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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

Estate of DONALD M. BEACH, Deceased.	B260366 (Los Angeles County Super. Ct. Nos. BP143125, LP16692)
ELIZABETH BEACH HUMISTON et al., Objectors and Appellants, v. BRUCE BEACH, Petitioner and Respondent.	

APPEAL from the judgment and order of the Superior Court of Los Angeles County, Daniel S. Murphy, Judge. Affirmed.

Lytton Williams Messina & Hankin, Sheldon H. Lytton and Richard D. Williams; Sullivan & Associates and Shaunna Sullivan for Objectors and Appellants.

Lurie, Zepeda, Schmalz, Hogan & Martin, Steven L. Hogan and Lawrence J. Imel; Law Offices of David C. Hinshaw and David C. Hinshaw for Petitioner and Respondent.

I. INTRODUCTION

Plaintiff, Ann Marie Beach Tabb, and intervener, Elizabeth Beach Humiston (the objectors), appeal from a probate order following trial of issues relating to the estate of Donald M. Beach (Donald).[1] Plaintiff, Bruce J. Beach, and Ms. Tabb each filed probate petitions concerning Donald's estate. Ms. Tabb is Donald's niece. And, Ms. Tabb is the daughter of Donald's brother, Robert Beach. Ms. Humiston is also Robert's daughter and Ms. Tabb's sister. Bruce is the brother of Robert and Donald.

Ms. Tabb filed a petition to enforce a holographic will allegedly prepared and executed by Donald on either February 1 or May 1, 2010 (the holographic will). By contrast, Bruce filed a petition to enforce a typewritten will entitled "Last Will and Testament of Donald M. Beach" executed on November 15, 2010 (the November 15, 2010 will). The November 15, 2010 will bequeathed almost all of Donald's property to the trustee of a trust entitled "DONALD M. BEACH DECLARATION OF TRUST DATED NOVEMBER 15, 2010" (the November 15, 2010 trust). The November 15, 2010 trust was subsequently restated in its entirety. The objectors argued the November 15, 2010 will was invalid because Donald was incapacitated and unduly influenced. Also, Ms. Tabb requested production of the November 15, 2010 trust by means of a subpoena duces tecum. But the probate court quashed the subpoena duces tecum. (Several different probate court judges made rulings in this case. In the body of this opinion, we will refer to their rulings generically as being made by the probate court.)

The competing petitions for probate of wills were litigated in a single trial. Following trial, the probate court entered orders granting Bruce's petition and denying that of Ms. Tabb. Following entry of judgment, Ms. Tabb moved for new trial. The probate court denied Ms. Tabb's new trial motion.

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[1] For ease of reference, we will refer to certain members of the Beach family by their first names. No disrespect is intended.

The objectors contend the probate court abused its discretion by refusing to compel production of the November 15, 2010 trust. The objectors contend the probate court erred by conducting its own inquiry into Donald's capacity. The objectors assert Donald was incapacitated because his durable power of attorney had been activated by its terms. The objectors also argue the probate court used the incorrect standard to determine Donald's capacity by applying Probate Code section 6100.5[2] rather than sections 810 through 812. We affirm the judgment.

II. BACKGROUND

A. The Holographic Will

On May 1, 2010, Donald executed a holographic will, entitled "Last Will and Testament." The holographic will provided $2 million and real property in Northridge, California was to be conveyed to Beverly MacDonald, Donald's sister. And $1 million and real property in Arroyo Grande, California was to be conveyed to Donna Teixeira, Donald's caregiver from November 2009 until mid-October 2010. The remainder of the estate was to be divided as follows: one-half to Bruce; one-quarter to Robert; and one-quarter to be divided amongst the children of Robert, Bruce and Beverly. Bruce and Beverly were named as co-executors in the holographic will.

B. November 15, 2010 Will

On November 15, 2010, Donald executed a document entitled "LAST WILL AND TESTAMENT OF DONALD M. BEACH." The November 15, 2010 will revoked all former wills. It provided that Bruce and Beverly would receive all of his personal

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[2] Further statutory references are to the Probate Code.

property and effects. As to the remainder of his estate, the will provides: "I, give devise and bequeath to the Trustee of the DONALD M. BEACH DECLARATION OF TRUST DATED NOVEMBER 15, 2010, all the rest, residue and remainder of my property, real, personal or mixed, of whatsoever character, and wheresoever situated, including all lapsed legacies and devises of any property over which I have the power of appointment at the time of my death . . . ." Bruce was appointed executor of the November 15, 2010 will, with Beverly as successor executor.

C. Restatement of November 15, 2010 Trust

On September 7, 2011, Donald, as trustor and trustee of the November 15, 2010 trust, executed the restatement of the November 15, 2010 trust (the restated trust). The restated trust names Bruce as its successor trustee of the trust. And Beverly is named as Bruce's successor. After Donald's death, the trust assets were to be distributed as follows: Donald's stock and interest in Strawberry Patch, Incorporated to Bruce; real property on Pico Boulevard in Los Angeles, California to Beverly; $1 million to Douglas Beach, Donald's brother; $1 million to Robert; and the balance of the assets distributed 50 percent each to Bruce and Beverly. The objectors are not beneficiaries under the restated trust.

The restated trust's assets were provided in the document entitled "EXHIBIT A TO THE DONALD M. BEACH DECLARATION OF TRUST DATED NOVEMBER 15, 2010," and included: real property in Northridge, California; real property on Pico Boulevard in Los Angeles, and Arroyo Grande, California; all tangible personal property and personal effects; all memberships in clubs, associations or organizations; all refunds, reimbursements, Medicare payments, insurance proceeds and similar items; all stocks, bonds, mutual funds, money market accounts and securities; all business interests, including Strawberry Patch, Incorporated and JRK Property Holdings; all inheritance rights; any assets requiring a designation of a beneficiary, such as retirement or annuity;

and all other property. This document was signed by Donald on November 15, 2010. Exhibit A was also witnessed by Michael Lanning, Donald's estate attorney who drafted the restated trust. The original November 15, 2010 trust was not before the probate court nor is it in the record. Donald died on May 22, 2012.

D. Bruce's Probate Petitions

On June 21, 2012, Bruce filed a petition seeking probate of the November 15, 2010 will. On August 2, 2012, Bruce filed a separate petition seeking an order that the assets from the November 15, 2010 will were assets of the restated trust as described therein. Bruce relied upon section 850, subdivision (a)(3) and *Estate of Heggstad* (1993) 16 Cal.App.4th 943, 951. Bruce requested his June 21, 2012 probate petition be dismissed without prejudice. No objection was filed. On December 4, 2012, the probate court granted the August 2, 2012 petition. No appeal was taken by any party.

On July 29, 2013, Bruce re-filed his petition seeking to probate the November 15, 2010 will. On August 26, 2013, Ms. Tabb filed her objection. Ms. Tabb contended: Bruce and Beverly were liable for financial abuse of an elder regarding Donald; Bruce and Beverly exerted undue influence in the creation of the November 15, 2010 will and trust; and Donald lacked capacity to sign the November 15, 2010 will and trust. Bruce responded that Ms. Tabb lacked standing to bring objections because she is not a beneficiary under the November 15, 2010 will, trust or the restated trust. On November 14, 2013, Ms. Humiston filed a complaint in intervention. Ms. Humiston joined in Ms. Tabb's objections to Bruce's petition.

E. Ms. Tabb's Probate Petition

On July 11, 2013, Ms. Tabb filed her petition seeking to admit the holographic will to probate. Ms. Tabb noted that she was separately suing Beverly and Bruce for

financial abuse of an elder, fraud and negligence pertaining to Donald. Ms. Tabb requested the probate court appoint her as administrator with will annexed. Bruce objected to Ms. Tabb's petition. Bruce argued the holographic will was obtained under duress and undue influence by Ms. Teixeira. Bruce also argued that all of Donald's assets were held in trust and thus there were no assets subject to probate.

F. Orders Quashing Subpoena the Duces Tecum

On October 22 and 25, 2013, Ms. Tabb's counsel served subpoenas duces tecum on Donald's former accountants and attorneys. The subpoenas duces tecum sought records pertaining to Donald's assets and estate planning, including the November 15, 2010 trust. The subpoenas duces tecum extended to: the law firm that represented Donald in divorce proceedings in 2009 and 2010; a forensic accounting firm hired by Donald's divorce lawyers; and the law firm at which Mr. Lanning is a partner. As noted, Mr. Lanning was responsible for drafting the November 15, 2010 will and trust and the restated trust.

Bruce moved to quash the subpoenas. Bruce argued the subpoenas duces tecum sought materials that were privileged as attorney-client communications and work product. Bruce argued some items listed in the subpoena duces tecum directed at Donald's divorce attorneys sought *all* of their files pertaining to the litigation. Bruce also argued the subpoenas duces tecum constituted an invasion of privacy that was not directly relevant to the probate petition. Ms. Tabb later withdrew her subpoena duces tecum as to the forensic accounting firm.

On January 3, 2014, the probate court heard the motion to quash pertaining to Donald's divorce lawyers. The probate court granted the motion to quash in part and denied it in part The probate court ordered the production of documents related to the creation or revocation of wills of Donald and claims of undue influence and lack of capacity. The probate court expressly excluded from the scope of matters that must be

disclosed pursuant to the subpoena duces tecum: the November 15, 2010 trust; all documents relating to the November 15, 2010 trust; and all documents relating to Donald's assets.

On January 7, 2014, the probate court heard the motion to quash pertaining to Mr. Lanning. The probate court granted in part and denied in part the motion to quash. The probate court ordered the production of documents related to Donald's creation or revocation of wills and claims of undue influence and lack of capacity. The probate court also refused to order disclosure of the November 15, 2010 trust.

Prior to trial, Ms. Tabb served a trial subpoena on three witnesses, including Mr. Lanning. Ms. Tabb requested the witnesses be ordered to bring to trial any documents pertaining to Donald's assets and trusts, including the November 15, 2010 trust. Bruce moved to quash all the trial subpoenas on the grounds that Ms. Tabb was violating the probate court's prior orders in connection with the subpoenas duces tecum.

G. Trial

1. Consolidation and ruling on the trial subpoenas duces tecum

Ms. Tabb's and Bruce's probate petitions were consolidated for trial. Trial commenced on June 9, 2014, as to both probate petitions. Bruce's motion to quash the trial subpoenas were granted with the possibility of reconsideration depending on the testimony. We will set forth the testimony in some detail.

2. Mr. Lanning's Testimony

Mr. Lanning is an attorney. Mr. Lanning first met Donald in 1996. Mr. Lanning helped prepare a will, trust and durable power of attorney for Donald. In the 1996 trust,

Donald gave 25 percent to Bruce's daughters to be divided equally. Donald did not have a close relationship with any of his other nephews or nieces.

Mr. Lanning prepared a durable power of attorney for Donald in late 2009 which was executed on January 4, 2010. In order for the durable power of attorney to be effective, a doctor must state under oath that Donald lacks capacity. Ms. Teixeira obtained two doctors' notes in August and September of 2010 purporting to state Donald lacked capacity. Neither note was executed under penalty of perjury. Mr. Lanning believed that neither of the two notes were sufficient to trigger the power of attorney's provisions. Donald told Mr. Lanning to name Bruce, then Beverly, and finally Ms. Teixeira as attorney-in-fact for the durable power of attorney. In October 2010, Mr. Lanning notarized an interspousal transfer deed which stated Bruce was the attorney-in-fact for Donald. Mr. Lanning made no inquiry to whether Donald had regained capacity in accordance with the steps enumerated in the power of attorney.

On November 15, 2010, Donald came to Mr. Lanning's office and they met for approximately two-and-a-half hours. Mr. Lanning did not record the execution of the estate documents by Donald. Mr. Lanning testified: "[Donald] was on top of his game. He was the same [Donald] Beach I had known before. I didn't see any need for it." Donald discussed how he felt imprisoned. Donald mentioned how he had gotten rid of Ms. Teixeira. Donald discussed divorcing his wife and the stock market crash in 2008. Donald had great affection for Bruce and Beverly. But Donald did not have a lot of contact with Robert and Douglas. As noted, Robert and Douglas were Donald's other brothers. Donald did not have much contact with his nieces and nephews. Donald did not like Robert's wife. Donald wanted to keep the estate planning simple and leave the bulk of the estate to Bruce and Beverly.

Mr. Lanning testified further as to Donald's mental state during the meeting. Donald knew who all his relatives were and all of his assets. Donald was worried he had signed documents while under medication while under Ms. Teixeira's control. Donald asked Mr. Lanning how to revoke a will. Mr. Lanning said that when he drafted a new

will and it was executed, it would be automatically revoked. During the meeting between Mr. Lanning and Donald, no one else was present.

Bruce was present in the reception room for Mr. Lanning's office on November 15, 2010. However, Bruce was not present during Mr. Lanning's meeting with Donald. Beverly was not present at Mr. Lanning's meeting with Donald. Mr. Lanning did not discuss Donald's estate plan for November 15, 2010 with Bruce or Beverly. Bruce and Beverly provided no instructions or guidance as to Donald's estate plan. Bruce and Beverly did not receive a copy of Donald's estate plan on November 15, 2010. All of the testamentary instruments were left with Mr. Lanning at his law office.

Mr. Lanning did not believe Donald lacked testamentary capacity on November 15, 2010. According to Mr. Lanning, Donald: was oriented as to time, place, person and the situation; could concentrate on the questions asked; and did not exhibit any memory loss. Mr. Lanning completed all the testamentary documents on November 15, 2010. Donald executed them all that day. Donald knew exactly what he wanted to do with his assets.

Mr. Lanning expressed doubt that Donald intended to draft the holographic will. Donald had expressed anger concerning Ms. Teixeira, but the holographic will left a home and money to her. Also, the distribution under the holographic will was inconsistent with how Donald had described his wishes about his estate. Mr. Lanning testified: "Well the first thing is that he's leaving money in a home to somebody that he's . . . just told me he was not only annoyed with but had been angry about and felt, quote, imprisoned, and he called her, that woman, so I see a will leaving her something, and I'm thinking, doesn't sound like the Don Beach that was talking to me. [¶] But more than that . . . I remember when I first saw this, I couldn't believe it -- he just absolutely had never expressed to me a thought about leaving a fourth of his estate to Robert and a fourth to be divided among children of Robert, Bruce and Beverly. Just no way."

Mr. Lanning continued: "Every time the subject of nieces and nephews came up, he just wasn't close to them, except Bruce's. . . . [¶] . . . Don had never named Bruce

and Beverly to act together, because Beverly lived in Connecticut, and getting her to act as an executor with Bruce here in California just would not have been a Don Beach move." Donald called Mr. Lanning to prepare a restatement of the November 15, 2010 trust in late 2011. The restated trust was executed September 7, 2011.

3. Bruce's testimony

Bruce is Donald's younger brother. Bruce and Donald owned several restaurants together while living in California. Ms. Teixeira worked as Donald's caregiver from November 2009 until her termination in mid-October 2010. Ms. Teixeira acquired physicians' notes for Bruce to use to invoke power of attorney. (As noted, neither note was executed under penalty of perjury.) Bruce used these notes and went to Citibank to withdraw $100,000 from Donald's account. The purpose of the withdrawal was to pay for Donald's healthcare. Ms. Teixeira opened an account in her name and deposited the $100,000.

Bruce contacted Beverly to come to California to assist in firing Ms. Teixeira as Donald's caregiver. Donald's health then improved drastically. After Ms. Teixeira was terminated, Donald moved to his home in Northridge, California. Steven MacDonald, Beverly's son, cared for Donald at this time.

In October 2010, Bruce through an attorney filed a complaint against Ms. Teixeira for financial abuse of an elder. Bruce was identified in the complaint as having a duly executed power of attorney for Donald. Concerning the holographic will, Bruce believed only the first paragraph and the signature were Donald's.

4. Beverly's testimony

Beverly was Donald's younger sister. Beverly is a retired registered nurse living in Connecticut. Beverly visited Donald twice in 2010, from mid-May to June 7 and from

mid-October to around mid-November. After Donald was removed from Ms. Teixeira's care, Beverly observed that Donald was more alert and did not sleep all the time. Beverly testified that as of mid-November 2010, Donald's cognitive skills were excellent. She described Donald as just enjoying life to its fullest. Beverly's son Steven came to California to care for Donald the day after Ms. Teixeira was fired.

Beverly was not in California on November 15, 2010. Donald came to visit Beverly in Connecticut around November 30, 2010. She was involved in Donald's medical care from October 2010 until his death in May 2012.

Beverly, Bruce and Donald had a discussion with Dr. Mehboob Makhani in late October 2010. Dr. Makhani had written a note stating Donald lacked capacity to make financial and medical decisions. Bruce wanted Dr. Makhani to write another note retracting the previous one. Beverly did not know what part of Donald's estate she was to receive under the November 15, 2010 trust. As to the holographic will, Beverly testified that only the first paragraph and the signature appeared to be in Donald's handwriting. She noted that Donald never spelled her last name correctly. Yet Beverly's last name was spelled correctly in the holographic will.

5. Ms. Tabb's testimony

As noted, Ms. Tabb was Donald's niece and Robert's daughter. Ms. Tabb stayed in touch with Donald via mail and phone calls. Ms. Tabb testified that Donald and her father Robert got along for years and never had a falling out. Ms. Tabb never had a conversation with Ms. Teixeira. After October 15, 2010, Ms. Tabb and Robert had difficulty contacting Donald. Ms. Tabb recounted a telephone call to Donald at which Steven was present. She recalled Donald and Steven yelling at each other. Ms. Tabb stated Donald had complained to her in 2009 about how Beverly was asking for her inheritance early to help her sons. Ms. Tabb expressed problems with Bruce being

executor of Donald's will. Ms. Tabb wanted to proceed with the financial elder abuse litigation against Bruce and Beverly.

6. James Ellis' testimony

Mr. Ellis is a stockbroker with whom Donald maintained an account. From the period of October 15, 2010 through November 15, 2010, Donald spoke to Mr. Ellis daily. Donald demonstrated mental acuity as to trade decisions. Donald expressed extreme happiness about how Ms. Teixeira had been removed from his life. Donald expressed how he wanted his estate to be distributed. Donald wanted the entire estate to go to Beverly and Bruce.

7. Michael Berger's testimony

Mr. Berger is an attorney whose practice primarily focused on estate planning, probate and business law matters. Mr. Berger first met Donald in 2005. Donald was referred to Mr. Berger by Mr. Ellis. Mr. Berger prepared an amendment to Donald's November 19, 1996 revocable living trust (1996 trust) in 2005 and 2006. He also prepared a notice of revocation of the 1996 trust on January 13, 2010.

At a January 13, 2010 meeting, Donald and Mr. Berger discussed the drafting of a holographic will. Mr. Berger stated he would be unable to draft one at the time. This was because Mr. Berger's secretary was out of the office. Mr. Berger gave an example of a holographic will to Donald. Mr. Berger expected Donald would complete the example of the holographic will and then return so that a brand new trust and pour-over will could be drafted. At that time, Donald's estate was worth approximately $35 to $40 million.

Mr. Berger reviewed documents pertaining to Donald's prior estate plans. In the 1996 trust, Bruce was named as successor trustee. Upon Donald's death, Elizabeth Beach would receive $10,000. Twenty-five percent of the trust assets would be set aside

in trust for Judy Beach, Donald's ex-spouse. The remaining 75 percent was split one share to Bruce and one share to his children. The first amendment to the 1996 trust, executed in September 1997, added the Northridge house to Judy's share. The second amendment modified the trust assets set aside for Judy from 25 percent to 50 percent for her lifetime. The second amendment also added an additional gift of $2 million to Beverly. The remaining 50 percent of the trust assets would go to Bruce. Also Bruce would receive Judy's share upon her death. The third amendment added a specific gift of property on Pico Boulevard and property in Rosemead to Bruce. The revocation of the 1996 trust removed Judy from the trust.

8. Frank Hicks' testimony

Mr. Hicks is a forensic document examiner. Mr. Hicks testified on behalf of Ms. Humiston. Mr. Hicks testified there was a "strong probability" that Donald signed the November 15, 2010 will and the holographic will. According to Mr. Hicks, "strong probability" is defined as one step below identification, the highest level of handwriting certainty. Mr. Hicks testified the body of the holographic will was probably prepared by Donald. This is one step below the "strong probability" standard.

9. Dr. Gary Nudell's testimony

Dr. Nudell testified via videotaped deposition. Dr. Nudell specializes in internal medicine. Donald was Dr. Nudell's patient. Dr. Nudell first met Donald on April 8, 2010. This was, after Donald had fallen and developed a subarachnoid hemorrhage (bleeding in the brain). At the time, Dr. Nudell did not find Donald had any neurologic issue.

Dr. Nudell saw Donald on June 6, 2010 and prepared an assessment. Dr. Nudell found Donald had suffered head trauma with a possible concussion and potentially

worsening dementia. Dr. Nudell did not conduct any personal observation of this, but acquired this information from Ms. Teixeira.

On September 23, 2010, Dr. Nudell wrote a note on a prescription pad concerning Donald. The note stated Donald was unable to make informed medical and financial decisions. Donald was at Dr. Nudell's office for treatment for a skin tear. Ms. Teixeira requested Dr. Nudell prepare the September 23, 2010 note. This occurred after Ms. Teixeira showed Dr. Nudell a note from another physician. The physician's note declared that Donald was unable to make informed medical and financial decisions. Dr. Nudell saw another physician's similarly written note. Dr. Nudell then wrote his note on a prescription pad. Dr. Nudell's note was not executed under penalty of perjury.

On October 29, 2010, Donald was admitted to West Hills Medical Center complaining of shortness of breath and coughing. The admitting doctor prepared a report of the visit. Dr. Nudell, though not the admitting doctor, was aware of this report. The report indicated that neurologically, Donald was awake, alert and oriented and was nonfocal. Dr. Nudell generally described that "oriented" meant as to time, person, and place. "Nonfocal" referred typically to no obvious neurological abnormalities on examination.

On November 11, 2010, Dr. Nudell examined Donald. Dr. Nudell noted Donald was suffering from depression. This diagnosis was based on Dr. Nudell's knowledge of Donald's prior history. Donald had a list of medications he was taking, including psychiatric medications for treating depression. Dr. Nudell noted during this November 2010 exam that Donald appeared very alert, answered questions appropriately and showed no overall signs of cognitive dysfunction. Dr. Nudell did not observe Donald displaying any abnormal or bizarre behavior.

10. Dr. Vivek Savur's testimony

Dr. Savur, a neurologist, testified via his videotaped deposition. Neurology deals with structural and chemical diseases of the brain. Donald was a patient of Dr. Savur's.

On November 11, 2009, Dr. Savur first met Donald in the hospital. This occurred after Donald suffered his subarachnoid hemorrhage. Dr. Savur noted at that time, Donald was uncoordinated and confused. Dr. Savur also noted Donald was alert and aware as time, place and person. Donald demonstrated no signs of mental incompetency.

On December 8, 2009, Dr. Savur examined Donald. Dr. Savur reported that Donald had completely recovered from the subarachnoid hemorrhaging at that time. Dr. Savur also noted Donald was awake, alert and lucid and oriented as to time, place and person. Dr. Savur similarly noted no mental issues for Donald during examinations on March 17, April 21 and June 1, 2010.

On June 23, 2010, Dr. Savur again examined Donald. Dr. Savur noted Donald appeared to be physically declining. Donald's mood was irritable, depressed and defiant based on his interactions with Ms. Teixeira. Dr. Savur noted Ms. Teixeira became upset at Donald for refusing to listen to reason. Dr. Savur also noted Ms. Teixeira was haranguing Donald.

On July 6, 2010, Dr. Savur examined Donald. This examination occurred after Donald had fallen and had been admitted and released from the hospital on June 28, 2010. Dr. Savur made several notes concerning Donald's condition. Donald was angry and depressed because he felt confined and treated like a child. Donald's daughter would not allow him to get around. In fact, Donald's purported daughter was actually Ms. Teixeira. Dr. Savur found Donald was mentally fairly lucid. However, Donald was distracted about his perceived confinement.

On July 26, 2010, Ms. Teixeira called Dr. Savur's office and left a message regarding a letter she wanted him to write. Ms. Teixeira requested Dr. Savur write a letter stating Donald could no longer trade stocks or be involved in the stock market until

further notice. Dr. Savur told Ms. Teixeira to get a letter from the psychiatrist. Ms. Teixeira called Dr. Savur again on August 17, 2010 requesting a letter about Donald's financial decision making. Dr. Savur again did not write such a letter. Dr. Savur testified a physician can test for cognitive ability as to competence in decision making within five minutes of talking to a patient.

11. Dr. Mehboob Makhani's Testimony

Dr. Makhani is a psychiatrist. Dr. Makhani first saw Donald as a patient on July 18, 2010, at Northridge Hospital. Donald had been admitted on July 17, 2010. Dr. Makhani noted that Donald was admitted on a 72-hour hold for danger to others. Dr. Makhani found Donald was angry, irritable and quite paranoid. Dr. Makhani's paranoia diagnosis was based in part in part on Donald's statements. Donald claimed that his employees were stealing money from him. Dr. Makhani noted Ms. Teixeira said she was Donald's caregiver. Ms. Teixeira said she had power of attorney granting her power over Donald's healthcare decisions.

Donald was eventually discharged from Northridge Hospital on July 26, 2010. Dr. Makhani made clinical daily observations of Donald. In Dr. Makhani's opinion, Donald could be discharged from the hospital. Dr. Makhani believed that even if someone was admitted to the psychiatric unit, it did not necessarily mean that person lacked capacity to manage his or her own financial matters.

On August 19, 2010, Donald came to Dr. Makhani's office for a follow-up visit. That day, Dr. Makhani wrote a note concerning Donald. Dr. Makhani wrote that Donald was currently unable to make informed medical or financial decisions. Dr. Makhani's note was not executed under penalty of perjury. Dr. Makhani did not require Donald to receive any psychological or neurological testing as part of the August 19, 2010 visit.

On October 28, 2010, Dr. Makhani wrote another note concerning Donald. Dr. Makhani found Donald was not evidencing any psychosis or mania. He found Donald's

mental status had improved markedly. Dr. Makhani determined Donald currently seemed quite stable. Donald was quite awake, alert and oriented to manage his own finances.

12. Serita Stevens' Testimony

Ms. Stevens testified via videotaped deposition and in court. Ms. Stevens worked for Accent Home Health, a home health agency. She is a registered nurse who has worked as a psychiatric nurse. Ms. Stevens formerly treated Donald. She first visited Donald in August 26, 2010, at a hotel in Valencia. Ms. Stevens noted Donald was unsteady on his feet and had multiple falls. She noted Donald's memory and judgment was impaired. Ms. Stevens based this information on what Ms. Teixeira said about Donald. Ms. Stevens noted a violent streak by Donald based on Ms. Teixeira's reporting. Ms. Stevens found Donald to be delusional based on his telling her that he had all this money and houses. Ms. Stevens never verified if this was true. Ms. Stevens also noted Donald was paranoid because he felt people were against him.

Ms. Stevens conducted multiple assessments of Donald in the following weeks. On each occasion, she noted in her assessment that Donald's memory and judgment was impaired. Ms. Stevens found Ms. Teixeira was very parental with Donald, telling him to: take a nap; take his medications; and eat properly. Donald expressed a desire to leave. Ms. Stevens' general assessment was conducted by consulting with Ms. Teixeira, reviewing a log book for the past week's events and talking to Donald.

On October 19, 2010, after Ms. Teixeira was fired, Ms. Stevens noted Donald had expressed he was feeling better and was a free man. On October 26, 2010, Ms. Stevens again noted Donald's memory and judgment were impaired though she found he was oriented as to person, place and time. Ms. Stevens found: his energy was better; he went out for walks; he was more alert; he had no violent episodes; and he was more stable. Ms. Stevens found Donald had shown marked improvement. She noted that while

Donald had some delusions and confusion, his memory and cognition was better. Ms. Stevens did not know what the delusion and confusion was.

On November 16, 2010, Ms. Stevens made her final assessment report of Donald. She checked the boxes indicating he had impaired judgment, memory and insight. Ms. Stevens found that Donald had a poor self concept and phobias. She noted that Donald was much more stable and showed no signs of aggression or violence. Ms. Stevens conceded that much of her reports consisted of recounting what other people had told her. Ms. Stevens testified she exercised professional judgment when preparing her reports.

13. Dr. Daniel Plotkin's Testimony

Dr. Plotkin was retained by Bruce to testify. Dr. Plotkin is a medical doctor with a background in geriatrics and psychiatry. Having reviewed medical, psychiatric and hospital records and deposition transcripts, Dr. Plotkin formed an opinion as to Donald's capacity to execute the November 15, 2010 will and the holographic will.

Dr. Plotkin testified the holographic will was likely executed in February 2010. Dr. Plotkin did not find that in May 2010 Donald had testamentary capacity. Dr. Plotkin did find Donald had testamentary capacity on November 15, 2010. Dr. Plotkin noted a trend of considerable improvement in Donald's medical, psychiatric and cognitive status from the summer of 2010 through mid-November 2010.

A computer tomography scan was conducted on Donald's brain on October 11, 2009 following a fall. Donald was diagnosed with having periventricular white matter disease in his brain related to his age. The disease was not predictive of psychological condition.

Dr. Plotkin reviewed an evaluation by Dr. David Trader, a psychiatrist, who had examined Donald in December 2009. Dr. Trader concluded from the December 2009 examination that Donald was basically intact cognitively and had testamentary capacity,

with mild cognitive impairment. Dr. Plotkin ranked Dr. Trader's evaluation as the highest quality. This was because Dr. Trader also practiced geriatric psychiatry.

Dr. Plotkin ranked Dr. Savur's deposition testimony higher than Dr. Nudell's or Dr. Makhani's evaluations. This was because Dr. Savur actually knew Donald. Dr. Plotkin ranked Ms. Stevens' deposition testimony lower than all the doctor's depositions. Dr. Plotkin ranked her testimony lower because she did not really know why she reported what she did.

Dr. Plotkin testified Donald was significantly vulnerable to undue influence in May 2010. Dr. Plotkin's opinion would be stronger in February 2010 based on the closeness to stressful and traumatic events. Donald had suffered a fall in October 2009. His wife left him in November 2009. Ms. Teixeira would be the dominant influence in early 2010.

Dr. Plotkin believed Donald was mildly vulnerable to undue influence in November 2010 from Beverly and Bruce. Dr. Plotkin found Donald was competent but he suffered from mild cognitive impairment. Dr. Plotkin testified Beverly and Bruce had prepared checks for Donald to sign. Dr. Plotkin did not find this indicative of lacking cognitive capacity as he knew many competent individuals who had others prepare checks for them to sign. Dr. Plotkin testified the substantive nature of the November 15, 2010 will restored the estate plan to near original when compared to a previous will in 1996.

Dr. Plotkin testified Dr. Nudell's and Dr. Makhani's notes pertaining to Donald's mental capacity were done in a casual manner and were not proper evaluations. (As noted, neither Dr. Nudell's and Dr. Makhani's notes were executed under penalty of perjury.) Dr. Plotkin cited a report from a physical therapist, Susan Bemis, in August 2010. Ms. Bremis had noted Ms. Teixeira's controlling behavior of pointing fingers at Donald while yelling and screaming at him. Also, Ms. Teixeira covered up checks that she was writing on his behalf for other caregivers.

14. Dr. Bennett Blum's Testimony

Dr. Blum is a medical doctor with training in general adult, geriatric and forensic psychiatry. Dr. Blum testified on behalf of Ms. Humiston. Dr. Blum reviewed the deposition transcripts, hospital records and other documents presented at trial. Dr. Blum testified Donald lacked testamentary capacity to execute the November 15, 2010 will.

Dr. Blum noted Donald had a history of transient ischemic attacks (blood flow problems in his brain). Donald also suffered a stroke. Dr. Blum noted Donald had fallen again in late June 2010. This fall resulted in cognitive changes for Donald like confusion and memory issues. Dr. Blum testified Donald's white matter disease would impact how long it takes for the brain to function. White matter disease is typical of aging.

Dr. Blum found that both Bruce and Beverly had some understanding that there was an issue with Donald's cognition as of June and July 2010. In July 2010, Donald had fallen again and was admitted to the hospital. Dr. Blum noted that medical records from the hospital indicated Donald had memory impairment.

Dr. Blum also reviewed the caregiver journals from August through September 2010 concerning Donald. Dr. Blum noted Donald's rapid and inappropriate fluctuations in behavior were indicative of an impaired ability to perceive reality correctly. Dr. Blum concluded from Ms. Stevens' assessments of Donald from September through November of 2010 that he had a continuing pattern of cognitive impairments.

Dr. Blum did find undue influence on Donald as to the November 15, 2010 will. Dr. Blum found Beverly's interest increased significantly from a prior trust's gift of $2 million to 50 percent of Donald's estate. Dr. Blum found this indicative of undue influence. Dr. Blum did not find Bruce exercised undue influence on Donald during this time.

Dr. Blum noted he had examined a cashier's check to Ms. Teixeira on May 11, 2010 for $65,000. Ms. Teixeira had e-mailed both Bruce and Beverly on May 14, 15,

and 26, 2010, concerning lack of payment for her services. Ms. Teixeira also received cashier's checks on June 3 and October 28, 2010.

Dr. Blum had also reviewed Dr. Trader's notes regarding Donald. Dr. Trader had discussed economic and legal issues with Donald. Dr. Trader's notes state, "Trusted [Bruce] with [power of attorney] more than wife." Donald had also discussed an estate plan with Dr. Trader. Donald mentioned giving more to his nephews, his sister's sons. Donald mentioned that Douglas was well-off and Robert was okay. Dr. Trader's notes also state, "Closer to sister than other brothers, except for Bruce."

Dr. Blum concluded Donald lacked testamentary capacity on November 15, 2010, based on two reasons. First, Donald had difficulty recalling what his assets were. Second, Donald had a misperception of reality, namely abuse by Ms. Teixeira by being imprisoned by her.

H. Statement of Decision and Judgment

On July 7, 2014, the probate court issued its tentative statement of decision. On July 22, 2014, Ms. Humiston and Ms. Tabb filed objections to the statement of decision. On July 28, 2014, the probate court issued its final statement of decision.

The probate court found Mr. Lanning's testimony credible. The probate court found Donald had testamentary capacity to execute the November 15, 2010 will. The probate court applied section 6100.5, the capacity standard for wills. The probate court determined that based on Mr. Lanning's testimony, "Donald had sufficient mental capacity to be able to understand the nature of the testamentary act, to understand and recollect the nature and situation of his property, and to remember and understand his relationship to living descendants, spouse, and parents, and those whose interests are being affected by the will."

The probate court also relied upon the medical records prepared near November 15, 2010. The probate court noted Dr. Nudell had found on November 11, 2010,

"[Donald] appears very alert, answering questions appropriately, and shows no sign of cognitive impairment." On October 29, 2010, the discharge paperwork from West Hills Hospital stated that neurologically Donald was "awake, alert, oriented x3 and nonfocal." On October 29, 2010, Dr. Makhani, a psychiatrist, found that Donald had "improved markedly" and seemed to be quite stable. Also, the probate court found Dr. Makhani related, "Donald was 'awake, alert [and] oriented' to manage his own financial affairs." The probate court noted on October 26, 2010, Ms. Stevens concluded, "[Donald] has shown marked improvement in these past few weeks" and his memory and cognition appear to be better. The probate court also found that on November 8 and 16, 2010, Ms. Stevens stated that Donald was oriented to time, place and person.

The probate court found Donald was not delusional when he executed the November 15, 2010 will. The probate court cited Dr. Savur's July 2010 report which described Ms. Teixeira as haranguing Donald. Ms. Bremis had noted hostile behavior by Ms. Teixeira towards Donald. Ms. Stevens had noted Donald felt like he was in prison under Ms. Teixeira's care. Donald had stated he felt like a free man after Ms. Teixeira was terminated.

The probate court found Donald was not delusional when he expressed concerns employees were stealing from him. The probate court noted a substantial amount of money was deposited into Ms. Teixeira's bank account that had not been explained. The probate court found Donald was not delusional when he spoke a great deal about his financial successes with Ms. Stevens and others. The probate court found in reality he was an extremely accomplished businessperson. The probate court also found the white matter disease on Donald's brain did not affect his capacity to make his will because it affected speed, not judgment.

The probate court found that even if Donald was delusional, the alleged delusions did not affect the devise of his property. Mr. Lanning observed that Donald was lucid and fully understood the nature of signing the November 15, 2010 will. The probate

court also found the doctors' notes stating Donald could not make informed financial decisions was not the legal standard for the capacity necessary to make a valid will.

The probate court ruled there was no undue influence in the production of the November 15, 2010 will. The probate court determined it was undisputed Donald was susceptible to undue influence because of his medical condition. The probate court also found Beverly and Bruce had authority and control over Donald's care on or about November 15, 2010. However, the probate court ruled Ms. Humiston and Ms. Tabb did not meet their burden of establishing the result of the will was inequitable. The probate court ruled the disposition of property was consistent with Donald's stated intentions during his lifetime.

The probate court relied upon Dr. Trader's notes of the session with Donald. In their meeting, Donald confirmed his close relationship with two of his siblings. Donald had been very close to Beverly and Bruce. Donald had previously provided for Beverly to receive $2 million in the 2005 amendment to his prior trust. Bruce would have eventually received the remainder of Donald's estate under the prior trust. The probate court found there was no evidence Beverly actively, or by proxy via Bruce and Steven, participated in the execution of the November 15, 2010 will. Having found the November 15, 2010 will was validly executed and not the result of undue influence, the probate court ruled the issue of the holographic will was moot.

On September 9, 2014, the probate court issued its judgment. The probate court granted Bruce's petition to probate the November 15, 2010 will. And the probate court denied Ms. Tabb's petition concerning the holographic will.

I. New Trial Motion

On September 23, 2014, Ms. Tabb moved for a new trial. Ms. Tabb again argued she was denied a fair trial because the probate court would not admit the November 15, 2010 trust into evidence. Ms. Tabb contended that the November 15, 2010 will and trust

were drawn at the same time and were so inextricably intertwined as to constitute Donald's whole estate plan. Ms. Tabb argued there was insufficient evidence for the probate court to rule she was not named in the November 15, 2010 trust because it was never produced. Ms. Tabb made the same argument as to Ms. Humiston.

Ms. Tabb argued certain evidence was not considered by the probate court. She noted Bruce, acting under a power of attorney, filed a complaint against Ms. Teixeira on October 29, 2010 in which it was alleged Donald was incapacitated. Ms. Tabb argued this directly contravened the argument that Donald was fully capable of making estate planning decisions. Ms. Tabb argued that Donald's power of attorney required two physicians to certify that Donald was able to again handle his own affairs. This was never done.

Bruce asserted the production of the November 15, 2010 trust would violate Donald's financial privacy right. Bruce argued Ms. Tabb and Ms. Humiston stipulated that they would not require production of the November 15, 2010 trust. Bruce asserted both Ms. Tabb and Ms. Humiston were not beneficiaries of the trust. Bruce argued that the October 29, 2010 complaint against Ms. Teixeira was unverified and thus any statements in them, including the power of attorney issue, were inadmissible. On November 5, 2014, the probate court denied Ms. Tabb's new trial motion.

III. DISCUSSION

A. Non-Production of November 15, 2010 Trust

Ms. Humiston and Ms. Tabb contend the probate court erred by not permitting discovery of the November 15, 2010 trust. Ms. Humiston and Ms. Tabb argue that the November 15, 2010 will and trust constituted one unified estate plan. A trial court's ruling on disclosure matters is reviewed for abuse of discretion. (*John B. v. Superior Court* (2006) 38 Cal.4th 1177, 1186; *Pacific Tel. & Tel. Co. v. Superior Court* (1970) 2

Cal.3d 161, 171; *National Steel Products Co. v. Superior Court* (1985) 164 Cal.App.3d 476, 492.) Our Supreme Court held: "[I]n passing on orders denying discovery appellate courts 'should not use the trial court's discretion argument to defeat the liberal policies of the statute.' [Citation.]" (*Pacific Tel. & Tel. Co. v. Superior Court, supra,* 2 Cal.3d 171, italics deleted; see *Forthmann v. Boyer* (2002) 97 Cal.App.4th 977, 987.) A trial court abuses its discretion when its ruling exceeds the bounds of reason. (*Denham v. Superior Court* (1970) 2 Cal.3d 557, 566; *Doe 2 v. Superior Court* (2005) 132 Cal.App.4th 1504, 1517.)

Ms. Humiston and Ms. Tabb contend the November 15, 2010 trust was erroneously not produced. They argued the probate court did not apply the correct legal standard when ruling on the motions to quash the subpoenas duces tecum and the trial subpoenas. They contend the correct standard is whether the information sought might reasonably lead to discovery of admissible evidence. (Code. Civ. Proc., § 2017.010.) Ms. Humiston and Ms. Tabb argue that the production of the November 15, 2010 trust was necessary to demonstrate Beverly's possible undue influence over Donald.

"Undue influence" under the Probate Code has the same meaning as defined in Welfare and Institutions Code section 15610.70. (§ 86.) Welfare and Institutions Code section 15610.70 provides: "(a) 'Undue influence' means excessive persuasion that causes another person to act or refrain from acting by overcoming that person's free will and results in inequity. In determining whether a result was produced by undue influence, all of the following shall be considered: [¶] (1) The vulnerability of the victim. . . . [¶] (2) The influencer's apparent authority. . . . [¶] (3) The actions or tactics used by the influencer. Evidence of actions or tactics used may include, but is not limited to, all of the following: [¶] (A) Controlling necessaries of life, medication, the victim's interactions with others, access to information, or sleep. [¶] (B) Use of affection, intimidation, or coercion. [¶] (C) Initiation of changes in personal or property rights, use of haste or secrecy in effecting those changes, effecting changes at inappropriate times and places, and claims of expertise in effecting changes. [¶] (4) The

equity of the result. Evidence of the equity of the result may include, but is not limited to, the economic consequences to the victim, any divergence from the victim's prior intent or course of conduct or dealing, the relationship of the value conveyed to the value of any services or consideration received, or the appropriateness of the change in light of the length and nature of the relationship. [¶] (b) Evidence of an inequitable result, without more, is not sufficient to prove undue influence." We note the probate court found the first two prongs were met, but did not find an inequitable result or inappropriate actions as to Beverly.

Bruce argues the November 15, 2010 trust is personal financial information that is protected under the California Constitution privacy right. (Cal. Const., Art. I, § 1; see *Britt v. Superior Court* (1978) 20 Cal.3d 844, 855-856; *Valley Bank of Nevada v. Superior Court* (1975) 15 Cal.3d 652, 656.) The constitutional right is not absolute and may be abridged to accommodate a compelling public interest, such as California's broad discovery statutes. (*Lantz v. Superior Court* (1994) 28 Cal.App.4th 1839, 1853-1855; *Moskowitz v. Superior Court* (1982) 137 Cal.App.3d 313, 316.) The objectors contend Donald's financial privacy right ended upon his death. They further assert that even if the financial privacy right applied, it was waived when Bruce submitted the restated trust, which disclosed all of Donald's assets, to the probate court.

We need not decide whether there was an abuse of discretion by refusing to compel production or disclosure of the November 15, 2010 trust. Even if the probate court erred, the error is not reversible. The Court of Appeal has held: "Article VI, section 13, of the California Constitution provides that a judgment cannot be set aside '. . . unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice.' This fundamental restriction on the power of appellate courts is amplified by Code of Civil Procedure section 475, which states that trial court error is reversible only where it affects '. . . the substantial rights of the parties . . . ,' and the appellant 'sustained and suffered substantial injury, and that a different result would have been probable if such

error . . . had not occurred or existed.' Prejudice is not presumed, and the burden is on the appealing party to demonstrate that a miscarriage of justice has occurred." (*Waller v. TJD, Inc.* (1993) 12 Cal.App.4th 830, 833; accord, *Jun Ki Kim v. True Church Members of Holy Hill Community Church* (2015) 236 Cal.App.4th 1435, 1444; *Grail Semiconductor, Inc. v. Mitsubishi Electric & Electronics USA, Inc.* (2014) 225 Cal.App.4th 786, 799.) Our Supreme Court has held: "'[A] "miscarriage of justice" should be declared only when the court, "after an examination of the entire cause, including the evidence," is of the "opinion" that it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error.' [Citation.] 'We have made clear that a "probability" in this context does not mean more likely than not, but merely a reasonable chance, more than an abstract possibility.' [Citation.]" (*Cassim v. Allstate Ins. Co.* (2004) 33 Cal.4th 780, 800, italics deleted; see *Pool v. City of Oakland* (1986) 42 Cal.3d 1051, 1069; *Huffman v. Interstate Brands Corp.* (2004) 121 Cal.App.4th 679, 692.)

Any error pertaining to the disclosure of the November 15, 2010 trust is nonprejudicial. First, the objectors raised their arguments of an inequitable result for Beverly without production of the November 15, 2010 trust in support of their undue influence case. Theodore Hankin, Ms. Humiston's attorney, contended during his closing argument: "But it's very clear that Beverly MacDonald increased her share of his estate, something that she had been talking about early on . . . from approximately $2 million plus a residence to 50 percent of the estate. [¶] That was the stipulation made by counsel in lieu of producing the trust. Either 16 million, 17 and a half million or 20 million, depending on what you want to look at. [¶] We submit that this is inconsistent with Donald Beach's express wishes. She was not mentioned in 1996. And when she was mentioned in the amendments created during the divorce of Don and Judy Beach, she was only to receive $2 million. And how did she get to 50 percent? [¶] Her brother, Robert's 25 percent went away. The gift to nieces and nephews, including four of her own children, was eliminated. [¶] We submit this is not an equitable result."

Second, the probate court found Beverly did not unduly influence Donald in the making of the November 15, 2010 will directly or by proxy. Substantial evidence supported the probate court's finding. Beverly testified she was not present during the meeting between Mr. Lanning and Donald. Mr. Lanning testified the preparation of the November 15, 2010 will and trust was completed without input from anyone other than Donald. According to Mr. Lanning, they were alone during the discussions concerning the November 15, 2010 will and trust. As noted, the probate court found Mr. Lanning's testimony credible. The probate court also found it was not an inequitable result. Beverly had previously been named as a beneficiary in the second amendment to the 1996 trust. Dr. Trader's notes indicated Donald was closer to Beverly and Bruce than other siblings. It is not reasonably probable that the probate court, even if it had considered the November 15, 2010 trust, would have reached a more favorable result for the objectors. Accordingly, the objectors have not demonstrated reversible error pertaining to non-production of the November 15, 2010 trust.

B. The Power of Attorney

The objectors also contend the probate court erred by finding Donald had testamentary capacity to execute the will. The objectors assert the power of attorney became effective September 27, 2010, when Dr. Nudell certified in writing that Donald was unable to make informed medical or financial decisions. Dr. Makhani had previously certified in writing the same statement on August 19, 2010. The objectors contend Donald never recovered his capacity by undoing the power of attorney. Thus, objectors assert Donald lacked capacity to execute the November 15, 2010 will.

Donald executed a durable power of attorney on January 4, 2010. Bruce was named as Donald's attorney-in-fact with Beverly and Ms. Teixeira as the successors. Under its terms, the power of attorney becomes effective upon Donald's incapacity as defined under Paragraph 2.1. A power of attorney, by its terms, may become effective at

a specific future time or when a specific future event or contingency occurs. (§ 4030; see Ross, Cal. Practice Guide: Probate (The Rutter Group 2014) ¶ 1:67, pp. 1-53 to 1-54 (rev. # 1, 2013.) Paragraph 2.1 provides: "Determination of Incapacity. For all purposes under this Power, I [Donald] shall be deemed 'incapacitated' if and so long as a court of competent jurisdiction has made a finding to that effect or a guardian or conservator of my person or estate duly appointed by a court of competent jurisdiction is serving, or upon certification by two physicians (licensed to practice under the laws of the state where I am domiciled at the time of the certification) that I am unable properly to care for myself or for my person or property, *which certification shall be made by each physician in a written declaration under penalty of perjury*. A certified copy of the decree declaring incapacity or appointing a guardian or conservator, or the physicians' certificate shall be attached to the original of this document and recorded in the same county or counties as the original if the original is recorded." (Italics added.) The power of attorney would remain effective until Donald regained his capacity as defined under Paragraph 2.2. Paragraph 2.2 required a determination of capacity by a court, termination of guardianship or conservatorship or certification by two physicians under penalty of perjury.

The objectors argue that if Donald was incapacitated because of the power of attorney being in effect, then he would have lacked capacity to execute the November 15, 2010 will. The objectors reason the evidence does not demonstrate Donald regained his capacity as defined under Paragraph 2.2. However, the probate court here found Donald had capacity to execute the November 15, 2010 will. Thus, under the implied findings doctrine, the power of attorney had not gone into effect by its terms when Donald executed the November 15, 2010 will.

Our Supreme Court has held, "A judgment or order of a lower court is presumed to be correct on appeal, and all intendments and presumptions are indulged in favor of its correctness." (*In re Marriage of Arceneaux* (1990) 51 Cal.3d 1130, 1133; see *SFPP v. Burlington Northern & Santa Fe Ry. Co.* (2004) 121 Cal.App.4th 452, 462.) The implied

findings doctrine requires we presume the probate court made all factual findings necessary to support the judgment so long as substantial evidence supports the findings. (*Michael U. v. Jamie B.* (1985) 39 Cal.3d 787, 792-793; *Fladeboe v. American Isuzu Motors, Inc.* (2007) 150 Cal.App.4th 42, 59-60.)

Substantial evidence supports the probate court's implicit finding that the power of attorney had not gone into effect. Under the durable power of attorney's terms, Dr. Nudell and Dr. Makhani notes were insufficient to render Donald incapacitated. This is because they were not declarations under penalty of perjury. Section 4129, which governs a power of attorney with contingent terms such as the one here, requires designated persons provide declarations under penalty of perjury. (See 14 Witkin, Summary of Cal. Law (10th ed. 2005) Wills, § 848, p. 946 ["*When Springing Event Occurs*. The principal may give the attorney-in-fact (or one or more other persons) the power to determine *conclusively* by declaration whether the event or contingency specified in the springing power of attorney has occurred so that the power of attorney is effective. The principal may specify that the designee perform this function either alone or jointly. The declaration must be in writing under penalty of perjury."].)

The objectors concede that the express requirements for certification of Donald's alleged incompetency were not met because the two physician's notes were not executed under penalty of perjury. However, they contend the test is whether the certification provides reliable and credible evidence of the certified findings. The objectors rely upon *Rands v. Rands* (2009) 178 Cal.App.4th 907, 912-914 (*Rands*) in support of their assertion.

In *Rands*, the trust settlor appealed a probate court order ruling that his trust revocation was ineffective because he lacked capacity. (*Rands*, *supra*, 178 Cal.App.4th at p. 909.) The Court of Appeal held: "[The settlor] contends that the trial court erred by ignoring the Trust requirements for physician certifications of incapacity. He points to the requirements of Paragraph 4.2(B)(b) that the 'executed, witnessed, [and] acknowledged' certifications must 'verify' that the physician has examined the person

and concluded that he is 'unable to act rationally and prudently in his or her own best interests financially.' [The settlor] correctly asserts that the Sobers and Sheehy letters [letters from the physicians who found he lacked capacity] are neither witnessed nor acknowledged. He asserts that neither physician performed a capacity examination prior to executing the certification. [¶] The lack of witnessing or acknowledgement does not invalidate Sobers' and Sheehy's certifications of incapacity because the certifications fulfilled the settlors' intent of reliable and credible evidence of incapacity. At trial, Sobers and Sheehy testified that they executed and dated the certifications because they believed them to be true." (*Id.* at p. 913.)

Rands is not persuasive. That case concerned a trust document and the settlors' intent. Here, the document at issue is a durable power of attorney. Under the Probate Code and the durable power of attorney's terms, the power of attorney's precondition to its effectiveness never occurred. The probate court did not err by implicitly finding the power of attorney had gone into effect. The preconditions to effectiveness of the power of attorney, under penalty of perjury documentation of Donald's incapacity, were never provided.

C. Application of Section 6100.5 to Determine Donald's Competency to Execute the Will

The objectors argue the court should have applied section 811 to determine Donald's capacity as opposed to section 6100.5. The objectors do not challenge how section 6100.5 was applied. Rather, they argue, section 6100.5 should not have been applied at all. The objectors contend sections 810 through 812 should have been applied because the November 15, 2010 will is a pour-over will into a more complex trust.

Sections 810 to 812 set forth a mental capacity standard for certain legal acts and decisions. (*Lintz v. Lintz* (2014) 222 Cal.App.4th 1346, 1351 (*Lintz*); *Andersen v. Hunt* (2011) 196 Cal.App.4th 722, 728.) The Court of Appeal held: "[S]ections 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." (*Andersen v. Hunt*, *supra*, 196 Cal.App.4th at p. 730.)

Section 6100.5 specifically applies to the mental capacity necessary to make a will: "(a) An individual is not mentally competent to make a will if at the time of making the will either of the following is true: [¶] (1) The individual does not have sufficient mental capacity to be able to (A) understand the nature of the testamentary act, (B) understand and recollect the nature and situation of the individual's property, or (C) remember and understand the individual's relations to living descendants, spouse, and parents, and those whose interests are affected by the will. [¶] (2) The individual suffers from a mental disorder with symptoms including delusions or hallucinations, which delusions or hallucinations result in the individual's devising property in a way which, except for the existence of the delusions or hallucinations, the individual would not have done." The Court of Appeal held: "'"It is thoroughly established by a series of decisions that: 'Ability to transact important business, or even ordinary business, is not the legal standard of testamentary capacity . . . .' [Citations.] Rather, testamentary capacity involves the question of whether, at the time the will is made, the testator "'has sufficient mental capacity to understand the nature of the act he is doing, to understand and recollect the nature and situation of his property and to remember, and understand his relations to, the persons who have claims upon his bounty and whose interests are affected by the provisions of the instrument.'" [Citations.] It is a question, therefore, of the testator's mental state in relation to a specific event, the making of a will.' [Citation.]" (*Andersen v. Hunt*, *supra*, 196 Cal.App.4th at p. 727; accord, *Lintz*, *supra*, 222 Cal.App.4th at pp. 1351-1352.)

Under California law, it is well settled that where two statutes deal with the same subject matter, the more specific one controls. (*Rose v. State of California* (1942) 19 Cal.3d 713, 723-724; *Das v. Bank of America, N.A.* (2010) 186 Cal.App.4th 727, 738; *Shoemaker v. Myers* (1992) 2 Cal.App.4th 1407, 1423-1424.) Section 6100.5 specifically concerns the mental capacity for making a will. Both probate petitions at issue concerned wills. Thus, the probate court applied the correct mental capacity standard by applying section 6100.5.

The objectors argue that Donald's estate plan was akin to a complex trust and thus the capacity standard used by the court was incorrect. They rely on analysis contained in *Lintz, supra*, 222 Cal.App.4th at pages 1352-1353. There, the Court of Appeal held: "[W]e conclude that the probate court erred by applying the Probate Code section 6100.5 testamentary capacity standard to the trusts and trust amendments at issue in this case instead of the sliding-scale contractual standard in Probate Code sections 810 through 812. The trust instruments here were unquestionably more complex than a will or codicil. They addressed community property concerns, provided for income distribution during the life of the surviving spouse, and provided for the creation of multiple trusts, one contemplating estate tax consequences, upon the death of the surviving spouse." (*Lintz, supra*, 222 Cal.App.4th at pp. 1352-1353.)

The analysis in *Lintz* is not controlling. Again, the probate petitions at issue here concerned wills. (See *Lintz, supra*, 222 Cal.App.4th at p. 1352 ["*Andersen* [*v. Hunt*] ruled that Probate Code section 6100.5 applied to the mental competency to make a will, not to a testamentary transfer in general."].) The objectors' arguments concerning the November 15, 2010 will and trust estate plan fail under the facts present here. The November 15, 2010 trust was restated. The restated trust was not in dispute. Additionally, the restated trust was not complex: Bruce would receive Strawberry Patch, Incorporated; Beverly would receive real property on Pico Boulevard; Douglas and Robert would receive $1 million each; and Beverly and Bruce would receive 50 percent

each of the remaining estate. The probate court did not err by applying the testamentary standard for capacity under section 6100.5.

IV. DISPOSITION

The probate court's order and judgment are affirmed. Petitioner, Bruce Beach, may recover his appeal costs from the objectors, Elizabeth Beach Humiston and Ann Marie Beach Tabb.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

TURNER, P. J.

We concur:

MOSK, J.

KIRSCHNER, J.*

* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.