The petitioner asserts that the June 6 draft is the closest evidence we have regarding a statement of Sr.'s intent as of June 2014, as Sr. did read it after a discussion with Scot Kirkpatrick. However, it fails to address any changes to the voting stock and rotating trustees. There are other documents indicative of a different intent, such as Jr.'s designation on the health directive, and Jr. and Margaret as trustees on the grandchildren's trust. To add to the ambiguity, Margaret and Ellen are the executors of his will. The Hospital Amendment incorporates changes that may have been the product of the Capital Grille dinner discussion. For whatever reason, the 2013 trust specifically gives exclusive power to Margaret and not Jr.

The court does not question, as expressed in the objections, that Sr. asked Jr.'s input in the estate planning process, nor that he was given permission to talk to the lawyers. However, this request does not correlate with the absence of undue influence when Sr.'s medical condition rapidly declined when he was in the hospital. Jr. concedes that he "implored" his father in the hospital, which he believes was innocent as his father had requested his help. This request does not immunize Jr. from the misstatements and pressure tactics described in the trial and summarized in this statement of decision.

With the conversations in the hospital, high pressure "sales tactics", factual mistakes, a ten minute signing ceremony, amidst panic, control of a \$300 million entity at stake (Jr.'s testimony about its capitalization), all thrust on an invalid, it is impossible for this court to read the mind of Sr. regarding his testamentary intent so as to negate undue influence. However, as the court has stated on previous occasions, Sr.'s ultimate intention with all of these drafts and discussions,

regardless of the lawyer, dinner conversation, who is to blame, and anything else presented in this case, was that this company was to be run by his three children for the mutual benefit of the family. Jr. has been stripped of any authority with RDI, contrary to Sr.'s expressed intentions in a testamentary document, and forced to resign. Unfortunately, Sr.'s intent has become impossible to achieve due to the acrimony that is the Cotter family today. The only intent we know is that his three children were to run the company, with Jr. as the president, with whatever actual responsibilities that came with this new position.

ELDER ABUSE

The holding in *In re Estate of Dito*, 198 Cal. App. 4th 791, 803-04 (2011) does not support the complete disinheritance of Margaret and Ellen should they have committed elder abuse.

Probate Code section 259(c) provides for disinheritance to the extent of any money damages awarded to the elder because of the abuse. The court of appeal stated that Probate Code section 259 does not necessarily disinherit an abuser entirely but rather restricts the abuser's right to benefit from his or her abusive conduct Thus, a person found liable under subdivision (a) of section 259 is deemed to have predeceased the decedent only to the extent the person would have been entitled through a will, trust, or laws of intestacy to receive a distribution of the damages and costs the person is found to be liable to pay to the estate as a result of the abuse. *Dito* specifically contrasts the limited disinheritance remedy provided by section 259 with the complete disinheritance imposed on someone who killed the decedent. Contrary to Jr.'s argument, this court does not believe this text is simply dictum, but believes it is bound by the court of appeal's decision.

Each counsel alleges forgery by either Jr. or the daughters in an effort to prove elder abuse. Forgery, Penal Code section 470 requires a fraudulent intent, rather than simply signing another person's signature without consent. This court does not find there is sufficient evidence of an intent to defraud Sr., with the various signings of documents, a necessary finding to a charge of elder abuse. As the court has previously noted, it is difficult to discern Sr.'s intent with the multitude of legal documents presented in this case.

LOAN FORGIVENESS

As opposed to the complexities of the Hospital Amendment, the court does not find that Sr. lacked capacity, whether contractual or testamentary, to make the relatively simple decision of granting Jr. full ownership of his home by forgiving the loan. This was not a complex decision. Sr. had discussed this long before, including on a video, and although he did not sign any documents to forgive the loan at that time, there is no evidence of any coercion or deception, or undue benefit. The circumstances had changed from earlier discussions about the loan. A parent forgiving a son or daughter's loan, while lay dying in a hospital, is a natural and understandable act, versus demanding that a child continue to make loan payments. (In view of the full original paragraph in the Tentative Statement of Decision, the court does not understand the objection/question asking if the court is only relying on "parental impulse", unless sarcasm was the intent.) The court did not observe any the coercive, high pressure, tactics or incorrect or misleading statements regarding the forgiveness of the loan. There was no evidence of different plans regarding forgiveness of the loan as with the multiple drafts of trust documents. The absence of Sr. signing a document to forgive the loan is insufficient to negate his expression of his intent. The court does not believe Sr. intended to give this house to his daughters or any other relatives, instead of Jr.

As for the question/objection regarding the effectiveness of the concurrent grant of the Manhattan condo to Margaret, the court does not recall that this issue is before the court.

UNCLEAN HANDS

The court does not believe the doctrine of unclean hands applies to this case, notwithstanding its earlier inquiry. It has not been used in probate disputes involving capacity, and there is insufficient evidence that Jr. was harmed by the conduct at issue.

CONCLUSION

A potential sale of RDI, and the appointment of a trustee ad litem, will be addressed in a separate statement of decision. For the reasons set forth in this decision, the 2014 "hospital amendment" is invalid.

BASED UPON THE FOREGOING, THE COURT RULES AS FOLLOWS:

1. The standard of capacity for the amended trust executed by James Cotter, Sr. on June 19, 2014 is governed by California Probate Code, Section 6100.5.
2. James Cotter Sr. lacked capacity to execute the "Hospital Amendment" on June 19, 2014.
3. James Cotter Sr. was subject to undue influence on June 19, 2014 when signing the "Hospital Amendment."
4. The 2014 "Hospital Amendment" is invalid.
5. James Cotter Sr. had capacity to understand the \$1.5 million loan forgiveness for James Cotter Jr. pursuant to California Probate Code, Section 6100.5 and was not subject to undue influence in violation of California Welfare and Institutions Code, Section 15610.70, as this document was consistent with his intentions and did not constitute an undue benefit.
6. No party has committed elder abuse.
7. No party shall be awarded punitive damages or double damages.
8. Neither James Cotter Jr., Ellen Cotter, or Margaret Cotter are deemed to have predeceased James Cotter Sr. pursuant to Probate Code section 259.
11. Each party shall bear their own costs.
12. Counsel for Margaret and Ellen Cotter shall prepare a judgment and order consistent with this statement of decision.

IT IS SO ORDERED.

Dated 12/8/17

CLIFFORD L. KLEIN

Clifford L. Klein
Judge of the Los Angeles Superior Court

SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

**Probate Division
Stanley Mosk Dept. - 9**

BP159755

In re: COTTER, JAMES J. LIVING TRUST DTD 8/1/2000

December 12, 2017

8:30 AM

Honorable Clifford Klein, Judge

Sharon McKinney, Judicial Assistant
Terrilynn Edwards, Court Services
Assistant

Elsa Lara (#3226), Court Reporter
Luis A Flores, Deputy Sheriff

NATURE OF PROCEEDINGS: Court Order Hearing re Notice of Entry of Statement of Decision

The following parties are present for the aforementioned proceeding:

No appearances.

Out of the presence of the court reporter, the Court makes the following findings and orders:

The parties are hereby notified that the Court has issued its Statement of Decision on Phase 1 of the trial on December 8, 2017. A copy of the Statement of Decision is sent to the parties as indicated below this date by the Clerk.

Counsel are ordered to pick up Phase 1 trial exhibits by December 28, 2017.

**CLERK'S CERTIFICATE OF MAILING/
NOTICE OF ENTRY OF ORDER**

I, SHERRI R. CARTER, Executive Officer/Clerk of the above-entitled court, do hereby certify that I am not a party to the cause herein, and that on this date I served the Notice of Entry of the above minute order of December 12, 2017 upon each party or counsel named below by placing the document for collection and mailing so as to cause it to be deposited in the United States Mail at the courthouse in Los Angeles, California, one copy of the original filed/entered herein in a separate sealed envelope to each address as shown below with the postage thereon fully prepaid, in accordance with standard court practices.

Dated: December 12, 2017

By: /s/ Sharon McKinney

Sharon McKinney, Deputy Clerk

SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

Probate Division

Stanley Mosk Dept. - 9

BP159755

In re: COTTER, JAMES J. LIVING TRUST DTD 8/1/2000

December 12, 2017

8:30 AM

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FILED
Superior Court of California
County of Los Angeles

MAR 22 2018

Sherri R. Carter, Executive Officer/Clerk

By Terrilyn Edwards Deputy
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14 *Attorneys for Petitioners,*
15 *Ellen Marie Cotter and Ann Margaret Cotter*

16 SUPERIOR COURT OF THE STATE OF CALIFORNIA
17 COUNTY OF LOS ANGELES, CENTRAL DISTRICT
18

19 In re

20 JAMES J. COTTER LIVING TRUST
21 dated August 1, 2000

Case No. BP159755

**JUDGMENT AND ORDER RE
PETITION FOR AN ORDER
DETERMINING VALIDITY OF TRUST
AMENDMENT AND FORGIVENESS
OF LOAN FILED FEBRUARY 5, 2015**

Date: July 12, 2016
Time: 1:30 p.m.
Dept. 9

12730 01 00268351.DOC1

JUDGMENT AND ORDER

RA572

1 The Petition for an Order Determining Validity of Trust Amendment and
2 Forgiveness of Loan filed February 5, 2015 came before the Court for trial commencing
3 on July 12, 2016, in Department 9 of the Superior Court, the Honorable Clifford L. Klein,
4 Judge presiding.

5 Petitioners Ellen Marie Cotter and Ann Margaret Cotter (collectively,
6 "Petitioners") appeared by their counsel of record, Sacks, Glazier, Franklin, & Lodise,
7 LLP and Susman Godfrey, LLP. Respondent James Cotter, Jr. appeared by his counsel of
8 record, Sheppard, Mullin, Richter & Hampton, LLP. Petitioners and respondent are each,
9 individually, parties.

10 The Court, having considered the pleadings, heard oral argument, considered the
11 documentary evidence, and read and considered all the papers filed, renders a decision as
12 follows:

13 NOW, THEREFORE, IT IS HEREBY ADJUDICATED, ORDERED, AND
14 DECREED that:

- 15 1. The 2014 Hospital Amendment is invalid.
- 16 2. The validity of the \$1.5 million loan forgiveness for James Cotter, Jr. is
17 confirmed.
- 18 3. No party has committed elder abuse.
- 19 4. No party shall be awarded punitive damages or double damages.
- 20 5. Neither James Cotter, Jr., Ellen Marie Cotter, nor Ann Margaret Cotter are
21 deemed to have predeceased James Cotter, Sr. pursuant to Probate Code section 259.

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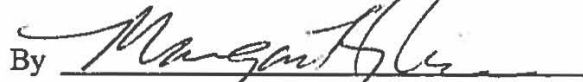
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28 ///

1 6. Each party shall bear his or her own costs.

2
3 APPROVED AS TO FORM AND CONTENT:

4 SACKS GLAZIER FRANKLIN & LODISE LLP

5 By 

6 Margaret G. Lodise

7 Douglas E. Lawson

8 - and -

9 SUSMAN GODFREY L.L.P.

10 Harry P. Susman

11 Glenn C. Bridgman

12 Attorneys for Petitioners,

13 Ellen Marie Cotter and Ann Margaret Cotter

14 SHEPPARD MULLIN RICHTER & HAMPTON LLP

15 By 

16 Adam F. Streisand

17 Nicholas Van Brunt

18 Attorneys for Respondent, James J. Cotter, Jr.

19
20
21 IT IS SO ORDERED

22 DATED: 3/22/15

23 By: 
24 JUDGE OF THE SUPERIOR COURT

Under Seal Document

RA575-RA679

Under Seal Document

RA680-RA750