IACP WORKSHOP 29

DIMINISHED CAPACITY, UNDUE INFLUENCE AND FRAUD:

THE IMPACT ON ESTATES, DIVORCE, AND THE TEAM.

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9. **Hypothetical case study**

Shirley is a 77-year-old widow. She and her husband Bill were married for 51 years until four years ago when he passed away. They bought their house in San Jose shortly after they were married for $26,000 and over the years, had made several upgrades and a large addition. It is now worth over two million dollars and there is no mortgage. Shirley’s husband also made sound investments in the stock market, enough for him to retire at 60 years of age. Shirley is currently able to live comfortably on the money he invested. They have three adult children, Mary, Jeff, and Julie.

Mary, age 50, is the oldest sibling and lives in Boston with her husband and two children. Mary is an administrative assistant for a company and her husband is a mid-level executive at another company. They own a home and are comfortable financially, but not wealthy. Mary and her husband visit her mother once a year when their children go to summer camp. They usually stay in a local motel when they visit.

Jeff, age 48, is divorced and lives in Chico with his girlfriend and her daughter. Jeff works as a mechanic in a local automotive repair shop has one child from his previous marriage who is in college in Southern California. He frequently works overtime to help pay for his daughter’s tuition and hopes to be able to buy a house of his own someday. Because of his work schedule, he can only come to visit his mother a couple of times a year.

Julie is 46 and the youngest of the three siblings. She graduated from high school with average and sometimes less than average grades. She struggled in school because she has a learning disorder. Since high school, she had various jobs but was often let go because she was prone to errors. Her most stable job was working as an aid in a child day care, which she did for 10 years. At that time she was sharing an apartment with three friends but over the past several years, roommates moved, the rent kept being raised, and she could no longer afford to live independently so she moved back in with her mother and father. After her father passed away, it started to become apparent that her mother was having cognitive problems. Julie kept having take time off to take her mother to doctor appointments, do the shopping, cooking, cleaning, and paying bills. Eventually, Julie felt it was not safe to leave her mother alone so she quit her job to take care of her mother full time.

Julie is resentful that she gave up a job she enjoyed while her siblings were able to carry on with their lives without sharing the burden. When Mary and Jeff call, Shirley has a difficult time understanding them and hands the phone to Julie. Mary and Jeff feel that Julie is preventing them from speaking with their mother. Mary and Jeff sometimes criticize Julie or tell her what she “should be” doing.

Shirley’s current will and trust plan is to divide everything equally between the adult children. However, one day, Julie brings her mother to the attorney’s office to create a new plan. The new plan sets out to leave half of everything to Julie and one quarter to each of the other siblings. The attorney has Julie wait in the waiting room while he meets with Shirley alone.

1. **DEFINITIONS**

**2.a.TESTAMENTARY CAPACITY**: Probate Code 6100(a) provides In California, anyone who is at least 18 years old and of sound mind can make a will.  However, the term “sound mind” means having testamentary capacity, and the law describes this as being “mentally competent”.

Mental competency means that, at the time the will was signed, the “testator” (person signing the will) was able to do all of the following:

(1)   Understand the nature of the testamentary act.  That is, they knew that they were giving specific instructions on who their beneficiaries would be and what property (real or personal) the beneficiaries would receive.

(2)   Understand and recollect the nature and situation of their property.  Did they know what their estate consisted of?  A house?  A bank account?  Some stock certificates?  They need not know, for example, the actual bank account numbers, or even the total number of accounts they have.  But they must know that they have bank accounts, and a general understanding of the assets that make up their estate at the time the will is signed.

(3)   Understand who their close relatives are and how they will be affected by the will.   If the person cannot remember that s/he is married, or has children, then the will is likely to be determined invalid, because only a mentally incompetent testator could have forgotten that such relationships existed.

(4)   The testator must not suffer from a mental disorder.  This includes hallucinations or delusions that result in the testator leaving property to individuals or entities that, absent any such delusions, s/he would never have done.

An example would be where the testator suffered from a delusion that he was being visited by ghosts every night and believed that the only way to stop the haunting would be to name a paranormal group (like the ghostbusters) as a major beneficiary to the will.

Other circumstances exist, however, that would allow a will to be made even though a person has been declared mentally incompetent.  In a [**conservatorship**](http://www.elder-law-advocate.com/conservatorships) case, where the court has appointed a conservator, a will can be executed on behalf of the conservatee.  However, for the will to be valid, the conservator would have to first petition the court and obtain a court order for such authorization.

From the above rules, you can see that testamentary capacity is not a high bar to hurdle.  When issues such as hallucinations and delusions appear, then a will may be challenged through a procedure known as a [**will contest**](http://www.elder-law-advocate.com/wills/will-contests).

**2.b. MENTAL INCOMPETENCY.** “It is not every form of insanity, not every mental departure from the normal, which destroys an otherwise valid testamentary act. (Witkin, 10th Edition, Vol 14 Wills & Probate, ss161. All future references to “Witkin” will be to this source.) Witkin continues, “Whether or not delusions and hallucinations are characterized as ‘insane,’ the proper test is whether delusions and hallucinations result in a devise the testator would otherwise not have made.” Citing Goodman v. Zimmerman.

“A contestant must show either (1) mental incompetence generally, or (2) a delusion that directly influenced the testamentary act. The point at issue is the testator’s mental condition at the time of the execution of the will; evidence of the testator’s condition at other times is only of significance insofar as it aids in determining condition at the time of execution.” Witkin ss 122, referencing Estate of Perkins.

**2.c. UNDUE INFLUENCE**: From Witkin, ss130: “Undue influence consists in the exercise of acts or conduct by which the mind of the testator is subjugated to the will of the person operating on it’ some means taken or employed which have the effect of overcoming the free agency of the testator and constraining him to make a disposition of his property contrary to and different from what he would have done had he been permitted to follow his own inclination or judgment.” “It is not undue unless the pressure has reached a point where the mind of the person subjected to it gives way before it so that the action of such person taken in response to the pressure does not in fact represent his conviction or desire, brought about perhaps by argument and entreaty, but represents in truth but the conviction or desire of another.”

“It is frequently said that a strong showing is necessary, or that the proof must be by clear and convincing evidence….the court should be vigilant in protecting the testator’s freedom to dispose of his or her property…. A legion of decisions strike down attempts of juries to invalidate wills upon the ground of undue influence in order to indulge their own concepts of how testators should have disposed of their properties.”

**2.d. BURDEN OF PROOF re Undue Influence.** (From California Trust and Probate Litigation [hereinafter “Litigation”] ss 6.23 and following which is an attachment to these materials)

“In general, the contestant has the burden of proof on the issue of undue influence. (Prob C 8252(a)). In the testamentary context, however, a presumption of undue influence may be raised by showing that:

* There was a confidential relationship between the testator and the person alleged to have exerted undue influence;
* The person actively participated in actual preparation or execution of the will; and
* The person unduly profited by virtue of the will.

These are further defined in the attached portions of chapter 6 from the treatise.”

**2.e. FRAUD.** See California Trust and Probate Litigation ss 6.27 and following, including the topics of DURESS OR MENACE, and MISTAKE.

**2.f.** WHAT CONSTITUTES **LACK OF CAPACITY?** Litigation ss 6.8

**2.g EVIDENTIARY REQUIREMENTS.** Litigation ss 6.9

**2.h STATUTORILY DISQUALIFIED DONEES AND TRUSTEES.** Litigation ss 6A.1 and following.

In short, there is a presumption, shifting the burden of proof to certain persons who are presumed to have caused the document to be the product of fraud or undue influence, with certain exceptions as noted in the attached materials.

**3. THE ROLE OF THE LAWYER IN PLANNING**

3.a The lawyer who represents the testator/trustor is a full team member and participates in all full team meetings, in addition to meeting separately with his or her client(s) when requested or advisable.

3.b The lawyer stays in his or her role as a legal representative of the client.

3.c The lawyer may represent more than one client if their interests coincide or align with each other.

3.d During full team meetings (the family members and neutral(s) the lawyer is present to gain additional insight into the family’s dynamics and concerns; explain the trust-maker’s rationale for including certain concepts into their will/trust, and help the participants in general to understand elements of the law that pertain to their situation. The lawyer may also share his or her experience if it might help the family gain a deeper understanding or shift an individual’s incorrect understanding of the law, trusts in general or the law in general. In this aspect, the lawyer is helping to educate the family.

3.e The lawyer does not become a facilitator or manage conflict that may arise during the discussion. Instead the lawyer can use his or her position to better understand the family’s concerns in order to help the client integrate those concerns, if appropriate, into the trust document at a later meeting with the team and the client.

3.f The lawyer meets with other team members, shares information that will help them understand the trust-maker and his or her intentions. It is the lawyer’s responsibility to educate the clients regarding the confidentiality guidelines in Collaborative Practice and how those differ from the usual lawyer-client confidentiality relationship.

3.g The lawyer is in a unique position to help other team members understand legal principles that may be involved in any particular case and to give insight into the trust-maker’s personality and intentions.

1. **CONSIDERATIONS** when Evaluating Competency, Capacity, and Undue Influence

* Competency
  + Global abilities to engage in a wide range of functions
  + Categorical (yes or no)
* Capacity
  + Specific abilities
  + Decisional vs. executional
    - Ability to make rational informed decision vs. having the ability to carry out the action
  + Types of capacities
    - Testamentary-capacity to make a will
    - Execute durable POA
    - Donative-capacity to make a gift
    - Contractual-capacity to execute a contract
    - Convey real property-capacity to transfer property
    - Capacity to mediate
    - Live independently
    - Manage finances
    - Consent to medical care
    - Sexual consent
    - Driving
    - Not an exhaustive list
* Undue influence
  + Dynamic of role relationship
  + Exploit the trust, dependency, and fear of elder
  + Power to gain control over decision making of elder
  + Elder may or may not have full capacity
  + Cognitive impairment or psychological issues that increase susceptibility and dependence
* Evaluating for Diminished Capacity
  + Subjective
  + Some cases clear/some cases not clear
  + Expert opinion
    - Opinion based on observation
    - Common mistakes
  + Objective evidence
  + Neurological/physical examination
    - Brain imaging
      * Structural versus functional
      * Caution—brain imaging is not the same as cognitive functioning
  + Neuropsychological assessment

1. **WRONGDOING Terms Defined by California State Law**

*(Noted in “The Wolf at the Door)*

5.a **Malice:** Conduct that is intended by the defendant to cause injury to the plaintiff or despicable conduct, which is carried on by the defendant with a willful and conscious disregard of the rights or safety of others.

5.b **Oppression:** Despicable conduct that subjects a person to cruel and unjust hardship in conscious disregard of that person’s rights.

5.c **Fraud:** An intentional misrepresentation, deceit, or concealment of a material fact known to the defendant with the intention on the part of the defendant of thereby depriving a person of property or legal rights or otherwise causing injury.

**5.d “Financial Abuse” California’s Welfare and Institutions Code Section 15610.30(a)**

5.d.1 Takes, secretes, appropriates, obtains or retains real or personal property of an elder or dependent adult to a wrongful use or with intent to defraud, or both.

5.d.2 Assists in taking, secreting, appropriating, or retaining real or personal property of an elder or depend adult to a wrongful use or with intent to defraud or both.

5.d.3 Takes, secretes, appropriates, obtains or retains or assists in taking, secreting, appropriating, obtaining or retaining, real or personal property of an elder or depend adult by undue influence as defined in Section 1575 of the Civil Code.

**5.d.4 In addition: Welfare and Institutions Code Section 15610.30(b)**

A person or entity shall be deemed to have taken, secreted, appropriated, obtained or retained property for a wrongful use if, among other things, the person or entity takes, secretes, appropriates, obtains or retains the property and the person or entity *knew or should have know that this conduct is likely to be harmful to the elder or dependent adult.*

**5.d.5 Some Factors to Consider When Determining Vulnerability of a Victim to Undue Influence: CA Welfare and Institutions Code Section 15610.70** (Not exclusive):

5.d.5.a 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.

5.d.5c The person is in a position to: (A) Control necessaries of life, medication, the victim’s interactions with others, access to information or sleep. (B) Use of affection, intimidation, or coercion (to unduly influence) (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.

1. **STARTING CONSERVATORSHIP PROCEEDINGS.**

The reference used for this section is the treatise on California Trust and Probate Litigation.

To start a conservatorship proceeding, there must be a Capacity Declaration – Conservatorship (Judicial Council form GC-335, a copy of which is included with these materials). This form is required when the petitioner alleges that the proposed conservatee:

\* Will be unable to attend the hearing (Prob code ss 1825(b))

\* Lacks the capacity to give informed consent to medical treatment (Prob C 1890(c)), or

\* Has dementia and would benefit from dementia medications or should be placed in a secured-perimeter facility (Prob C ss 2356.5(f)).

This form generally requires declarations from experts, which may include doctors, psychologists, or religious healing practitioners.

**7. SAMPLE ADR CLAUSES FOR TRUSTS** (August, 2019)

**A mandatory provision:**

**V1 - Alternate Dispute Resolution:** As a condition of receiving any benefit under this Trust, all beneficiaries **shall,** before participating in any adversarial court process, agree to have any dispute between them or with the trustee, including (but not limited to) distributions of estate assets or interpretation of the Trust or over an accounting or other action of the Trustee resolved through alternative dispute procedures, limited to Collaborative Practice or mediation. Such procedures shall be agreed to and participated in good faith by the Trustee and the beneficiaries, and the parties to a dispute shall attend at least one mediation or Collaborative Practice meeting with all parties to the dispute prior to submitting such dispute to any adversarial process. The reasonable expense of such alternate dispute resolution process may, by agreement, be paid for by the Trust.

**V2 – Alternate Dispute Resolution:** As a condition of receiving any benefit under this Trust agreement, all beneficiaries **shall** agree to have any dispute between them or with the Trustee resolved through alternative dispute resolution procedures, limited to a Collaborative Practice Dispute Resolution process or mediation, before participating in any adversarial court process. Such disputes include, but are not limited to, conflict surrounding distributions of estate assets, interpretation of the Trust agreement, an accounting, or any other action of the Trustee. The Trustee and all the beneficiaries shall participate in good faith in at least one mediation session or Collaborative Practice meeting prior to submitting such dispute to any adversarial process. The reasonable expense of such alternate dispute resolution process may be paid for by the Trust Estate.

**A “suggestion” (Mere precatory words):**

**V1 - Alternate Dispute Resolution:** At trust expense, the Trustee may prosecute or defend actions, claims, or proceedings of whatever kind for the protection of the trust property and of the Trustee in the performance of the Trustee's duties, and employ and compensate attorneys, advisers, and other agents as the trustee deems advisable. The Trustee and trust beneficiaries are **encouraged**, authorized and directed to use forms of Alternative Dispute Resolution in resolving any controversy involving the trust or the trustee and a beneficiary or heir of the settlor(s). The Trustee is specifically encouraged and authorized to engage in mediation or Collaborative Practice Dispute Resolution, and is authorized, within his or her discretion to pay the reasonable expenses of alternate dispute resolution expenses from the trust.

**V2 – Alternate Dispute Resolution:** The Trustee and all trust beneficiaries are **encouraged** to use forms of Alternative Dispute Resolution in any resolving any controversy involving the Trust Estate or the Trustee and any beneficiary. The Trustee is specifically directed to engage in mediation and/or Collaborative Practice Dispute Resolution, and is authorized, within his or her absolute discretion, to pay the reasonable expenses of the alternate dispute resolution process from the Trust Estate.