2002 WL 34413825 (Cal.Superior) (Trial Order)
Superior Court of California.
Marin County

In re Jane ALTER Trust Susan David, Petitioner,
v.
Wendy ALTER, individually and as successor trustee of the Jane Alter Living Trust, Respondent.

No. PR 000851.
December 10, 2002.

**Statement of Decision**

John A. Sutro, Jr, Judge.

The trial of the above-entitled matter came on regularly for hearing on March 6, 7, 13, 14, 15, 20 and 21, 2002. Catherine Duggan, Esq. appeared on behalf of SUSAN DAVID, petitioner, and Robert Helmenstine, Esq. and Sterling Ross, Esq. appeared on behalf of WENDY ALTER HERMANN respondent. The Court having heard the evidence and reviewed the trial transcript and exhibits and post-trial briefs of the parties, and being fully advised, renders the following statement of decision herein.

The validity of two documents is involved in this proceeding. The first is the Jane Alter Trust dated June 8, 1993 (Exh. 4), and the second is a November 2, 1995,amendment thereto (Exh. 5). Petitioner urges the Court to set aside these two documents on two grounds: one is that Jane Alter, her mother, lacked the competence to execute them, and the other is that they were the result of undue influence exerted by respondent, who is petitioner's sister.

## I. *COMPETENCE*

The law as to the issue of competence to execute documents such as those in question is clear. The California Supreme Court, in *Estate of Lingenfelter* (1952) 38 Cal.2d 571 stated at pages 580 and 581 that:
"* * * the evidence * * * shows no lack of testamentary capacity at the time of the execution of the will presented for probate. There is testimony concerning isolated acts, foibles, idiosyncrasies, mental irregularities or departures from the normal which do not bear directly upon and influence the testamentary act. But much more than that is required to set aside bequests of property. 'The actual mental condition of the decedent at the time of the execution of the will is the question to be determined upon a contest based on his alleged incompetency and evidence tending to show unsoundness of mind either before or after the execution of the will is important only in so far as it tends to show mental condition at the time of the execution of the will.... To overcome the presumption of sanity the contestant must show affirmatively and by a preponderance of the evidence that the testator was of unsound mind at the time he executed his will.' (*Estate of Smith,* 200 Cal. 152, 158 [252 P. 325].)

" 'Testamentary capacity cannot be destroyed by showing a few isolated acts, foibles, idiosyncrasies, moral or mental irregularities or departures from the normal unless they directly bear upon and have influenced the testamentary act.' (*Estate of Wright,* 7 Cal.2d 348, 356 [60 P.2d 434]; *Estate of Selb,* 84 Cal.App.2d 46, 49 [190 P.2d 277]; *Estate of Arnold,* supra, p. 586.)"

Also in *Estate of Llwewllyn* (1948) 83 Cal.App.2d 534, the court states that (pp. 554-555):
"* * * testamentary incapacity must be shown by a preponderance of the evidence to exist at the time of the execution of the will, and that any infirmities of body or mind had a direct influence upon the testamentary act. The question is not what may

have been the testator's mental state at the time of the testamentary act, but what it actually was. It is true of course that evidence of the condition of the testator's mind before and even after the date of the testamentary act was admissible, but it assumes importance only insofar as it bears upon that condition at the very time of the execution of the will. As was said by this court in *Estate of Schwartz,* 67 Cal.App.2d 512, 520 [155 P.2d 76]:

" 'What others than the testator may think as to the justice or injustice of a will is simply a matter of opinion and therefore, before the law will permit judges or juries to make disposition of a decedent's property irrespective of his or her desires, substantial evidence is required to show lack of testamentary capacity at the time of the execution of the will.' "

It is clear that whatever Jane's[1] condition might have been at the times of her hospitalizations and otherwise, what is important here is her capacity as of June 8, 1993, and November 2, 1995.

Footnotes

There is a substantial amount of evidence in the record of Jane's physical and mental infirmities during the years 1990 to 1995. There is also evidence that those infirmities progressed as the years went by and that her condition deteriorated both physically and mentally. But there is no evidence in the record to show that she lacked competence at the time of the execution of the instruments in question.

Mr. Ross, the attorney who prepared the Jane Alter Trust, testified that Jane knew exactly what she wanted and understood the provisions of the Jane Alter Trust when he explained them to her. Ms. Marshall, the attorney who prepared the November 2, 1995, amendment, also testified to the same effect: that when Jane came to her office to execute the amendment on November 2, Ms. Marshall paraphrased it for her, that Jane was not having any difficulty communicating with Ms. Marshall during the meeting, and that Jane knew who she was and was oriented as to time. She knew who her beneficiaries were, what she wanted to do with her estate plan and what the consequences of that plan were.

In *Estate of Arnold* (1940) 16 Cal.2d 573, the Supreme Court states the following with regard to competence at pages 585-586:
"It is well settled that mere proof of mental derangement or even of insanity in a medical sense is not sufficient to invalidate a will, but the contestant is required to go further and prove either such a complete mental degeneration as denotes utter incapacity to know and understand those things which the law prescribes as essential to the making of a will, or the existence of a specific insane delusion which affected the making of the will in question. (*Estate of Shay,* 196 Cal. 355, 359 [237 Pac. 1079]; *Estate of Russell,* 189 Cal. 759, 769 [210 Pac. 249].)

" 'A testator is of sound and disposing mind and memory if, at the time of making his will, he has sufficient mental capacity to understand the nature of the act he is doing, to understand and recollect the nature and situation of his property and to remember, and understand his relations to, the persons who have claims upon his bounty and whose interests are affected by the provisions of the instrument.' "

Just to show how heavy a burden that is, at page 587, the court discusses the testimony of two doctors as follows:
"Great reliance is placed by contestant upon the evidence of Doctors Pleth and Thurlow that long and excessive use of intoxicating liquor causes a disease and deterioration of the brain cells, which results in a loss of memory and impairment of the mental faculties. Contestant contends that long and excessive use of intoxicating liquors had brought this condition upon Arnold. Giving this evidence all that can possibly be claimed for it, it simply shows that Arnold had sustained, as a result of chronic alcoholism, a loss of memory and an impairment of his other mental faculties, but it failed to show that 'utter incapacity to know and understand those things which the law prescribed as essential to the making of a will.' "

The Court believes that those statements apply to this case. As far as competence to execute the documents in question goes, the record is devoid of any evidence that, at the time of execution of those two documents, Jane lacked competence to

execute them.

## II. *UNDUE INFLUENCE*

### A. *LEGAL GUIDELINES REGARDING UNDUE INFLUENCE*

As defined in the Civil Code in section 1575, undue influence consists:
"1. In the use, by one in whom a confidence is reposed by another, or who holds a real or apparent authority over him, of such confidence or authority for the purpose of obtaining an unfair advantage over him;

2. In taking an unfair advantage of another's weakness of mind; or,

3. In taking a grossly oppressive and unfair advantage of another's necessities or distress."

The following statements appear in the case of *Hagen v. Hickenbottom* (1995) 41 Cal.App.4th 168 with regard to the question of undue influence (pp. 181-182):
" 'As a general proposition, California law allows a testator to dispose of property as he or she sees fit without regard to whether the dispositions specified are appropriate or fair. [Citations.] Testamentary competence is presumed. [Citations.]' (*Estate of Sarabia,* supra, 221 Cal.App.3d at p. 604.) The presumption can be overcome if it is shown that the testamentary act was the product of undue influence (ibid.), but the strictness of the rules for proof of undue influence reflects the strength of the presumption in favor of the will: ' "[I]t is necessary to show that the influence was such as, in effect, to destroy the testator's free agency and substitute for his own another person's will. [Citation.] Evidence must be produced that pressure was brought to bear directly upon the testamentary act. [Citation.] Mere general influence, however strong and controlling, not brought to bear upon the testamentary act, is not enough; it must be influence used directly to procure the will and must amount to coercion destroying free agency on the part of the testator. [Citation.] ... [M]ere opportunity to influence the mind of the testator, even coupled with an interest or a motive to do so, is not sufficient. [Citation.] 'The unbroken rule in this state is that courts must refuse to set aside the solemnly executed will of a deceased person upon the ground of undue influence unless there be proof of "a pressure which overpowered the mind and bore down the volition of the testator at the very time the will was made." '[Citation.]" '(*Estate of Welch* (1954) 43 Cal.2d 173, 175-176 [272 P.2d 512], quoting from *Estate of Arnold* (1940) 16 Cal.2d 573, 577 [107 P.2d 25].)"

In *Estate of Sarabia* (1990) 221 Cal.App.3d 599, the court stated: "Undue influence, then, 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. (See *Estate of Baker* (1982) 131 Cal.App.3d 471, 480, 486 [182 Cal.Rptr. 550]; *Estate of Truckenmiller* (1979) 97 Cal.App.3d 326, 334 [158 Cal.Rptr. 699]; *Estate of Franco* (1975) 50 Cal.App.3d 374, 382 [122 Cal.Rptr. 661, 123 Cal.Rptr. 458].) It is akin to fraud. (See *Estate of Garibaldi* (1961) 57 Cal.2d 108, 114 [17 Cal.Rptr. 623, 367 P.2d 39].)" (221 Cal.App.3d at p. 605).

" '[I]nfluence which reaches the stage of being undue influence is not at all the same in every case. In one case it takes but little to unduly influence a person; in another case much more.... Accordingly, every case must be viewed in its own particular setting.' (*Estate of Bucher,* supra, 48 Cal.App.2d 465 at p. 474; see *Estate of Peters,* supra, 9 Cal.App.3d 916 at p. 923.) If the trier of fact is empowered to check for 'unnatural' provisions of the will as an indicator of undue influence (see *Estate of Lingenfelter,* supra, 38 Cal.2d 571 at pp. 583, 585), it follows as a matter of simple corresponding logic that the trier is empowered to decide what would constitute natural provisions. To determine if the beneficiary's profit is 'undue' the trier must necessarily decide what profit would be 'due.' These determinations cannot be made in an evidentiary vacuum. The trier of fact derives from the evidence introduced an appreciation of the respective relative standings of the beneficiary and the contestant to the decedent in order that the trier of fact can determine which party would be the more obvious object of the decedent's testamentary disposition. (See *Estate of Mann* (1986) 184 Cal.App.3d 593, 612-613, & fns. 10-11 [229 Cal.Rptr. 225].)" (221 Cal.App.3d at page 607).

It is apparent from the trial of this matter that there is no direct evidence of undue influence by respondent Wendy upon Jane and that petitioner Susan must, therefore, rely upon circumstantial evidence to prove undue influence. In *Estate of Bould* (1955) 135 Cal.App.2d 260, the court said the following about the sufficiency of circumstantial evidence to prove undue influence (pp. 270-271):
"* * * circumstantial evidence is sufficient only when it is inconsistent with the absence of undue influence. *Estate of Hamburger,* supra, 126 Cal.App. 455, at page 464 [14 P.2d 802], says in this regard: ' "It is not sufficient for a contestant merely to prove circumstances consistent with the exercise of undue influence, but, before a will can be overthrown, the circumstances proved must be inconsistent with voluntary action on the part of the testator. (*Estate of Morcel,* 162 Cal. 188 [121 P. 733].)" (*Estate of Donovan,* 114 Cal.App. 228 [299 P. 816].) See also *Estate of Presho,* 196 Cal. 639 [238 P. 944], *and Estate of McDevitt,* 95 Cal. 17 [30 P. 101].)' And *Estate of Welch,* supra, 43 Cal.2d 173 at page 178: 'It is not sufficient for a contestant merely to prove circumstances consistent with the exercise of undue influence; but before the will can be overthrown the circumstances must be *inconsistent* with voluntary action on the part of the testator. (*Estate of Donovan,* 114 Cal.App. 228, 233 [299 P. 816].)' This is a well established rule, stated in numerous cases, e. g. *Estate of Doty,* 89 Cal.App.2d 747, 755 [201 P.2d 823]; *Estate of Carson,* 74 Cal.App. 48, 61 [239 P. 364]; *Estate of McGivern,* 74 Cal.App.2d 150, 156 [168 P.2d 232]; Estate of Hull, 63 Cal.App.2d 135, 143 [146 P.2d 242]; *Estate of Lombardi,* 128 Cal.App.2d 606, 612 [276 P.2d 67]. (14) In the Doty case this court pointed out, at page 755, that: 'Proof of conduct which merely inspires affection and gratitude, standing alone, does not even tend to prove undue influence. If it results in recognition by a testamentary act it is regarded as a natural and proper result. If the acts themselves are not [to] be condemned, the fact that they are inspired by a selfish motive does not give them legal significance.' "

Finally, the law is clear that, in determining whether a disposition is the result of undue influence, the Court cannot substitute its own judgment of what is fair for that of the testator's. As the court stated in *Estate of Rabinowitz* (1943) 58 Cal.App.2d 106, 111:

> "Appellant urges that the will in question is upon its face an unnatural and unjust one. Insofar as this claim is concerned, we are first of all confronted with the fact that every person of sound mind, over the age of eighteen years, may dispose of his or her separate property by will (sec. 20, Prob. Code). In other words, the property belongs to the maker of the will and he or she may dispose of it as he thinks fit without regard to the views of juries or courts. In the minds of others than the testator, the naturalness or justice of the document is a matter of opinion and where the testator is competent, and undue influence or fraud is absent, it is the desires of the maker of the will that must prevail and not the opinions of a court or jury. (*Estate of Nolan,* 25 Cal.App.2d 738 [78 P.2d 456]. By an unbroken line of authorities in this state, it is firmly established that however unnatural or unjust a will may appear to be, and however much at variance with expressions by the testator concerning relatives or the natural objects of his bounty, the testamentary document may not be held invalid on the ground of undue influence unless there be a showing of some sort of pressure which overpowered the mind and mastered the volition of the testator at the very moment of execution. (*Estate of Clark,* 170 Cal. 418, 424 [149 P. 828]; *Estate of Carithers,* 156 Cal. 422, 428, [105 P. 127]; *Estate of Gleason,* 164 Cal. 756, 765 [130 P. 872]; *Estate of Lavinburg,* 161 Cal. 536, 543 [119 P. 915].)"

**B. *BURDEN OF PROOF OF UNDUE INFLUENCE***

An important question on the issue of undue influence in this case is whether the presumption of undue influence applies.
"The presumption in favor of a will may be neutralized by a presumption that undue influence was brought to bear on the testator. The presumption of undue influence arises only if *all* of the following elements are shown: (1) the existence of a confidential relationship between the testator and the person alleged to have exerted undue influence; (2) active participation by such person in the actual preparation or execution of the will, such conduct not being of a merely incidental nature; and (3) undue profit accruing to that person by virtue of the will. If this presumption is activated, it shifts to the proponent of the will the burden of producing proof by a preponderance of evidence that the will was not procured by undue influence. It is for the trier of fact to determine whether the presumption will apply and whether the burden of rebutting it has been satisfied. (See e.g., *Estate of Lingenfelter* (1952) Cal.2d 571, 585 [241 P.2d 990]; *Estate of Baker,* supra, 131 Cal.App.3d 471 at pp.

480, 483; *Estate of Clegg* (1978) 87 Cal.App.3d 594, 602 [151 Cal.Rptr. 158]; *Estate of Gelonese* (1974) 36 Cal.App.3d 854, 861-863 [111 Cal.Rptr. 833]; *Estate of Evans* (1969) 274 Cal.App.2d 203, 211-212 [79 Cal.Rptr. 1].)" (*Estate of Sarabia, supra,* 221 Cal.App.3d 599, at p. 605).

In *Estate of Bould,* supra, the court had the following to say about the second requirement for applicability of the presumption, that is, activity with regard to the procuring of the instrument in question (135 Cal.App.2d 260 at pp. 274-276): "The necessary basis for the shifting of the burden is set forth in *Estate of Lingenfelter,* supra, 38 Cal.2d 571, 585: 'The indicia of undue influence have been stated as follows: "(1) The provisions of the will were unnatural.... (2) the dispositions of the will were at variance with the intentions of the decedent, expressed both before and after its execution; (3) the relations existing between the chief beneficiaries and the decedent afforded to the former an opportunity to control the testamentary act; (4) the decedent's mental and physical condition was such as to permit a subversion of his freedom of will; and (5) the chief beneficiaries under the will were active in procuring the instrument to be executed.' (*Estate of Yale,* 214 Cal. 115, 122 [4 P.2d 153].) These, coupled with a confidential relationship between at least one of the chief beneficiaries and the testator, altogether were held "sufficient to shift the burden to the proponents of the will to establish an absence of undue influence and coercion and to require the issues to be determined by the jury." (*Estate of Yale,* supra, p. 123.)' * * *

"The mere existence of a confidential relationship coupled with opportunity to impose the beneficiary's will upon the testatrix is not enough to shift the burden of proof. 'As suggested in *Estate of Higgins,* 156 Cal. 257 [104 P. 6], a "presumption of undue influence" arises from proof of the existence of a confidential relation between the testator and such a beneficiary, "coupled with activity on the part of the latter in the preparation of the will." The confidential relation alone is not sufficient. There must be activity on the part of the beneficiary in the matter of the preparation of the will.' (*Estate of Baird,* 176 Cal. 381, 384 [168 P 561].) "Undoubtedly the relation between respondent and his mother was affectionate and confidential and that *(sic)* he would have a general influence over his mother proceeding from such relation. But the existence of such relation and this general influence raises no presumption that undue advantage was taken of it by respondent. There is no legal suspicion of undue influence arising from the existence of such a relationship, which imposes upon the son the necessity, when a will in his favor is attacked, of assuming the burden of proof that he had not unduly influenced his mother in making the will.' (*Estate of Anderson,* 185 Cal. 700, 716, 717 [198 P. 407].) See to the same effect *Estate of Kilborn,* 162 Cal. 4, 11 [120 P. 762]; *Estate of Ricks,* 160 Cal. 450, 461 [117 P. 532]; *Estate of Doty,* 89 Cal.App.2d 747, 758 [201 P.2d 823]. And, as shown above, the addition of interest and motive to subvert the testatrix' will does not change the burden; activity on the part of the one occupying the confidential role is requisite.

"That activity must be in the preparation of the will. *Estate of Lombardi,* 128 Cal.App.2d 606, 612 [276 P.2d 67], quotes *Estate of Burns,* 26 Cal.App.2d 741 [80 P.2d 77], as follows: ' "... where one who unduly profits by the will as a beneficiary thereunder sustains a confidential relation to the testator, *and has actually participated in procuring the execution of the will,* the burden is on him to show that the will was not induced by coercion or fraud ... However, the confidential relation alone is not sufficient. *There must be activity on the part of the beneficiary in the matter of the preparation of the will.' "* Some incidental activity in the execution, rather than the preparation of the will, is not enough to swing the burden. The Lingenfelter opinion, *supra,* at page 586 says: 'Active participation in procuring the execution of the will cannot be inferred from the fact that Madge accompanied Vivian [the testatrix] to Powell's office, in the absence of any indication that Vivian went there at Madge's instigation or request, or that Vivian was not acting entirely in accord with her own desire.' It has been held that the mere fact of the beneficiary [sic] procuring an attorney to prepare the will is not sufficient 'activity' to bring the presumption into play (*Estate of Llewellyn,* 83 Cal.App.2d 534, 565 [189 P.2d 822, 191 P.2d 419]; *Estate of Hull,* 63 Cal.App.2d 135, 139, 142 [146 P.2d 242]; *Estate of Williams,* 99 Cal.App.2d 302, 315 [221 P.2d 714]); or selection of attorney and accompanying testator to his office (*Estate of Latour,* 140 Cal. 414, 424 [73 P. 1070, 74 P. 441]; *Estate of Anderson,* 185 Cal. 700, 717 [198 P. 407]); or mere presence in the attorney's outer office (*Estate of Lingenfelter,* supra, 38 Cal.2d 571, 586 [241 P.2d 990]; *Estate of Anderson,* supra, 185 Cal. 700, 717); or presence at the execution of the will (*Estate of Jacobs,* 24 Cal.App.2d 649, 652 [76 P.2d 128]; *Estate of Lombardi,* supra, 128 Cal.App.2d 606, 608-609, 613); or presence during the giving of instructions for the will and at its execution (*Estate of Easton,* 140 Cal.App. 367, 376 [35 P.2d 614]; *Estate of Morcel,* 162 Cal. 188, 197 [121 P. 733])."

Turning, then, to a determination whether the presumption of undue influence applies in the present case, with regard to the first element of the presumption, the existence of a confidential relationship between Wendy and Jane, that issue is not even

contested by Wendy, nor could it be based upon the facts that were adduced in evidence at the trial. It is clear that, commencing in the fall of 1990, Jane relied upon Wendy for assistance in her daily living, a dependence that increased substantially with the passage of the years to November 1995. The evidence showed, for example, that Wendy drove Jane to attorneys' offices, banks and medical appointments, among other things. In addition, Wendy was trustee of the Jane Alter Trust and, as such, had control of all her assets, handled all her financial affairs and, at least at some point between 1990 and 1995, started paying all of her bills as well. Also, the law presumes that a confidential relationship exists between parent and child. Certainly that presumption cannot be rebutted; to the contrary, it is borne out by the facts. There is no question on the record that there was a confidential relationship between Wendy and Jane.

Skipping to the third element, that is, undue profit, in looking at the estate plan of both Jane and her husband, Zal prior to 1991, Jane and Zal treated their two daughters, Susan and Wendy, equally, as is reflected by the dispository provisions of the Alter Family Trust, pursuant to which the residue was left in equal shares to the two of them. By 1995, Susan and her side of the family were all but completely eliminated from Jane's estate plan. If undue influence can be proven, the Court finds that these facts show that Wendy has unduly profited from the execution of the 1993 and 1995 instruments in question.

Going back to the second element prerequisite to application of the presumption, which is active participation in procuring the instruments, the Court believes that the following facts bear upon that element.

In September of 1990, Wendy contacted the law firm of Titchell, Maltzman, Mark, Bass, Ohleyer & Mishel when she became angry with Susan because of what she considered a slight in the gifting that Zal Alter had effected in August 1990.[2] Wendy communicated her anger over the gifts to Jane, as a result of which the two of them went to Titchell Maltzman to meet with attorney Stephen Gould. When it became apparent to Mr. Gould that the good offices of his firm could not be used to help settle the dispute that had arisen between Wendy and Jane, on the one hand, and Susan, on the other, he referred them to Sterling Ross. Wendy thereupon contacted Mr. Ross, and Jane and she then went to see him. Subsequently, they had several meetings with him between September of 1990 and April of 1991. There were times during those meetings when Wendy spoke with Mr. Ross alone, and times when she brought Jane and stayed out of his office while Jane talked to him.

[1] The Court refers to the parties and other members of the Alter family by their given names for the sake of clarity only; no disrespect is intended.

During the period October 1990, through the first few months of 1991, according to Wendy's testimony during the trial, she saw Jane at least once a week. They discussed the question of Jane's access to her account, Jane's allowance and the gifting on more than one occasion. They discussed the issue of Jane's access to her account in connection with their going to the bank, and Wendy took Jane to the bank more than once to help her gain access to the funds in the Alter Family Trust account. They discussed these issues in connection with their visit to Titchell Maltzman and later with Mr. Ross.

The discussions between Wendy, Jane and Mr. Ross led, on April 23, 1991, to Wendy's and Jane's filing a petition against Susan seeking to have her removed as co-trustee of the Alter Family Trust and to eliminate her entirely from any responsibilities with regard to the management of the family finances. During the course of this litigation, which ultimately was resolved in August 1992, Wendy received copies of correspondence concerning it.

In 1992, Wendy and Jane met Mr. Ross at his office. They then went to the Buckeye Restaurant in Mill Valley and talked about, among other things, Jane's trust.

In 1993, Wendy took Jane to Mr. Ross's office so that Jane could change her estate plan; however, there is no evidence in the record that Wendy knew that that was the purpose of Jane's meeting with Mr. Ross or what Jane actually intended to do. While the record is susceptible of an inference that Wendy knew Jane was going to change her estate plan, there is no evidence that she knew what change Jane planned to make.

Wendy received copies from Mr. Ross of correspondence about Jane's estate plan as indicated by a letter dated April 28, 1993 (see Exh. 22). She was not present, according to Mr. Ross's and her testimony, when Jane discussed her estate plan with Mr. Ross. When Jane signed the Jane Alter Trust on June 8, 1993, Wendy took her to the office, was present during the discussion of it and signed the documents herself as trustee.

In 1995, Wendy took Jane to Mr. Ross's office to have an amendment prepared to the Jane Alter Trust. Wendy testified that Mr. Ross met alone with Jane. Wendy did not understand that the issue they probably were discussing was a change in Jane's estate plan. Mr. Ross, however, declined to represent Jane with regard to making any change in the Jane Alter Trust because he thought Wendy and Jane should each have her own counsel, although he had represented both of them since 1990. Accordingly, Mr. Ross referred Jane to Marita Marshall.[3] Wendy took Jane to Ms. Marshall's office. She took Jane every time that Jane went there between her first visit and the execution of the second amendment to the Jane Alter Trust on November 2, 1995.

[2] The Titchell Maltzman firm had been involved in the preparation of the Alter Family Trust and, in that regard, had represented both Zal and Jane and had advised Zal about the gifting (see Exh. 35).

Wendy met with Ms. Marshall during Jane's and her first visit and gave her background information about the family. Wendy testified that she did not recall whether she knew why Jane went to see Ms. Marshall. She also testified that Jane did not tell her that she, Jane, intended to amend the Jane Alter Trust. However, this testimony conflicts with testimony that Wendy gave that she knew that when she took Jane to Mr. Ross's office that Jane wanted to have an amendment prepared to her trust. Wendy did testify that she knew, before Jane signed the second amendment to her trust on November 2, 1995, that under the provisions of the trust then in effect half of the residue was to go to her and the other half equally to the four grandchildren, that is, Susan's two children and her two children.

This is all the evidence that the Court could find that relates to the procurement of the documents in question. There is no evidence that, in 1993 and 1995, Wendy asked or encouraged Jane to make changes in her estate plan or that she prompted the visits to Mr. Ross and Ms. Marshall. As the quotes from the cases previously cited make clear with regard to the second element of activity in procurement, the application of the presumption of undue influence must be in connection with the preparation of the documents in question. There does not appear to be sufficient evidence in the record that would support that proposition. The Court concludes, therefore, that a presumption of undue influence cannot be made in this case, and so the burden remains on the petitioner, Susan, to prove by a preponderance of the evidence that the execution of the 1993 Jane Alter Trust and the second amendment thereto in November 1995 were the result of undue influence exerted by Wendy upon Jane.

### C. *THE FACTS*

The issue for decision is whether there is proof by a preponderance of the evidence that the documents Jane executed on June 8, 1993, and November 2, 1995, were the result of Wendy's undue influence upon her.

First, briefly with regard to the background of the parties as of late summer 1990, the evidence showed that Zal was a domineering, argumentative, abusive man. Jay Vari Berger, Jane's nephew, testified that Jane, at least until 1989, before she moved out of the family residence, was a caring person with strong interpersonal skills, who easily established rapport with people, did things for other people and was kind, loving and compassionate. Susan's testimony about Jane was to that effect as well. Jane tried to do everything she could to make Zal happy, but he was nevertheless persistently abusive and argumentative.

Susan was living in Hillsborough, as she now does, and, up until February 1990, Wendy was living in Fresno. Wendy moved to Marin County on February 1, 1990. The evidence shows that, while Susan and Wendy did not get along well with each other, they both had a good relationship with their parents. In that regard, Susan introduced into evidence a grandparents' book wherein both Wendy and she were described in very complimentary terms by Jane, as was everybody else (Exh. 20). Susan also introduced into evidence a note in Jane's handwriting stating, "Dear Susan: Many, many thanks. I love you, Mom" (Exh. 20). Susan testified that she received the note in 1990, after a presentation on flower arranging that she gave at the Broadmoor, where Jane was living at the time.

Historically, as of the end of the summer of 1990, Zal had handled all the family finances and the family business, the family business being the 300 Company, which was comprised of two buildings - one at 300 Brannon Street, San Francisco, which

was the company's principal asset, and the other at Hayes and Divisadero in San Francisco. Most of the family income was derived from these properties, and most of the income in that regard was derived from a rental payment made by one Rifkind at 300 Brannon. Unfortunately, Mr. Rifkind had a habit of making his rent payments late, which caused a problem with Jane, first for Zal and later for Susan, after Jane moved out of the family home. This was because Zal paid the monthly allowance that he gave Jane from the rent received from Mr. Rifkind. After Jane moved out of the family residence in 1989, the timeliness of the payment of her allowance took on a much greater significance to her.

Zal's handling of the family finances and business also included gifting. In that regard, the record shows, in the response to the objections to the accounting that Susan had given in the proceeding in San Francisco Superior Court, that Zal had a habit of gifting to Wendy, Susan and Lee David, who is Susan's husband (Exh. 14).

There is a letter in the record dated January 25, 1989, from Melvin Mark of the Titchell Maltzman firm to Zal, marked "Personal and Confidential," wherein Mr. Mark made certain recommendations to Zal about his estate planning (Exh. 35). Among the recommendations was the creation of a living trust in which Zal and Jane would place all of their property. They did this less than a week later, on January 31, 1989, with the execution of the Alter Family Trust (Exh. 1).[4] Also, the record shows that Zal followed Mr. Mark's advice in two other particulars. One was that he converted all of his separate property into community property. The other recommendation in the letter that Zal followed was the gifting that led to a total breakdown in Susan's relationship with Jane and the present dispute between Susan and Wendy (see p. 14, line 26 et seq., *infra*).[5]

[3] Mr. Ross continued to represent Wendy. He was her co-counsel at the trial of this matter.

[4] The trust provided that the residue was to go in equal shares to the two daughters, Susan and Wendy.

Sometime soon after the execution of the Alter Family Trust I January 1989, the testimony adduced at the trial indicates that Zal's health declined and began to cause problems with his management of the family's financial affairs. By way of background, the 300 Company was owned half by Zal and half by his sister, Renee Delman, but it was Zal who managed the business. Renee Delman did not take an active role in management. Implicit in what has been said about Zal's handling all the family finances, business and gifting is the fact that Jane, particularly as of the fall of 1990, did not have anything to do with those matters.[6] Zal received $1,000/month for his work as manager of the properties owned by the 300 Company.[7] Though he received those payments while he was trustee of the Alter Family Trust, they were not made to him in his capacity as trustee. They were made to him for his work in managing the 300 Company. The trust had nothing to do with the 300 Company, other than dispensing its dividends. Consequently, there was nothing improper with regard to either Zal's or, later, Susan's receiving that $1,000/month.

[5] Sometime soon after the execution of the Alter Family Trust on January 31, 1989, Jane finally had her fill of Zal's abusiveness and moved out of the family home to the Broadmoor. Susan helped her with the move.

[6] In fact, there is in evidence a copy of two envelopes with the date of November 25, 1989, that show that, when Jane received copies of bank statements from First Interstate Bank with Zal's, Susan's and her names as addressees, she wrote on the envelope, "Sorry this was opened by mistake. Has both my name and address on it" and presumably then gave the statements either to Zal or Susan (Exh. 10).

Susan testified that, sometime during 1989, Jane telephoned her saying that she (Jane) was trying to help Zal with the books because he was not keeping up with them and was having trouble balancing them. Jane told Susan that she (Jane) could no longer help him and asked Susan if she would do so, which Susan agreed to do. When Susan arrived at Zal's house, she found bills and papers all over the floor. She also found a letter stating that Zal's accountant had gone bankrupt, and it was tax time. She had to collect everything, do an accounting and get an accountant. From that point on, Susan came to San

Francisco from Hillsborough to discuss the bills with Zal and help him write the checks and balance the checkbooks. Jane knew that Susan was doing this work with Zal.

In 1990, Susan testified that she started writing checks with Zal's approval and that she never wrote any without his knowledge. She also helped Zal with the management of the 300 Company, particularly as to some very difficult problems with the Hayes and Divisadero property, which was a dilapidated mess. Both Zal and Jane were aware of the problems, and Jane knew that Susan was dealing with them. Jane also knew that Mr. Rifkind, the tenant at 300 Brannon, was consistently late with his rental payments and that the payment of her allowance was dependent upon receipt of the rent from Mr. Rifkind.

Renee Delman also knew that Susan had become involved in the management of the 300 Company, and Susan discussed company affairs with her many times. Ms. Delman approved of and never disagreed with the manner in which Susan was handling the company, and Susan kept her apprised of everything that she (Susan) was doing. Jane was not involved in the management of the company, and it can be inferred from that that Susan was not discussing company business with her at that point.

Commencing January 31, 1989, and continuing on into the fall of 1990, Zal was the sole trustee of the Alter Family Trust. Also, in 1989, a fact of significance is that Jane appeared to undergo a change in personality. It is reasonable to infer that change likely may have come about by reason of her separating from her husband of some 50-plus years and having to fend for herself.

Although there is evidence that Jane enjoyed her independence, her moving out on her own brought with it, among other things, greater concern for her financial well being which manifested itself in increasing irritability and irrational anger towards Zal, and later Susan, about timely receipt of her allowance, even though she knew that Mr. Rifkind was the cause of that problem. It was difficult to reason with her, and she was not as loving and kind as she had been. Besides expressing displeasure with Susan over late payment of her allowance, Jane got angry with Susan when Susan was trying to give her some thoughtful advice about the sagacity of her (Jane's) desire to move from the Broadmoor to Opera Plaza.

We turn now to what the Court considers to be, unfortunately, the pivotal event of this whole unhappy situation between Susan and Wendy. In August 1990, Zal pulled out the January 25, 1989, letter from Mr. Mark, which recommended, among other things, that he consider gifting the $10,000 amount that the Federal government allows a taxpayer to gift annually without payment of a gift tax and without using up the donor's lifetime exemption. The record is clear that these gifts were made based upon Mr. Mark's advice, that they were made by Zal and that they were not made by Susan. All Susan did was what she habitually did at that point in time with regard to helping Zal with the family finances, that is, she wrote out the checks and he signed them.

The record shows that Zal had a habit of gifting Lee David, Susan's husband, so that there was nothing to indicate that his doing so in this particular instance was out of the ordinary. To the contrary, it was consistent with his gifting pattern. Unfortunately, however, despite Zal's good intentions and Susan's lack of responsibility in any manner for making these gifts, other than writing the checks so that Zal could sign them, Wendy was furious with Susan because she felt that her (Wendy's) side of the family had been shorted by $10,000 in the gifting.[8] Wendy complained to Jane. She called her parents' attorneys, Titchell Maltzman. She initially claimed in her testimony that her original call to that firm did not involve her anger over the gifts but concerned the problems of Jane's access to bank funds that arose after Zal became incapacitated from a fall and was hospitalized on September 17, 1990. But it was quite clear that the first call to Titchell Maltzman had nothing to do with the problems caused by Zal's fall on September 17. Exhibit 23, Bates #230, the first page of Stephen Gould's records,[9] is a telephone message indicating that Wendy first called his firm on September *11,* six days *before* Zal's fall. When confronted with this evidence, Wendy reluctantly had to admit that her first call was to talk about her problem with the gifts and not about Susan's alleged mismanagement of family financial affairs or the other matters that ultimately became issues between the parties.

[7] Susan subsequently received the same $1,000/month when she took over responsibility for managing the properties (see p. 18, lines 9-11, *infra).*

[8] Both daughters were given $10,000, and each grandchild had gotten $10,000. Because both sides of the family happened to have two grandchildren each, the gifts worked out to be $40,000 to each side of the family until Zal gifted Lee David, which caused the $10,000 imbalance in favor of Susan's side of the family that infuriated Wendy.

At about this time (the late summer of 1990), Jane was apparently becoming increasingly irritable towards Susan. Susan was so upset with the change that she perceived in her mother's attitude towards her that she wrote Jane a letter dated October 1, 1990 (Exh. 20, pp. 5-7) pleading for an explanation and seeking to maintain what, up until then, had been a loving and cordial relationship between the two of them.[10] It is fair to say that, by the time Susan wrote this letter to Jane, Wendy, having received her gift from Zal in August, had been complaining and making uncomplimentary remarks to Jane about Susan because of what Wendy considered a slight with regard to the gifts.[11]

[9] Mr. Gould is an attorney in the Titchell Maltzman firm.

[10] In that regard, Susan testified that during, 1990, she talked with Jane every day.

On October 5 or 6, 1990, Susan left on vacation. Wendy knew that she was leaving[12] and nevertheless scheduled a meeting on October 4 with the attorneys at Titchell Maltzman to discuss her (Wendy's) various complaints about the gifts and family financial affairs. There was some testimony about Susan's being derelict in not attending the meeting, but the Court believes Susan's testimony that she advised everyone that she was not going to be present. Considering all the circumstances of this case, it is not unlikely that Wendy scheduled the meeting knowing that there was little chance that Susan would attend since she was leaving for a three-week trip to Europe the next day.

[11] There does not appear from the evidence to be any rational explanation for Jane's anger towards Susan other than Jane's believing the derogatory statements being made about her by Wendy.

Susan returned from her trip to find that Wendy and Jane had continued to consult with attorneys and were accusing her of a variety of misdeeds, not just limited to the gifts, but to dereliction in the management of the family's financial affairs, which included her denying Jane access to funds in the Alter Family Trust.[13] Susan testified - and the Court agrees - that the charges of Jane's lack of access to the Alter Family Trust Funds were hard to understand because Jane did in fact have access to them, as indicated by the envelope mailed by the bank, in November 1989, to Jane, Zal and Susan (Exh. 10, p. 13, fn. 6, *supra)*. Also, before Susan left on her vacation, she made every reasonable provision to ensure that Jane would have her allowance[14] and that every bill had been paid. In addition, Susan had contacted and been assured by Zal's doctor that there would be no major medical expenses while she (Susan) was away. In case a problem might arise despite the foregoing precautions, Susan also left word that she could be reached, if need be, through her son, Kent David.

[12] It appears from the evidence that Jane also knew that Susan was leaving then.

[13] Susan testified that she learned of these accusations upon her return from vacation, not from Jane or Wendy but from Renee Delman, who told her that Jane and Wendy had concerns about the finances. The Court finds it odd that there was no effort by Jane or Wendy to advise Susan of their concern over these alleged problems or to discuss them with her. Instead, Wendy, immediately after learning that Susan's side of the family had received $10,000 more in gifts than hers, consulted an attorney and maintained a hostile, adversary position against Susan that eventually led, in April 1991, to the filing of the petition in San Francisco Superior Court to have Susan removed as trustee.

As reflected by the stipulation and order filed August 11,1992, in the petition proceeding, resolving the matter, approving all

of Susan's acts as trustee and finding no wrongdoing on her part (Exh. S), there is no basis that the Court can find in the record for any of the claims that were made against Susan in the petition (see Pet., ¶ 6).[15] Absent an effort wrongfully to discredit Susan and turn her mother against her, there is no reasonable explanation as to how the situation could have progressed to the point it did, with Wendy and Jane treating Susan like something short of a criminal in spite of all the work she had done for the benefit of the family.

[14] Before Susan left, she deposited two months' allowance in Jane's personal bank account.

The principal difference between what went on after September 17, 1990, when Zal became incapacitated and could no longer manage the family's financial affairs, and what had been going on before when Susan was helping him with those matters, was that Susan started signing the checks. She did nothing more than maintain order in the family's financial affairs after Zal became incapacitated. Susan had been helping Zal with management of the family finances for at least a year with Jane's knowledge and without complaint from her, Wendy or anyone else. Nevertheless, Wendy and Jane charged Susan in the April 1991 petition with breach of trust by her allegedly unilaterally taking control of the 300 Company (Pet., ¶ 6(a), pp. 4-5), a charge that is belied by documents in the record, which show that there was no complaint from Renee Delman about Susan's continuing to help in the management of that company (see Exh. 17).

The petition also charged Susan with a breach of trust in connection with Zal's August 1990 gifts. In that regard, Wendy and Jane alleged that
"* * * without the knowledge, participation or consent of petitioners, in late August, 1990, [Susan] caused to be prepared certain checks payable to herself, her spouse, and her children totaling $50,000 and caused such checks to be signed by Mr. Alter at a time when he was not mentally capable of managing his own personal or financial affairs. She further caused these checks to be delivered to herself and members of her family and to be deposited in such persons' personal accounts. Said gifts were purportedly to effectuate a tax plan to benefit Mr. Alter and Mrs. Alter (who had no knowledge of this action) but they in fact inured to the primary benefit of [Susan] in that the value of gifts to [Susan's] family exceeded the value of gifts to other family members [Wendy and her family]" (Pet., ¶ 6(b), pp. 4- 5).

Wendy and Jane also filed a declaration of Jane's wherein she stated that, "Without obtaining my approval or consulting with me, SUSAN DAVID made gifts of our (Zal's and her) community property totaling $90,000" (Exh F, ¶ 4, p. 2, lines 3-5).

These allegations of the petition and statements in Jane's declaration are without the benefit of any support in fact. Zal made the gifts, and, historically, he had never consulted with Jane or Wendy - or Susan - on such matters. The gifts were consistent with Zal's prior giving patterns and with the advice given him by Mr. Marks. Moreover, there is no evidence in the record that, as of August 1990, Zal was not competent to make the gifts. Given the circumstances under which these allegations and statements were made, they appear to the Court to represent an effort to contrive misconduct based upon Susan's accepting gifts from Zal for her family and herself that exceeded the value of the same gifts to Wendy and her family. The allegations make no sense in light of the facts, and there is nothing in the record to substantiate any charge of wrongdoing on Susan's part with regard to the gifts.[16]

[15] It does not appear that the petition was admitted in evidence during the trial of this matter. Accordingly, the Court takes judicial notice of it pursuant to Evidence Code section 452(d)(1).

Similarly, there are no facts in evidence that would substantiate the charges in the April 1991 petition that Susan committed a breach of trust by being paid $1,000/month for her work in managing the 300 Company (Pet., ¶ 6(c)). As pointed out above (p. 13, lines 9-14, *supra),* it was not the responsibility of the trustee of the Alter Family Trust to run the family business; it was the trustee's responsibility only to take the rental checks and disburse them in accordance with the provisions of the trust.

In sum, the charges against Susan in the April 1991 petition were, in the Court's estimation, unfortunate and irresponsible allegations of wrongdoing that never occurred. The charges completely mischaracterized Susan's intentions and the work she had done - with Jane's knowledge and approval - for the benefit of the family after Zal became incapacitated. Despite the

lack of basis for the charges, they were perpetuated in Jane's mind over the entire span of time from September 1990, when her estate was to go in equal shares to Susan and Wendy, through November 2, 1995, when she almost totally disinherited Susan and her family and left almost her entire estate to Wendy. For example, as Mr. Berger, Jane's nephew put it, Jane was angry and almost irrational when it came to talking about Susan. She had it in her mind that Susan had stolen money from the Alter Family Trust and would not let it go. She would not listen to reason. When Mr. Berger's mother and father tried to find out why Jane thought that about Susan because they did not believe it, Jane reacted by swearing profusely about Susan and what she had done. Prior to September 1990, Susan had a loving relationship with her mother. The facts disclose no logical reason for Jane to turn against Susan so vehemently and completely starting in September 1990. The facts do show that all the trouble began with Wendy's anger over the fact that Susan's side of the family had received $10,000 more in gifts from Zal than her side. They also show that Wendy and Susan never got along well together (p. 11, lines 26-28, *supra).* While Jane had no logical reason to attack Susan, Wendy did. After September 1990, Wendy spent time with Jane on a continuing basis, and, as the years passed, Jane became more and more dependent upon her. On the other hand, Susan spent no time with Jane for obvious reasons. The evidence points to Wendy as the only source of the irresponsible, unfounded allegations of wrongdoing by Susan that turned Jane against her and led to Jane's disinheriting her and her side of the family.

For someone who had never been involved, prior to September 1990, in management of the family's financial affairs, gifting or otherwise, Jane had an inexplicably intense anger towards Susan after September 1990 for not consulting her on these matters. It is important to recall that, historically, Jane had never been consulted on these matters either when Zal was handling them himself or, later, with Susan's assistance. It is also unexplainable that, in such a situation, Jane's first recourse would be to an attorney rather than talking to her daughter. The Court believes that the explanation for Jane's hostility towards Susan lies in misrepresentations about Susan's motives and conduct that Wendy was making to her mother. There is no rational explanation for Jane's sudden shift in attitude towards and break with Susan in September 1990 other than Wendy's falsely poisoning Jane's mind against Susan because of her (Wendy's) anger over the perceived slight in the August 1990 gifts.[17]

16 It is evident to the Court from Jane's declaration that her objection to the gifts was prompted by Wendy's furor over the perceived slight to her side of the family: "The result of this gift-giving is that SUSAN's side of the family received $50,000, while WENDY's side of the family received only $40,000. I object to this unequal pattern of giving * * *" (Exh. F, ¶ 5, p. 2, lines 13-16).

Jane's deteriorating physical and mental condition, while not sufficient to show incompetency, is relevant to the issue of undue influence. The record is replete with evidence of problems that Jane had with walking, with her eyesight and hearing, and also with her cognitive abilities. There are numerous references to these infirmities in the hospital records (see Exh. L).[18] Wendy testified that Jane went blind in 1994. When Jane signed the November 2, 1995, second amendment to the Jane Alter Trust, someone had to read it to her. What is significant about Jane's clearly declining physical and mental condition, a condition that as of 1990, was described as frail by at least one witness, is that this made her vulnerable to undue influence and to accepting misrepresentations without making any effort to seek out the truth.

17 In this regard, the evidence shows that, at or about the time the two documents in question were executed, statements were made about Susan in Wendy's presence that she did not refute, even though she knew that they were false, e.g., that Jane did not get her allowance when Susan was away on vacation and that Susan was stealing family money.

In this regard, the testimony of Dr. Abraham Nievod was helpful to the Court's determining whether the documents in question were the result of undue influence in this case. Dr. Nievod is a forensic psychologist with extensive experience in evaluating individuals on the issue of undue influence.[19] After first concluding that, because of Jane's deteriorating physical and mental condition, she was vulnerable to undue influence during the period 1990 to 1995, he applied the following criteria to determine if, in fact, there was undue influence: isolation, dependence, siege mentality, sense of powerlessness, fear and vulnerability, being kept unaware. His testimony about siege mentality is of particular interest and may be summarized as follows:

18 Thus, there are references in the hospital records to cognitive impairment, to vision and hearing impairment and to anger and lack of cooperation: "Patient states that she is blind" (Nursing weekly summary, April 27, 1995); "Confused most of the time;"

"Confused at times;" "Blind in left eye"(June 14, 1995); "Agitated, angry, irrational. Angry and uncooperative."

"Siege mentality" is the manipulator's ability to create a sense that a particular person is hostile, threatening, self-serving and selfish and that the only protection that the victim has is in dependence upon and trust in the manipulator. The more a person can be characterized as hostile and threatening, the more dependence is fostered and the more isolated the victim becomes. Dr. Nievod concluded that there was a siege mentality based upon the following facts.

Susan was characterized as self-serving, cheating and manipulating Zal's financial affairs. She was dishonest with regard to the checking accounts and unfair with regard to how financial resources were to be divided in the family. She wrongfully paid herself fees and controlled finances in a manner that endangered Jane's well being. Jane thought that Susan was manipulating finances for her own gain because there were things that did happen, like Susan's taking control of the finances, and things that did not happen, like Jane's not getting her allowance when in fact she had. Susan was characterized as someone who did not care for her mother's well being and wanted control of the money. Jane was convinced of this through Wendy's efforts. Wendy was telling Jane these things about Susan. Jane's weakened mental condition made her willing to believe what the financial records belied. Her cognitive impairment limited her ability to engage in abstract reasoning, to go through the records herself and to think of alternate hypotheses and make independent judgments. In addition, with her loss of eyesight, she could not review the records to determine whether or not the financial situation was as it was characterized to be.

The fact that an independent fiduciary (Debra Dolch) twice explained to the victim (Jane) that she found no irregularities in Susan's accountings of her management of the trust and that Jane did not change her opinion that Susan was taking money from the trust indicates that the manipulator (Wendy) had succeeded in unduly influencing Jane by convincing her that Wendy knew the truth and that contrary opinions were based upon a lack of understanding or knowledge of the true situation. Jane would disregard a stranger if someone who had gained influence, control and authority over her contradicted the stranger. Also, because of Jane's progressing dementia, her thinking became progressively simplistic and concrete as her ability to reason abstractly worsened.

Finally, Dr. Nievod pointed out, with regard to the criteria of being kept unaware, that Jane seemed not to have understood or acted upon the idea that there was no self-appropriation of trust funds by Susan, that the bookkeeping accurately reflected how Susan had disbursed the funds and that they were properly disbursed. Wendy kept from Jane the fact that the allegations of irregularities were untrue. If Jane had known the truth, there would have been no basis for the siege mentality, that there was a threat, that Jane was being taken advantage of, that money was being taken from her and that she did not have enough upon which to live.

Jane's irrational anger towards Susan that arose after September 1990, and persisted to the end of Jane's days is reflected in the testimony of Jay Berger, Jane's nephew, and Debra Dolch, the independent trustee of the Alter Family Trust. Mr. Berger testified that, when he saw Jane in the summer or fall of 1993, in Pasadena, she appeared very different than he recalled seeing her before. She was frail and angry. There was a personality change. She was vindictive. It was as if she had taken on Zal's personality. She was mean and no the same person that he remembered. As stated above (p. 19, lines 2-6, *supra),* she was angry and almost irrational when it came to talking about Susan. She had it in her mind that Susan had stolen money from the Alter Family Trust, and she would not let this notion go. She would not listen to reason. Debra Dolch testified to the same effect. She testified that, by 1993, it was preferable to talk to Jane in the morning when it was easier to communicate with her. In the afternoon, she was angry and unpleasant. It was difficult to explain things to her. She did not want to listen. Her angry behavior continued in 1994 and 1995. Her conversations dealt mainly with money issues. There were a couple of conversations in which Jane referred to Susan's taking money from the Alter Family Trust. Ms. Dolch tried to explain to Jane that she (Ms. Dolch) had investigated the matter and found no wrongdoing, but Jane was not interested in an explanation. When Susan's name came up, Jane got angry, and this was despite the fact that, in taking over as trustee, Ms. Dolch reviewed Susan's actions to determine whether they were reasonable and appropriate and found that they were. Other people tried to reason with Jane as well, including Susan's son, Kent, but he also was unsuccessful.

Jane was totally dependent upon Wendy and became more so as the years passed and she (Jane) became blind and her dementia progressed. As Mr. Ross himself testified, Wendy was an important person in Jane's life and became more and more so between 1990 and 1997. In 1993 and 1995, the record shows that Jane persisted in accusing Susan of stealing money

and not paying her (Jane) her allowance despite the lack of factual basis for such charges. According to Ms. Marshall, Jane called Susan a "bitch" who wanted to take everything from her.

There were a number of unusual circumstances surrounding the execution of the second amendment to the Jane Alter Trust. In November of 1995, Jane was blind, hard of hearing, in a wheelchair and had been weakened mentally by a series of strokes. Her cognitive abilities were diminished.[20] She first went to Mr. Ross about amending her trust almost totally to exclude Susan and her side of the family and to leave substantially her entire estate to Wendy. Mr. Ross saw red flags and decided at that point that Jane ought to get her own attorney. Therefore, he sent her to Ms. Marshall. After talking with Jane and Mr. Ross, Ms. Marshall decided to obtain not just one, but two competency opinions. One was from Dr. Fletcher, Jane's primary care physician, whom Ms Marshall did not consider to be particularly qualified to render such an opinion. The other was from Dr. Jess Ghannam, a clinical psychologist specializing in geri-psychology or geriatrics.[21]

19 Dr. Nievod has previously testified in several Bay Area Counties, including this county, as an expert on issues of testamentary capacity and undue influence. He has been retained by governmental agencies, such as District Attorney's offices, public guardian offices, adult protective services and police departments with regard to undue influence of elders. Part of those consultations involved teaching about undue influence, financial fraud, elder abuse and testamentary capacity. He has lectured to probate judges and investigators on the subject of undue influence and has evaluated over one hundred individuals on the issue of undue influence.

20 As Dr. Nievod's testimony indicates, Jane's irrationality was reflective of her diminishing mental capacity.

The Court concludes that, starting in August or September of 1990, continuing misrepresentations that Wendy made to Jane and/or her failure to disabuse Jane of what Wendy knew to be untruths about Susan's conduct caused a precipitous break in Susan's relationship with Jane that persisted until Jane's death. There was nothing that Susan could do to repair the break because it was based upon Jane's blind acceptance of false accusations without any desire or, ultimately, any ability on her part to seek out the truth. Her declining physical and mental state made it easy for Wendy to perpetuate untruths that led, first, to Susan's disinheritance and, then, for all intents and purpose, to her children's as well. The Court does not believe that the record is susceptible of finding any excuse or rational explanation for Wendy's proceeding as she did against Susan in 1990, other than to get Jane to eliminate Susan from the family picture. Wendy's denials of influencing Jane are self-serving and not credible. There are numerous instances in the transcript and in her demeanor as a witness where the Court finds that her testimony was evasive.[22] She was forced after initially denying certain facts to admit them - for example, that the gifts were the reason for her first call to the Titchell Maltzman firm and that she obtained loans from Jane while she (Wendy) was trustee of the Jane Alter Trust.

21 Although competency is not an issue here, the Court has given Dr. Ghannam's opinions no weight. He lost all of his notes about Jane in violation of American Psychological Association rules. He lost the results of the Cognistat test that he gave Jane. In addition, he worked with Jane's attorney, Ms. Marshall, on the drafting of his opinion.

There is no direct evidence in this case that Wendy made any suggestions to Jane about the disposition of her estate. There is evidence, however, that, in August/September 1990, Wendy became very angry with Susan because of Zal's gifts, that Wendy complained to Jane about this, and that, shortly thereafter, a sudden break occurred in what had, up until then, been a loving and cordial relationship between Susan and Jane. There is no rational explanation for this sudden shift in attitude by Jane towards and break with Susan in September 1990 other than Wendy's falsely poisoning Jane's mind against Susan because of her (Wendy's) anger over the perceived slight in the August 1990 gifts. In other words, there is compelling circumstantial evidence that Wendy made continuing misrepresentations about Susan to their mother for the purpose of alienating Susan from her mother and effecting Susan's and her family's disinheritance.[23] Proof that a testator/settlor is induced by misrepresentations into making dispositions that would not have been made absent those misrepresentations constitutes fraud. Thus, in *Estate of Pohlmann* (1949) 89 Cal.App.2d 563, the court said (pp. 571, 580):

22 Contradictory statements made by a witness while testifying and the evasive character of some of the witness's testimony justify the Court in disbelieving any of the witness's testimony (*Estate of Pohlmann* (1949) 89 Cal.App.2d 563, 579).

"False representations constitute fraud if the evidence shows they were designed to and did deceive the testator into making a will different in its terms from that which he would have made had he not been misled, although there is no proof that they were used as pressure upon the mind of the testator. (*Estate of Newhall,* 190 Cal. 709, 718 [214 P. 231, 28 A.L.R. 778].)"

> "The record is devoid of evidence that anything occurred to cause decedent to lose the affection for her daughter that is indicated in her earlier letters. The reason for the change in her attitude and feeling was inferred by the trial judge from decedent's letters, in one of which she told Lucie that Willy "talks very badly about you."

(See also *Estate of Corbett* (1963) 221 Cal.App.2d 34, where a testator was induced to change his will because of lies that had been told him by the beneficiary and proponent of the will.)

In *Estate of Newhall* (1923) 190 Cal. 709, the facts of which bear substantial similarity to those of the present case, the Supreme Court stated as follows at pages 717-718:
"Undue influence is defined to be the exercise of acts or conduct by one person toward another person by means of which the mind of the latter is subjugated to the will of the person seeking to control it.

"As applied to a ground of contest of the will of a decedent undue influence has reference to the means and methods resorted to and employed by a person for the purpose of affecting and overcoming and which ultimately do affect and overcome the free and unrestrained will of a testator. (*Estate of Snowball,* 157 Cal. 301 [107 Pac. 598]; *Estate of Ricks,* 160 Cal. 467 [117 Pac. 539].) As we read and understand the evidence relating to the issue of undue influence it does no more than show that the two younger sisters had the opportunity to make, and did make, to their mother, the testatrix, false, derogatory, and defamatory statements concerning the contestant. But there is no showing in addition that the mind of the testatrix, at the time of the making of the will, was subjugated to and dominated by the desires and designs of the contestees to the point of undue influence. That is to say, there is no showing of any restraint by the two contestees upon the mind of the testatrix, which resulted in making the will, as executed, represent the wishes of the contestees, who were the principal beneficiaries, rather than the wish and will of the testatrix.

"Undue influence is not always the equivalent of fraud. One may exist without the presence of the other. The former, however, may, at times, be exerted and applied through the medium of fraud. Oftentimes the terms 'undue influence' and 'fraud' are used interchangeably. Thus it has been held that undue influence, even though exercised without the aid of actual fraud or fraudulent representations, is a form of fraud. (*Estate of Ricks, supra.)* It has also been held that undue influence may be exerted no less by fraudulent misrepresentations than by means of duress or other pressure. (*Estate of Snowball, supra.)*

"Undue influence and fraud as a ground of contest are not, as a matter of law, identical. Theoretically they constitute two separate and distinct grounds of contest.

"In cases where fraud alone is relied upon as a ground of contest it is the theory of the law that the testator, even though acting, in a manner of speaking, of his own free will, was, nevertheless, deceived by false data into doing that which he would not have done had he not been fraudulently imposed upon.

"It is the general rule that for false and fraudulent representations to enter as an element into undue influence it is necessary that the misrepresentations be shown to have been intermingled with or made the basis of importunities and mental pressure upon the testator. On the other hand, such false representations, even in the absence of proof that they were used as pressure upon the mind of the testator, have been held to constitute fraud if it can be shown that they were designed to and did deceive the testator into making a will different in its terms from that which he would have made had he not been misled. (*Estate of Benton,* 131 Cal. 472, 478 [63 Pac. 775].)"

And further, at pages 719, 720, 721-722:

"While the evidence was not sufficient to support the inference of undue influence as above defined there was, however, in our opinion, sufficient evidence to warrant and require the submission to the jury of the issue presented by the pleadings as to whether or not the testatrix was fraudulently induced and impelled practically to disinherit her daughter, the contestant herein, by reason of the false statements made to the testatrix by the two contestees concerning the character and conduct of the contestant.

"From the circumstances shown in evidence it is apparent that the jury might rightfully have found that there was a constant effort on the part of the two younger sisters to prejudice and influence their mother against the two older sisters and particularly against the contestant herein. There is no question but that intense bitterness and hostility existed between contestant herein and her two younger sisters and that the latter, living as they did with their mother, had ample opportunity to discredit the older sister in the eyes of the mother. There is also direct evidence that disparaging and false statements were made to the mother concerning the contestant by the younger sisters which must, undoubtedly, have had an influence in creating and keeping alive the bitterness of the mother against the contestants.

"These circumstances would have warranted a finding by the jury that the whole atmosphere surrounding the mother was poisoned with hatred, hostility, and ill will toward the two older daughters. In this atmosphere the will in contest was made practically disinheriting the contestant herein.

"* * * If, from the evidence offered in support of contestant's case, the inference can fairly be drawn that the intent behind the making of the false representations was to influence the execution of the will, and that the will was a result of such false representations, and but for such representations would not have been so drafted, then the prima facie case necessary to take the case to the jury has been established. From the very nature of the inquiry the proof must necessarily be largely or wholly circumstantial. The contestant is not required to prove every fact and every conclusion of fact upon which the issue depends.

"Legitimate and reasonable inferences may be drawn from every fact proved and any inference fairly deducible from the evidence is as much proved for the purpose of making out a prima facie case as if it had been directly proved. The contestant is not confined to the bare facts but is entitled to the benefit of all inferences which may legitimately be drawn from the facts established.

"While, of course, the statements made by the younger sisters may be explainable solely upon the hypothesis of their animosity and hatred toward their older sister, yet the undisputed existence of this very hostility furnishes ground for the inference that the intention of the sisters was that, by reason of the statements and the belief engendered in the mother's mind therefrom, their mother should execute a will benefiting them and at the same time injuring their sister.

"This being a question of fraud, it is not necessary that there should be evidence that the fraud relied upon was practiced at the very time of the making of the will. If the belief in the fraud previously practiced, even though occurring long prior thereto, persisted at the time of the execution of the will so that but for the persistence of such belief the will would have been different from that actually executed, the fraud vitiates the will. (*Estate of Benton,* 131 Cal. 472, 479 [63 Pac. 775].)"

**D.** ***DISPOSITION AND FORM OF JUDGMENT***

Because the Court concludes, based upon the evidence presented at trial and the reasonable inferences to be drawn therefrom, that Wendy made disparaging and false statements to Jane about Susan with the intent of influencing Jane to disinherit Susan and her family; that these statements instilled and perpetuated in Jane an intense hostility towards Susan commencing in September 1990 and continuing until her death in 1997; that the Jane Alter Trust executed on June 8, 1993, and the second amendment thereto executed on November 2, 1995, disinheriting Susan and, for all intents and purposes, her family, were the result of such false statements; and that those two documents would not have been executed absent Wendy's false statements to Jane about Susan, the Court finds that both of those documents were executed as a result of Wendy's fraud and, accordingly, are hereby declared to be void.

Counsel for Susan, under cover of letter dated September 26, 2002, has submitted a form of judgment ordering (1) that the Jane Alter Trust and 1995 amendment thereto are invalid and void due to the undue influence by means of Wendy's fraudulent misrepresentations; (2) that Wendy holds the assets of the purported Jane Alter Trust, as amended, or a portion thereof as constructive trustee for the benefit of Susan and persons entitled to distribution of Jane's assets; (3) that Wendy shall account for her administration of the Jane Alter Trust; and (4) that Susan is awarded attorney's fees and costs incurred herein in an amount to be determined. By letter dated October 1, 2002, counsel for Wendy has submitted objections to Susan's proposed form of judgment.[24] On October 10, 2002, Susan filed a response to these objections (hereinafter "Resp. to Obj.").

[23] "Undue influence may be proved by circumstantial as well as by direct evidence. (*Estate of Sproston,* 4 Cal.2d 717, 720 [52 P.2d 924]; *Estate of Miller,* 16 Cal.App.2d 154, 167 [60 P.2d 498]; Estate of Snowball, 157 Cal. 301, 314 [107 P. 598].) In the Snowball case the court said an unjust will does not of itself raise the presumption of undue influence but the nature of the will may be considered as a circumstance upon the issue of undue influence" (*Estate of Pohlmann* (1949) 89 Cal.App.2d 563, 577).

First, Wendy objects to item 1 on the ground that there was no finding by the Court of fraudulent misrepresentations by her. This objection is not well taken (see Resp. to Obj., p. 1, line 21 to p. 6, line 2). While the tentative decision given by the Court in open court on August 2, 2002, may be susceptible of some ambiguity in this regard, the within statement of decision makes clear that the documents in question are declared void because of fraud perpetrated by Wendy upon her mother.

Next, Wendy objects to her being ordered to hold the assets of the Jane Alter Trust for Susan's benefit because Jane's 1991 will specifically omitted Susan. Susan's argument that she is properly included as a beneficiary is based upon an assumption that the 1991 will and concurrent revocation of Jane's half of the Alter Family Trust will both be declared invalid (Resp. to Obj., p. 6, lines 4-20). Wendy's objection is well taken. The assumption is only that and not a sufficient basis for including her at this time as a beneficiary of a constructive trust.

Third, Wendy objects to the Court's ordering Wendy to account at this time on the grounds that the Court did not specifically order one and that Susan may make an appropriate demand therefor at the conclusion of judgment, citing Probate Code section 17200. Contrary to Wendy's contentions, there is no reason not to order an accounting as part of the judgment.

Finally, Wendy contends that Susan cannot show any legal basis for an award of attorney's fees herein. In Susan's response to this objection, she sets forth numerous authorities that she contends justify the Court's awarding Susan her reasonable attorney's fees and costs incurred herein out of Wendy's share of the assets of Jane's estate (Resp. to Obj., p.7, line 6 to p.10, line 8). Wendy's fraud required Susan to commence this litigation to vindicate her children's and her interests as residuary beneficiaries of Jane's estate. Susan should not in equity have to bear the burden of her own fees and costs to correct the wrong resulting from Wendy's fraud. In such case, this Court has the equitable power to order that Susan's reasonable attorney's fees and costs incurred herein by paid by Wendy from her share of Jane's estate (see, e.g., *Wells Fargo Bank v. Marshall* (1993) 20 Cal.App.4th 447, 458; *Estate of Whitney* (1932) 124 Cal.App. 109, 121-125; Witkin, California Procedure, 4th Ed., Jdgt. § 147, pp. 661-662, citing, inter alia, *Prentice v. North Amer. Title Guaranty Corp.* (1963) 59 Cal.2d 618, 620, a person who, through the tort of another has been required to protect his/her interests by bringing an action against a third party may recover for attorney's fees he/she incurred).

Judgment shall be entered consistent with the disposition reached herein.

Dated: December 10, 2002

<<signature>>

John A. Sutro, Jr.

Judge of the Superior Court

[24] The conclusion of this letter stated that Wendy was going to file formal objections in pleading form with the next two court days. However, no such document has, to date, been filed with the Court.

End of Document