San Luis Obispo County Bar Association
Estates and Trusts Section

EVIDENCE FOR TRUSTS AND ESTATES LAWYERS

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I. INTRODUCTION

This presentation is intended to alert estate planners to opportunities and pitfalls related to creation and preservation of evidence that will be essential in assuring that the client's plan is implemented as prepared. The approach will be to look at evidence that is used in common types of disputes that arise involving a client and his or her estate plan.

A range of disputes is familiar in the trusts and estates practice. This program will focus on issues when a will or trust is challenged because the testator or grantor lacked capacity or was the victim of undue influence.

II. CLIENT CAPACITY

A. A Will

1. California Probate Code Section 6100(a):

> An individual 18 or more years of age who is of sound mind may make a will.

2. California Probate Code Section 6100.5:

> (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.

These longstanding standards of testamentary capacity have been supplemented by the Due Process in Competence Determinations Act (DPCDA) at Sections 810-813 of the California Probate Code. DPCDA attempted to modernize a loose collection of hoary terms to describe mental condition. The Legislature's purpose as set forth in Section 810(c) was to require that any judicial determination that a person lacks the legal capacity to perform a specific act should be based on evidence of a deficit in one or more of the person's mental functions rather than on a diagnosis of a persons mental or physical disorder. So for example, it is not adequate to say a person is afflicted with Alzheimer's Disease and therefore lacks capacity. There must be evidence that some mental deficit resulting from the disease affects one of the listed mental functions and evidence of a correlation between the deficit or deficits in question and the decision or act to be performed.

B. A Trust

1. California does not have a trust-specific statute describing the standard for capacity for executing a trust.

2. If a trust in its content and complexity is "simple" and like a will substitute, the required capacity is the same as for a will. *Anderson v. Hunt,* 196 Cal App 4th, 722 (2d Dist 2011).

3. However, if a trust is more complex than the trust which the court considered in *Anderson v. Hunt* (which only reallocated the percentage of the trust estate among the beneficiaries) then the "sliding scale" contractual standard of capacity created by DPCDA. *Lintz v. Lintz,* 222 Cal App 4th 1346 (6th Dist 2014).

4. We are left with scant guidance as to which trusts are truly simple and which are more complex.

C. Evidence of Capacity

1. There is a common law presumption of competence to make a will. *Estate f Fritschi,* 60 Cal 2d. 367 (1963).

2. Section 810 creates a rebuttable presumption that every person has capacity to make decisions and be responsible for their acts.

3. Section 870 of the Evidence Code allows a subscribing witness to a writing to state his or her opinion as to the "sanity" of the signer of the writing if the validity of the writing is in question.

4. An attorney who drafts a will and is also a subscribing witness can testify about the capacity of the testator. *Estate of Goetz*, 253 Cal App 2d 107 (1st Dist. 1967). The *Goetz* court said that "The attorney's testimony, although not conclusive, is entitled to much weight, particularly when, as here, he is a subscribing witness." In *Goetz*, the drafting attorney had not had a long relationship with the testator. When he met with the testator for the first time she came to his office requesting that he prepare a will. She knew that she had a husband and two children, a son and a daughter. She was able to describe her assets, knew what was in joint tenancy with her husband and what was her separate property. The testator said that because her husband and daughter were already well off, they were to be omitted from the will. She told the attorney that there were problems in the marriage, and that her husband had attempted to "have her committed". She was also concerned that her husband might

contest the will. As a result, the attorney spent considerably more time with her than he otherwise would have for a simple will. The attorney took an abundance of precaution to satisfy himself that she had adequate testamentary capacity. The husband did in fact contest the will, and there was testimony from three treating doctors about the testator's mental infirmity. Nevertheless, the jury [!!!] found in favor of the proponent of the will. The Court of Appeal affirmed the judgment. The Court of Appeal found the testimony of the attorney compelling, and even more compelling were letters from testator to her daughter at about the time of the execution of the will. The Court described the letters as "intelligent, chatty, and well put together. They exhibit orientation as to time and place."

5. Medical Testimony. A testator's treating physician or a medical professional can testify as to his or opinion of testator's capacity. The opinion should be based on an actual examination, if possible. However, even if the testator is deceased, an opinion may be based on medical records or other information regarding the testator. It is of paramount importance that the physician or other qualified professional know and apply the standards for capacity. Some practitioners like to use the Capacity Declaration (Judicial Council Form GC-335) as a guide for physicians who may not be familiar with evaluating people for capacity. The form is not perfectly designed for a capacity determination, but it is a tool to consider.

In *Key v. Tyler,* below, an examining physician's opinion on ability to resist undue influence was considered not useful because the physician had not been provided enough information about what was going on in a trust amendment. It is up to the

attorney soliciting a medical evaluation to be sure that the medical expert knows what is needed.

6. Filming. It is difficult to find a capable trusts and estates attorney who believes that filming a document execution ceremony is a good idea. There are too many ways it can turn out poorly.

III. Undue Influence

A. A trust, will or other donative document that is procured through undue influence is invalid and may be set aside. *Rice v. Clark*, 28 Cal 4th 89 (2002).

Section 86 of the California Probate Code reads as follows:

> "Undue influence" has the same meaning as defined in Section 15610.70 of the Welfare and Institutions Code. It s the intent of the Legislature that this section supplement the common law meaning of undue influence without superseding o interfering with the operation of that law."

W&I Section 15610.70 is a part of the Elder Abuse and Dependent Adult Civil Protection Act ("EADACPA"), and it reads as follows:

> **15610.70** (a) "Undue Influence" means excessive persuasion that causes another person to act or refrain from acting by overcoming that person's free will and results in inequity. In determining whether a result was produced by undue influence, all of the following shall be considered:
>
> (1) The vulnerability of the victim. Evidence of vulnerability may include, but is not

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

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

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

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

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

(C) Initiation of changes in personal or prroperty 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 of dealing, the relationshhip of the value conveyed to the value of any services r consideration received, or the appropriateness of the change in light of the length and nature of the ralationship.

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

B. Burden and Evidence. Ordinarily the burden of challenging a document based an undue

influence falls on the contestant. California Probate Code Section 8252(a). However, a presumption of undue influence, shifting the burden of proof and requiring the proponent of the document to establish that there was no undue influence, arises upon a showing by a contestant that

> (1) the person alleged to have exerted undue influence had a confidential relationship with the testator;
>
> (2) the person actively participated in procuring the instrument's preparation or execution; and
>
> (3) the person would benefit unduly by the donative instrument. See, *Rice v. Clark,* at pp 96-97.

This burden shifting is often a critical element in a case which successfully challenges a will or trust on the ground of undue influence.

A recent Court of Appeal case is illustrative of an undue influence case. The case generated two Court of Appeal opinions, one which was ordered not published and one which is published. In *Key v. Tyler,* ___ Cal App 5th ___ (2d Dist April 19, 2019)(WL1748577)(Modified May 7, 2019) the Court of Appeal dealt with the portion of the case which followed an earlier adjudication that one of three sisters had exerted undue influence on her mother to adopt a trust amendment for one daughter's benefit and to the detriment of one of her sisters. In this second portion of the case, the Court found that the sister exerting undue influence had violated the trust's No Contest provision by defending against her sister's petition to set aside the flawed amendment. In the first phase of the case which resulted in an unpublished opinion, *Key v. Tyler* (WL 3587505)(2016) the Court of Appeal found that this same sister had in fact exerted undue influence over her mother in obtaining a trust amendment that virtually disinherited another daughter. The unpublished opinion is where

the important facts are found regarding the undue influence claim.

The sister who was found to be the undue influencer was the attorney for her mother's business and also controlled many aspects of the business. Mother was elderly, and her husband had died recently. The parents' trust had directed distribution in equal shares on the second death among their three daughters. The amendment in question which was adopted by mother changed that pattern to give a token gift to one daughter, a larger gift to another daughter and the lion's share including the interest in both the family business and the family home to the influencer daughter.

Mother's attorney testified that he had met alone with mother only once, in connection with allocating trust assets following death of her husband. He took almost all guidance from the influencer daughter or other attorneys in daughter's law firm. Influencer daughter was a powerful figure who appears to have dominated her mother, her mother's attorney and employees in the family business. The attorney was sensitive enough to the potential problems related to the amendment that he contemplated a contest. He had a contemporaneous psychiatric exam of mother on the day she signed the amendment. When mother died, the daughter who was disadvantaged contested the amendment.

The probate court upheld the contest and set aside the amendment. The court found that neither the influencer nor the other attorney in her office who worked on the amendment was credible. The court did not find the examining doctor credible on the issue of whether mother was susceptible to undue influence. The court found the testimony of the drafting attorney unhelpful, in part because he had spent almost no time alone with mother.

IV. The Attorney's Role in Establishing Capacity and Insuring Against Undue Influence.

A. Duty. An attorney engaged to prepare or modify a client's testamentary or dispositive documents may owe the client a duty of loyalty which at a minimum requires the attorney to consider whether the client has the requisite capacity to execute the documents in question. However, the attorney does not have a duty to heirs or beneficiaries to determine capacity and refrain from helping a client execute documents when the client lacks capacity. *Moore v. Anderson Zeigler Disharoon Gallagher & Gray, P.C.*, 109 Cal App 4th 1287 (1st Dist. 2003). "The attorney who is persuaded of the client's testamentary capacity by his or her own observations and experience, and who drafts the will accordingly, fulfills that duty of loyalty *to the testator*. In so determining, the attorney should not be required to consider the effect of the new will on beneficiaries under a former will or beneficiaries of the new will." Presumably, the attorney's duty to identify and guard the client against undue influence is a duty only to the client, not to heirs and beneficiaries.

There is no case which elaborates on how an attorney should articulate and preserve the basis on which the attorney was "persuaded of the client's testamentary capacity by his or her own observations and experience". The attorney should keep in mind the *Goetz* case and the potential important testimony of the attorney in the event of a will contest. It is also well to treat *Key v. Tyler* as a cautionary tale. With those cases and considerable experience in mind, here are some suggestions.

B. Evidentiary Tips.

1. Be alert. Attorneys encounter people of all sorts, and we develop instincts about people who may be a bit "off" or people whose acts are possibly subject to challenge after

death. Don't ignore those instincts. They inform your judgment. If the attorney senses that there are issues, other people may as well, including family and close associates.

2. Time. Spend enough time with the client to be sure that you will be a credible witness about the client's condition and the possibility of undue influence. The economics of the practice and client cost are constraints, but this is important. We see both sides of that coin in *Goetz* and in *Key v. Tyler*. There is no one rule; but determining what is "enough" is part of an attorney's judgment. If there is a will contest, one of the items of evidence will be any business records (Evidence Code Sections 1270-1272) of the attorney showing time spent with the client. Even if some of the time is deemed non-billable, it may be useful to have a record of it in the system. If a client has questions after a meeting, the attorney may want to consider answering them directly and not delegating all contacts to staff. If staff are talking with the client, make sure they know the importance of documenting those conversations.

Undue influence is harder sometimes to detect than lack of capacity. Again, the planning attorney's judgment and experience are important. Here, especially, meeting alone with the client and communicating directly with the client are of paramount importance. It is also important to be keenly alert to signs that the client is feeling pressed to take or not to take a certain action. Similarly, a client can be irrationally exuberant about a new beneficiary or other advisor or confidant. If something seems a little off, probe.

3. Time Alone. The attorney must control his or her interactions with the client. If a client wants to bring another person into a discussion with the attorney, the attorney should get the client's informed consent in writing. If the attorney has reservations about whether

the client truly understands the issues about bringing others into the conversation, then the attorney should spend more time with the client, alone, before the non-client joins the conversation. That is true whether the non-client is a potential beneficiary, CPA, insurance advisor or other advisor. Different participants will cause different levels of concern.

4. Humanize the client. Spend some of the time with the client talking about things that may seem extraneous. What does the client do? What was the client's career? Does the client have grandchildren? How often does the client get to visit with children or grandchildren? If a client has no close family, talk about how the client spends her time. What can seem like idle chatter can be very useful when a client's capacity is at issue. Remember Mrs. Goetz's letters to her daughter. Even though the case is often cited for the proposition that the attorney is qualified to testify about the client's capacity, the court said, "But perhaps the most persuasive of all the evidence are the letters written in her own hand by Mrs. Goetz to her daughter, . . .".

5. Understand what is happening with the client's health. If the client is taking medications or in pain or has other issues which to some people might suggest lack of capacity, find out more about those things. Be prepared to have discussions with the client about how she feels when she is taking her medication?

6. Revisit your form documents. Are your wills and trusts understandable by the clients? Will they be understandable by the judge who may pass judgment on them some day. Keep in mind the distinction drawn by the courts between "simple" documents like wills and complex trusts that do more than just adjust percentages. Try having someone who does not do what we do read sample wills and trusts that your office prepares and see if that person considers the documents accessible. We attorneys have a tendency to use terms of art or jargon that is potentially

confusing, even to attorneys who do not regularly deal with such documents.

7. Other witnesses. Think of having someone involved with a signing who is truly credible and independent. That may even be required. For example if the client is also updating a health care directive and the client is living in a skilled nursing facility, a patient advocate or ombudsman is required (Probate Code Section 4675). That independent person typically is knowledgeable about the mental states of people in compromised health situations and can be invaluable. The patient advocate may not be willing to witness a will, but he or she can be present if an Advance Health Care Directive is being signed at the same time and can someday be a valuable witness as to the circumstances of the signing and the condition of the testator.

An attorney's staff can frequently be called on as witnesses for documents. Consider having a standard office protocol for what staff members do during a signing and the kind of notes they take.

It is almost always a good idea to exclude people who may benefit or suffer from the document in question from the signing process.