6

Grounds for Setting Aside Will or Trust

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§6.1 I. INTRODUCTION

This chapter discusses the substantive requirements and evidentiary rules that apply to the grounds most typically alleged to set aside all or part of a will or trust, including lack of capacity (see §§6.2–6.20), undue influence (see §§6.21–6.26), fraud (see §§6.27–6.29), duress or menace (see §6.30), mistake (see §6.31), and limitations on transfers to drafters and others (see §§6.32–6.33, chap 6A). Many of the elements of causes of action for contesting wills are identical or similar to those for contesting trusts. The statutory and case law rules for establishing lack of mental capacity in a will contest, for example, are for the most part equally applicable to trust contests. Mistake is a notable exception, however, serving as a ground for setting aside a trust but not normally useful in attacking a will.

On will contests generally, see chap 17. On attacks on trusts generally, see chap 20. On litigation tools generally for such litigation, see chap 10, and for discovery in particular, see §§10.14–10.37.

§6.2 II. LACK OF CAPACITY

Will contests and attacks on trusts often involve the question of whether the testator or settlor had the requisite mental capacity at the time the instrument was executed. In most cases, the analysis of capacity to execute wills and trusts is the same. More stringent tests for capacity may apply to trusts, however, when they are irrevocable or when property is transferred to an independent trustee.

§6.3 A. Testamentary Capacity

To make a valid will, the testator must be at least 18 years of age and of sound mind. Prob C §6100. More specifically, under Prob C §6100.5(a), a person is not mentally competent to make a will if at the time of making the will he or she either:

- Does not have sufficient mental capacity to (1) understand the nature of the testamentary act, (2) understand and recollect the nature and situation of his or her property, or (3) remember and understand his or her relations to living descendants, spouse, parents, and others whose interests are affected by the will; or
- Suffers from a mental disorder with symptoms including delusions or hallucinations that result in his or her devising property in a way that, except for the delusions or hallucinations, he or she would not have done.

A testator's beliefs may be inaccurate without being delusional. A mere unfounded belief does not justify overturning a will when there is any evidence supporting the belief. See *Estate of Shay* (1925) 196 C 355, 361; *Goodman v Zimmerman* (1994) 25 CA4th 1667, 1676; *Estate of Struve* (1929) 100 CA 255, 259. To destroy testamentary capacity, a delusion must be one so irrational that no normal person could have it. 14 Witkin, Summary of California Law, *Wills and Probate* §124 (10th ed 2005).

NOTE➤ To justify setting aside a will, the alleged delusions or hallucinations must cause the testator to devise his or her property in a way that he or she would not have done in their absence. Prob C §6100.5(a)(2); *Estate of Perkins* (1925) 195 C 699; *Goodman v Zimmerman* (1994) 25 CA4th 1667, 1677. It is not sufficient merely to establish that a testator was the victim of delusions or hallucinations.

§6.4 B. Capacity to Create Trust

Courts have not necessarily applied a consistent standard for evaluating a person's capacity to create or amend a trust. In many cases, they apply the standard for testamentary capacity to trusts. See, *e.g.*, *Goodman v Zimmerman* (1994) 25 CA4th 1667, 1674 (evaluating decedent's capacity to execute a new will and amend a trust both under Prob C §6100.5). Similarly, they will state that a person who lacks capacity to make an ordinary transfer of property also lacks capacity to create an inter vivos trust. *Walton v Bank of Cal.* (1963) 218 CA2d 527, 541; 13 Witkin, Summary of California Law, *Trusts* §25 (10th ed 2005); Restatement (Third) of Trusts §11 (2007). The test of capacity to transfer property is generally the same as for capacity to execute a will. *Tuttle v Bessey* (1955) 137 CA2d 725, 727; *Hughes v Grandy* (1947) 78 CA2d 555, 565. On capacity to execute a will, see §6.3.

On the other hand, in *Walton v Bank of Cal., supra,* the court applied a heightened standard of contractual capacity to evaluate a settlor's decision to enter into an irrevocable trust. See *Andersen v Hunt* (2011) 196 CA4th 722, 729 (citing *Walton*). Arguably, the test for capacity should be more stringent for irrevocable trusts, or when property is transferred to a third-party trustee, than for revocable trusts when the settlor serves as trustee. Also, a testator must understand the consequences of his or her bequests. *Estate of Lingenfelter* (1952) 38 C2d 571, 582. That understanding may require a higher level of capacity when a will (or trust) is complex. See *Estate of Ivey* (1928) 94 CA 576, 586.

Based on such considerations, *Andersen v Hunt, supra,* held that a settlor's execution of simple trust amendments should have been measured by a testamentary, rather than a contractual, standard for capacity. The court reasoned that, although Prob C §6100.5 defines only capacity to make a will, Prob C §§810–812 (see §§6.6–6.10) provide a method to measure capacity for a variety of acts, including contracting, making a will, or executing a trust, based on a person's ability to understand the consequences *of the particular act he or she wishes to take.* In view of the uncomplicated and testamentary nature of the amendments at issue, they should be treated no differently under Prob C §§810–812 than a will or codicil under Prob C §6100.5. See also *Lintz v Lintz* (2014) 222 CA4th 1346 (decedent's capacity to execute trust instruments should have been determined under "sliding-scale contractual standard" of capacity in Prob C §§810–812, rather than lower standard of capacity to make a will under Prob C §6100.5).

§6.5 C. Presumptions and Burden of Proof

A competent testator or settlor may dispose of his or her property as he or she wishes, without regard to the desires of prospective beneficiaries or the views of anyone else, as long as the document's terms are not prohibited by law or contrary to public policy. *Estate of Markham* (1941) 46 CA2d 307.

The testator is presumed sane and competent and the contestant has the burden of proving by a preponderance of the evidence that the testator lacked testamentary capacity at the time the will was signed. *Estate of Fritschi* (1963) 60 C2d 367, 372; *Estate of Locknane* (1962) 208 CA2d 505.

The same general presumption of competence exists with respect to the execution of trusts. *American Trust Co. v Dixon* (1938) 26 CA2d 426, 431.

If a testator had a mental disorder but had lucid periods, there is a presumption that the will was executed during a period of lucidity. *Estate of Mann* (1986) 184 CA3d 593, 604; *Estate of Goetz* (1967) 253 CA2d 107, 114.

Once it is shown that testamentary incompetency exists and that it is caused by a mental disorder of a general and continuous nature, the inference is reasonable (and might even be a presumption) that the incompetency continued to exist at the time the instrument was signed. *Estate of Fosselman* (1957) 48 C2d 179.

§6.6 D. Due Process in Competence Determinations Act

The case law and standards under Prob C §6100.5 (see §6.3) are not the entirety of the law on the issue of mental capacity. The Due Process in Competence Determinations Act (Prob C §§810–813), enacted in 1995, provides a statutory framework for making determinations on competence, including a list of factors that may be dispositive in proving lack of mental capacity.

The statute is also applicable in many instances to proof of susceptibility to undue influence (see §§6.21–6.26). Often an important element of an undue influence case is proof that the testator or settlor suffered from a mental deficit that impaired his or her ability to resist undue influence.

§6.7 1. Purpose and Applicability

In the Due Process in Competence Determinations Act, the legislature states that a person who has a mental or physical disorder may still be capable of performing a variety of actions with legal consequences. Prob C §810(a). Accordingly, the Act's purpose is to ensure that a judicial determination that a person should be deemed to lack the legal capacity to perform a specific act be based on evidence of a deficit in one or more of the person's mental functions rather than on a diagnosis of the person's mental or physical disorder. See Prob C §810(b).

The Act applies to determinations that a person is of unsound mind or lacks the capacity to make a decision or do a certain act, expressly including the incapacity to contract, make a conveyance, marry, make medical decisions, vote, or execute wills or trusts. See Prob C §811(a).

This legislation had its origins in efforts to set limits on competence determinations in conservatorships and other protective proceedings.

There is, however, nothing in the Act that prevents its application in will and trust contests and, as noted above, it expressly applies to the actions underlying such proceedings.

The Act does not conflict with the statutory definition of testamentary incapacity under Prob C §6100.5 (see §6.3) or with case law standards for capacity to create a trust (see §6.4). The Act's section addressing what constitutes lack of capacity to make a decision expressly states that it applies "[e]xcept where otherwise provided by law, including ... the statutory and decisional law of testamentary capacity." Prob C §812.

§6.8 2. What Constitutes Lack of Capacity

The Due Process in Competence Determinations Act provides that, except when otherwise provided by law, including the statutory and decisional law of testamentary capacity, a person lacks the capacity to make a decision unless he or she has the ability to communicate the decision, by verbal or any other means, and to understand and appreciate, to the extent relevant (Prob C §812):

- The rights, duties, and responsibilities created by or affected by the decision;
- The probable consequences for the decisionmaker and, when appropriate, the persons affected by the decision; and
- The significant risks, benefits, and reasonable alternatives involved.

§6.9 3. Evidentiary Requirements

The Due Process in Competence Determinations Act requires, for a determination that a person lacks capacity to do a certain act, support by evidence of a deficit in at least one of a list of specific mental functions, grouped into the following categories (Prob C §811(a)):

- Alertness and attention;
- Information processing;
- Thought processes; and
- Ability to modulate mood and affect.

A deficit in one of the specified functions may be considered, however, only if the deficit, by itself or in combination with one or more other mental function deficits, significantly impairs the person's ability to understand and appreciate the consequences of his or her actions regarding the

decision in question. Prob C §811(b). The court may take into consideration the frequency, severity, and duration of periods of impairment. Prob C §811(c). The mere diagnosis of a mental or physical disorder is not itself sufficient to support a determination that a person is of unsound mind or lacks the capacity to perform the act in question. Prob C §811(d).

§6.10 4. Implications for Psychiatric Testimony

When prosecuting or defending a will or trust contest, it is often advisable to engage a psychiatric or psychological expert to give testimony regarding the mental capacity of the testator or trustor. Such testimony is useful on the issue of mental capacity, and also on the issue of the ability to resist undue influence (see §§6.21–6.26).

PRACTICE TIP➤ Counsel should ensure that the expert understands the statutory framework for determining mental capacity under Prob C §6100.5 and the Due Process in Competence Determinations Act. The expert's analysis should be focused on establishing or refuting deficits in the specific mental functions listed in the statute.

If the mental health professional did not directly examine a deceased testator or settlor, it will be necessary for the expert to conduct a retrospective evaluation. In such cases, it is essential to provide the expert with as much information as possible from the decedent's medical, personal, and business records, and from the decedent's friends, relatives, and business associates. Ideally, the expert would interview the drafter of the will or trust before forming an opinion. This is advisable because the opinion of a mental health expert who did not personally examine the decedent, which is based on inferences, can be overcome by the testimony of the estate planning attorney, which is entitled to "much weight," particularly when the drafting attorney is also a subscribing witness. *Estate of Goetz* (1967) 253 CA2d 107, 114.

§6.11 E. Evidence Regarding Capacity

There is a large body of case law concerning presumptions, inferences, and types of evidence relevant to capacity determinations. The Due Process in Competence Determinations Act (see §§6.6–6.10) does not supplant the existing case law except to the extent that the statute sets a more rigorous framework for medical testimony.

Lack of capacity must be shown to have existed at the moment when the will or trust was executed. *Estate of Fritschi* (1963) 60 C2d 367 (will); *Walton v Bank of Cal.* (1963) 218 CA2d 527 (trust).

To prove a person's mental capacity on a given day, a party can introduce evidence of his or her capacity at times before and after that date. *Estate of Miller* (1936) 16 CA2d 154, 165. But such evidence is important only insofar as it tends to show mental capacity at the time at issue. *Estate of Lingenfelter* (1952) 38 C2d 571, 580; *Estate of Perkins* (1925) 195 C 699, 703.

§6.12 1. Medical and Psychiatric Testimony

Medical testimony is not conclusive on the issue of testamentary capacity. The weight of medical testimony is for the trier of fact to determine. *Estate of Martin* (1969) 270 CA2d 506. In *Estate of Wynne* (1966) 239 CA2d 369, it was noted that no principle of law compels the trial judge to reject testimony of the subscribing witnesses and of the testator's local doctor and acquaintances and to accept at its full face value the opinion of a specialist who never saw the decedent and whose testimony was given in response to a hypothetical question.

A similar result was reached in *Estate of Goetz* (1967) 253 CA2d 107, in which the opinion of a psychiatrist was not required to determine testamentary capacity. The psychiatric testimony in that case was overcome by the testimony of the estate planning attorney.

§6.13 2. Testimony of Attorney

Although not conclusive, testimony of the attorney who drafted the will or trust is entitled to much weight, especially when he or she is a subscribing witness. *Estate of Goetz* (1967) 253 CA2d 107. In *Goetz,* the drafting attorney related a long series of relevant details that the testator had provided him to support a finding of testamentary capacity.

§6.14 3. Testimony of Subscribing Witness

There is a presumption that the subscribing witnesses to the execution of a will had their attention drawn to and noted the testator's mental capacity. Consequently, the opinions of subscribing witnesses are given more weight than the opinions of nonsubscribing witnesses. *Estate of McDonough* (1926) 200 C 57. See Evid C §870(b). The testimony of subscribing witnesses is not conclusive, however, against that of other witnesses who saw the testator within a few days after the execution of the will or against other evidence of circumstances in the case. *Estate of Bourquin* (1958) 161 CA2d 289.

PRACTICE TIP➤ Although trusts normally do not have subscribing witnesses, the capacity of the settlor can be supported by the testimony of the subscribing witnesses to a contemporaneous pour-over will.

§6.15 4. Adjudication of Incompetence

A judicial determination of incompetence, *e.g.*, in a conservatorship proceeding, will not be sufficient to support a finding of lack of testamentary capacity. See *Estate of Nelson* (1964) 227 CA2d 42. An adjudication of incompetence is, however, evidence of the testator's mental condition on the date of the finding and raises an inference of lack of testamentary capacity at that time. *Estate of Wochos* (1972) 23 CA3d 47, 54; *Estate of Fossa* (1962) 210 CA2d 464.

The mere fact that a person is under a conservatorship does not deprive him or her of the power to make a will. Prob C §1871(c). See *Estate of Johnson* (1881) 57 C 529; *Estate of Powers* (1947) 81 CA2d 480.

§6.16 5. Ability to Transact Business

The testator's ability to transact business is not a legal standard of testamentary capacity. *Estate of Goddard* (1958) 164 CA2d 152.

§6.17 6. History of Mental Disorder

The relevance of a testator's or settlor's past mental condition depends on the circumstances of the case. Evidence of the existence of a mental disorder over a long period of time is admissible to show that the condition developed early in life and was of such a fixed and permanent character that it would have existed at the time the will was signed. *Estate of Baker* (1917) 176 C 430.

The contestant has the burden of proving that the mental disorder had a direct bearing on the act of executing the will or trust. In *Walton v Bank of Cal.* (1963) 218 CA2d 527, a widow with a history of mental illness transferred all of her assets into an irrevocable inter vivos trust. Later she changed her mind and filed an action to rescind the trust based on lack of capacity. The trial court upheld the trust, and the court of appeal affirmed. The settlor was held to have had sufficient capacity to create the trust, despite evidence in the record that, over a 12-year period ending six months after the execution of the trust, the settlor had been a patient in various hospitals, sanitariums, and rest homes on 31 separate occasions,

that she had at one point been adjudicated incompetent (but was later ordered restored to capacity), and that she suffered from an anxiety neurosis, was subject to fits of depression, and sought relief and escape in the use of alcohol. Witnesses, including the attorney who drafted the trust, testified that, on the day she signed the trust, there was nothing in the settlor's manner, appearance, or speech to indicate that she was under the influence of alcohol or drugs and that, although the settlor was normally a nervous person, on the day in question she did not appear to be harassed or upset, and appeared to comprehend what she was doing.

§6.18 7. Foibles and Eccentricities

Testamentary capacity cannot be refuted merely by showing a few isolated acts, foibles, idiosyncrasies, mental irregularities, or departures from the normal, unless they bear directly on and influence the testamentary act. *Estate of Woehr* (1958) 166 CA2d 4, 17. "Old age, feebleness, forgetfulness, filthy personal habits, personal eccentricities, failure to recognize old friends or relatives, physical disability, absentmindedness, [or] mental confusion" do not establish that a testator lacked capacity. "Even hallucinations and delusions" do not show lack of capacity if they are unrelated to the testamentary act. *Moore v Anderson Zeigler Disharoon Gallagher & Gray* (2003) 109 CA4th 1287, 1300; *Estate of Mann* (1986) 184 CA3d 593, 603; *Estate of Fritschi* (1963) 60 C2d 367, 372. See Prob C §6100(b).

§6.19 8. Senile Dementia

When an elderly person's mental condition deteriorates beyond isolated instances of forgetfulness or erratic behavior, there may be evidence of "senile dementia" that is inconsistent with testamentary capacity. See *Estate of Callahan* (1967) 67 C2d 609. Senile dementia is defined as a "chronic progressive mental disease of late life characterized by failing memory and loss of other intellectual functions." Blakiston's Gould Medical Dictionary, p 1238 (4th ed 1979). The sufferer may have failing memory, groundless suspicions of relatives or associates, confusion about time and place, use of obscene or profane language, slovenly personal habits, loss of concentration, impulsive changes of intention, and general incoherence. Senile dementia is frequently accompanied by decay of brain tissue or "chronic brain syndrome."

The presence of senile dementia can give rise to an inference that the condition was continuous and existed at the time the document was signed. *Estate of Fosselman* (1957) 48 C2d 179.

The contestant has the burden of proving by a preponderance of the evidence that the testator or settlor suffered from senile dementia and that the condition directly interfered with capacity to execute the document. See *Estate of Schwartz* (1945) 67 CA2d 512.

NOTE➤ Under the Due Process in Competence Determinations Act (see §§6.6–6.10), a mere diagnosis of senile dementia, without proof of a deficit in one or more specific mental functions, will not be sufficient to prove lack of capacity to execute a will or trust.

§6.20 9. Alcohol and Drug Abuse

Alcohol abuse, even if chronic, does not prove lack of capacity unless there is proof that the decedent was drunk at the time he or she executed the document. *Estate of Arnold* (1940) 16 C2d 573; *Estate of Warner* (1959) 166 CA2d 677. The same principles would seemingly apply if a testator's or settlor's drug abuse were at issue.

III. UNDUE INFLUENCE

§6.21 A. Underlying Law

For purposes of will and trust contests, "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." Prob C §86; Welf & I C §15610.70(a). Factors that must be considered to determine whether a result was produced by undue influence include the vulnerability of the victim, the influencer's apparent authority, the actions or tactics used by the influencer, and the equity of the result. Welf & I C §15610.70(a)(1)–(4). Evidence of an inequitable result, without more, is not sufficient to prove undue influence. Welf & I C §15610.70(b).

The statutory definition of undue influence supplements the common-law meaning of the term, without superseding or interfering with the operation of that law. Prob C §86. Under the common law, undue influence is conduct that subjugates the testator's or settlor's will to that of another, causing a disposition different from that which the testator or settlor would have made if permitted to follow his or her own inclinations. *Estate of Ricks* (1911) 160 C 450; *Estate of Baker* (1982) 131 CA3d 471, 480. Undue influence is established when it is shown that a testamentary disposition was brought about by undue pressure, argument, entreaty, or other coercive acts that destroyed the testator's freedom of choice so that it can

fairly be said that the testator was not a free agent when making his or her will. *Estate of Truckenmiller* (1979) 97 CA3d 326. Proof of general influence or opportunity to influence is not enough; there must be proof that the influence was used directly to procure the instrument. *Estate of Kreher* (1951) 107 CA2d 831, 839.

Some cases have suggested that a strong showing of undue influence is necessary, even going so far as to say that undue influence must be proved by clear and convincing evidence. *Estate of Ventura* (1963) 217 CA2d 50, 58. See *Estate of Anderson* (1921) 185 C 700, 707.

Recognized indications of undue influence include (*Estate of Yale* (1931) 214 C 115, 122; *Estate of Lingenfelter* (1952) 38 C2d 571, 585)

- Provisions that are unnatural, cutting off from any substantial bequests the natural objects of the decedent's bounty;
- Dispositions at variance with the decedent's intentions, expressed before and after the document's execution;
- Relations existing between the chief beneficiaries and the decedent that afforded the former an opportunity to control the testamentary act;
- A testator whose mental and physical condition was such as to permit a subversion of his or her freedom of will; and
- A chief beneficiary under the will or trust who was active in procuring the execution of the instrument.

Different rules may apply when the alleged undue influence occurred in connection with an irrevocable inter vivos trust rather than a will. In this instance, the definitions of undue influence in contract formation set forth in CC §1575 may apply, and the rules regarding shifting the burden of proof may be different. See §6.23.

When only part of the instrument was procured by undue influence, the remaining portion is valid if it is not inconsistent with and can be separated from the invalid part. *Estate of Molera* (1972) 23 CA3d 993; *Estate of Stauffer* (1956) 142 CA2d 35. See Prob C §6104.

Although a claim of undue influence can be sustained without any proof of mental dysfunction, the issue of mental condition is often relevant to the testator's susceptibility to influence. If there is evidence that the testator was susceptible to outside pressures because he or she was in a weakened state of mind (*e.g.*, senile, lonely, ill, distraught from the death of a loved one), it is easier to demonstrate that pressure from another overcame the testator's free will. See *Estate of Yale* (1931) 214 C 115; *Estate of Ander-*

son (1921) 185 C 700, 707. A testator who had full testamentary capacity may nevertheless have been the victim of undue influence because his or her weakened physical or mental condition left him or her susceptible to it.

Under case law, the types of mental weakness that are probative of undue influence are of a less debilitating quality than the mental defects required for lack of capacity (see §§6.2–6.20). In *Estate of Yale, supra,* the decedent had suffered a stroke, but the supreme court noted that he had not been entirely incapacitated by it. 214 C at 119. The court indicated, however, that the decedent also suffered from incontinence and "myocarditis, chronic nephritis, arteriosclerosis, Parker's palsy and senility." 214 C at 120. The court noted that, among other indications of undue influence, "the decedent's physical and mental condition was such as to permit a subversion of his freedom of will." 214 C at 122.

§6.22 B. Proof by Circumstantial Evidence

An undue influence case normally must be established by circumstantial evidence, *i.e.,* through inferences. Undue influence takes place between the proponent of the will or trust and the decedent. By the time the undue influence is under investigation, the decedent is no longer available to testify about it. Undue influence also normally takes place behind closed doors. Rarely will a case be decided on the basis of testimony or other direct evidence of the ultimate fact of undue influence. See, *e.g., David v Hermann* (2005) 129 CA4th 672 (court inferred that settlor's sudden negative shift in attitude toward older daughter was caused by younger daughter falsely poisoning settlor's mind because it could find no other "rational explanation"). Usually, evidence of cumulative events must be introduced that, taken together, support a finding of undue influence but that, if taken alone, might not be sufficient. See *Estate of Graves* (1927) 202 C 258.

Undue influence can be inferred from dispositions under the purported will that are at odds with the testator's stated intentions and desires during life, before or after execution of the will, or as reflected in earlier documents. Undue influence can also be inferred from the close relationship between the testator and the proponent of the will, and from participation by the proponent in procuring execution of the will. *Estate of Yale* (1931) 214 C 115, 122; *Estate of Graves, supra.*

Activity on the part of the challenged beneficiary in procuring the instrument is one of the three factors that shifts the burden of proof to him or her. See §6.23. Reliance on circumstantial evidence is particularly nec-

essary with respect to this factor. The court may consider facts bearing on undue influence both before and after execution of the document, as long as they warrant the inference that the document was the direct result of undue influence, and that the influence existed at the time of execution. *Estate of Baker* (1982) 131 CA3d 471, 481. See *Estate of Larendon* (1963) 216 CA2d 14, 19. The person using undue influence need not be present at the time of execution of the document, as long as the influence itself was present. *Estate of Greuner* (1939) 31 CA2d 161, 163.

For an example of circumstantial evidence sufficient to prove undue influence, see *Estate of Garibaldi* (1961) 57 C2d 108. In *Garibaldi,* the California Supreme Court affirmed a judgment of undue influence, denying probate, based on circumstantial evidence of the decedent's weakened mental and physical condition and the proponents' opportunity to control the testamentary act, activity in procuring the will, and misrepresentations (57 C2d at 113):

> There was ample opportunity for proponents to control the testamentary act of decedent. They lived with her and managed most of her business affairs, and she trusted them and would sign any instruments they would present to her. At the time she made the will she was of advanced age, with a long history of illness, and her mind was "not too clear." It could be inferred that her mental and physical condition was such as to permit a subversion of her freedom of will....
>
> [T]here was evidence that [proponent] was present when the will was executed, that he gave decedent pen, ink and paper, that she wrote the will and immediately gave it to him, that he took it to his attorney, whom she did not know, and that contestants had no knowledge of its existence for several months after her death. The evidence relating to proponents' management of decedent's business affairs showed that, by taking advantage of their confidential relationship, they engaged in a course of fraudulent conduct designed to conceal from decedent the large increase in her net worth ... and to mislead her into believing that an equal division of her property among her children would be accomplished by giving each contestant $7,000.

The use of circumstantial evidence is permitted "so long as the evidence raises more than a mere suspicion that undue influence was used." *Estate of Franco* (1975) 50 CA3d 374, 382. Mere proof of circumstances consistent with undue influence is insufficient to prove undue influence; the contestant must prove circumstances inconsistent with voluntary action by the testator. *Estate of Mann* (1986) 184 CA3d 593, 607; *Estate of Franco, supra.*

§6.23 C. Shifting Burden of Proof

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 (*Estate of Graves* (1927) 202 C 258, 262; *Estate of Sarabia* (1990) 221 CA3d 599, 605)

- There was a confidential relationship between the testator and the person alleged to have exerted undue influence (see §6.24);
- The person actively participated in actual preparation or execution of the will (see §6.25); and
- The person unduly profited by virtue of the will (see §6.26).

The rules regarding the burden of proof may be different when the case involves an inter vivos trust rather than a will, if the trust was irrevocable on execution. For an inter vivos transfer, the presumption of undue influence arises if the grantor was susceptible to imposition and there is slight evidence that the instrument was the product of coercion. *O'Neil v Spillane* (1975) 45 CA3d 147, 155 (discussing differences between undue influence in testamentary and inter vivos contexts and applying CC §1575 when undue influence was alleged in connection with joint tenancy deed). Similarly, an inter vivos transfer is presumed invalid when a confidential relationship existed between the parties. *Strasberg v Odyssey Group, Inc.* (1996) 51 CA4th 906, 920. These rules may apply to other inter vivos acts such as the creation of an irrevocable trust.

When the trust was revocable, however, the court may be justified in treating it like a will and applying the testamentary rules, because the settlor retained control of the property until death. *Hagen v Hickenbottom* (1995) 41 CA4th 168, 182 (principles of undue influence applicable in testamentary context also apply to challenge of estate plan consisting of revocable inter vivos trust and pour-over will).

Regardless of which law triggers it, the presumption of undue influence affects the burden of proof. When the facts triggering the presumption are shown, the proponent of the instrument has the burden of proving that it was not procured by undue influence. *Estate of Sarabia, supra.* Some cases have indicated that, once the presumption applies, the proponent has the burden of proving his or her innocence by *clear and convincing* evidence. See, *e.g., Bank of America v Crawford* (1945) 69 CA2d 697, 701.

Although not indispensable to establishing undue influence, shifting the burden of proof is a powerful weapon for the contestant and can make or break a case.

§6.24 1. Confidential Relationship

A confidential relationship exists whenever trust and confidence are placed by one person in the integrity and fidelity of another. *Estate of Rugani* (1952) 108 CA2d 624, 630. Blood relation can be an important and material circumstance in considering whether a confidential relationship exists, but it is not necessarily sufficient. *Estate of Llewellyn* (1948) 83 CA2d 534, 562. The relationship and duties involved need not be legal; they may be moral, social, domestic, or merely personal. *Estate of Bliss* (1962) 199 CA2d 630, 640. A confidential relationship often arises when the vulnerability of one party empowers the stronger party, leaving the weaker party unable to protect himself or herself. *Richelle L. v Roman Catholic Archbishop* (2003) 106 CA4th 257, 272.

Similarly, under Welf & I C §15610.70(a)(2), a factor in determining whether a result was produced by undue influence includes the influencer's "apparent authority." Evidence of apparent authority may include status as a fiduciary, family member, or care provider.

§6.25 2. Active Participation

Active participation in procuring the execution of a will or trust cannot be inferred from the fact that the beneficiary accompanied the testator or trustor to the attorney's office, in the absence of any evidence that the testator went there at the beneficiary's instigation or request or that the testator was otherwise not acting in accord with his or her own desire. *Estate of Lingenfelter* (1952) 38 C2d 571, 586. Moreover, evidence that a beneficiary urged the testator to make a will does not establish undue influence in the absence of evidence that the beneficiary urged the testator to make any particular disposition. *Estate of Mann* (1986) 184 CA3d 593, 608. For a case illustrating active participation in procuring the document, see *Estate of Garibaldi* (1961) 57 C2d 108, 113 (proponent was present when will executed, gave testator pen, ink, and paper, was given the will by testator immediately after execution, and took it to his attorney, whom testator did not know).

Under the statutory definition of undue influence, which supplements the common law, the actions or tactics used by the influencer must be con-

sidered to determine whether a result was produced by undue influence. Prob C §86; Welf & I C §15610.70(3). Evidence of actions or tactics may include the initiation of changes in personal or property rights, the use of haste or secrecy in effecting those changes at inappropriate times and places, and claims of expertise in effecting changes. Welf & I C §15610.70(3)(C).

§6.26 3. Undue Profit

Determination of whether a beneficiary's profit was undue entails a qualitative assessment of the relationship between the decedent and the beneficiary. The court may examine a variety of factors, including dispositions in previous wills executed by the decedent and other past expressions of the decedent's intent. The mere fact that a beneficiary takes substantially more under the will than he or she would take without the will does not, by itself, establish undue profit. *Estate of Sarabia* (1990) 221 CA3d 599, 607.

The *Sarabia* case articulated a qualitative test for undue profit. In *Sarabia,* the decedent was an opera singer who spent almost all of his adult life living and working in Europe. He lived with and had an affectionate relationship with his manager, who looked after the decedent's finances and ran the decedent's household. The decedent's will left everything to the manager. The decedent's brother contested the will, lost, and appealed. The contesting brother argued that the decedent's manager unduly profited because he would have received nothing in the absence of the will, and the whole estate would have gone to the brother. The court of appeal rejected this quantitative approach, and said that the trier of fact must make a *qualitative* assessment of the respective relationships of the decedent with the contestant and beneficiary, as well as the decedent's prior expressions of intent. In *Sarabia,* numerous witnesses had testified that the decedent had often expressed a desire to leave everything to the manager.

For a case illustrating undue profit, see *Estate of Graves* (1927) 202 C 258 (real estate agent, who removed testator from hospital to apartment over garage in rear of his own home, where she executed will in his presence and that of doctor and nurse chosen by him, received virtually entire estate).

The equity of the result is a factor that must be considered under the statutory definition of undue influence, a definition that supplements the common law. Prob C §86; Welf & I C §15610.70(a)(4). Evidence of the equity of the result may include the economic consequences to the victim,

sidered to determine whether a result was produced by undue influence. Prob C §86; Welf & I C §15610.70(3). Evidence of actions or tactics may include the initiation of changes in personal or property rights, the use of haste or secrecy in effecting those changes at inappropriate times and places, and claims of expertise in effecting changes. Welf & I C §15610.70(3)(C).

§6.26 3. Undue Profit

Determination of whether a beneficiary's profit was undue entails a qualitative assessment of the relationship between the decedent and the beneficiary. The court may examine a variety of factors, including dispositions in previous wills executed by the decedent and other past expressions of the decedent's intent. The mere fact that a beneficiary takes substantially more under the will than he or she would take without the will does not, by itself, establish undue profit. *Estate of Sarabia* (1990) 221 CA3d 599, 607.

The *Sarabia* case articulated a qualitative test for undue profit. In *Sarabia,* the decedent was an opera singer who spent almost all of his adult life living and working in Europe. He lived with and had an affectionate relationship with his manager, who looked after the decedent's finances and ran the decedent's household. The decedent's will left everything to the manager. The decedent's brother contested the will, lost, and appealed. The contesting brother argued that the decedent's manager unduly profited because he would have received nothing in the absence of the will, and the whole estate would have gone to the brother. The court of appeal rejected this quantitative approach, and said that the trier of fact must make a *qualitative* assessment of the respective relationships of the decedent with the contestant and beneficiary, as well as the decedent's prior expressions of intent. In *Sarabia,* numerous witnesses had testified that the decedent had often expressed a desire to leave everything to the manager.

For a case illustrating undue profit, see *Estate of Graves* (1927) 202 C 258 (real estate agent, who removed testator from hospital to apartment over garage in rear of his own home, where she executed will in his presence and that of doctor and nurse chosen by him, received virtually entire estate).

The equity of the result is a factor that must be considered under the statutory definition of undue influence, a definition that supplements the common law. Prob C §86; Welf & I C §15610.70(a)(4). Evidence of the equity of the result may include 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. Welf & I C §15610.70(a)(4). However, evidence of an inequitable result, without more, is not sufficient to prove undue influence. Welf & I C §15610.70(b).

§6.27 IV. FRAUD

A will is ineffective, and will be denied probate, to the extent that its execution was procured by fraud. Prob C §6104. Fraud can also be a basis for attacking a trust instrument. Restatement (Third) of Trusts §12, 62, Comment a. When only part of a will or trust is procured by fraud, the rest of the instrument can be held valid. *Estate of Carson* (1920) 184 C 437.

§6.28 A. Elements and Pleading

The elements of fraud that will serve as the basis for a will contest are the same as those that would be relied on to vitiate a contract. *Estate of Newhall* (1923) 190 C 709, 719; *Estate of Benton* (1901) 131 C 472, 477.

Fraud must be pleaded with specificity, alleging ultimate facts rather than conclusions of law. *Estate of Streeton* (1920) 183 C 284. A mere assertion that a will was procured by fraud, without setting forth the specific supporting facts, is insufficient. *Estate of Marler* (1957) 148 CA2d 30.

PRACTICE TIP➤ The decedent's diminished mental capacity or mental pressure exerted on the decedent is not required for proof of fraud. See *Estate of Newhall* (1923) 190 C 709, 718. The decedent's weakened mental state, however, may have facilitated the fraud, and should be pleaded.

§6.29 B. Comparison and Overlap With Undue Influence

Fraud (see §§6.27–6.28) and undue influence (see §§6.21–6.26) are separate causes of action, although the terms are often used interchangeably. Fraud is sometimes an element of an undue influence cause of action, *e.g.*, when the party exerting undue influence uses false statements to poison the testator's attitude toward the contestant. When fraud alone is relied on as a ground of contest, the theory is that the testator, though acting of

his or her own free will, was deceived into doing what he or she would not have done in the absence of fraud. *Estate of Newhall* (1923) 190 C 709, 718.

NOTE➤ Similarly, under the statutory definition of undue influence, evidence that the influencer controlled a victim's access to information must be considered in determining whether a result was produced by undue influence. Prob C §86; Welf & I C §15610.70(a)(3)(A).

Many of the concepts applicable to undue influence are relevant to fraud cases. Fraud, like undue influence, may be proved by circumstantial evidence. *Estate of Newhall* (1923) 190 C 709, 721. Although the contestant bears the initial burden of proof with respect to fraud, there is authority that the burden of proof shifts to the proponent of the instrument once there is proof of a confidential relationship, active participation in procuring the instrument, and undue profit. See *Estate of Baird* (1917) 176 C 381, 384. The discussion of these elements in the context of undue influence (see §§6.24–6.26) should have equal application in shifting the burden of proof in a pure fraud case.

As in the case of undue influence, the mistaken belief induced by fraud must be proved to have existed at the time the instrument was signed, though the misrepresentation may have been made before then. *Estate of Newhall* (1923) 190 C 709, 722.

§6.30 V. DURESS OR MENACE

Duress and menace are separate grounds for a will contest under Prob C §6104. Trusts may also be overturned for duress or menace. Restatement (Third) of Trusts §12, 62, Comment a. Under CC §1569, duress consists of the following:

- Unlawful confinement of a party, the party's spouse, or an ancestor, descendant, or adopted child of the party or the party's spouse;
- Unlawful detention of the property of any such person; or
- Confinement of any such person, lawful in form, but fraudulently obtained, or fraudulently made unjustly harassing or oppressive.

Menace consists of a threat of duress or of unlawful and violent injury to person, property, or character. CC §1570. Although the contestant has the burden of proving duress or menace (Prob C §8252(a)), there is authority that the burden of proof shifts to the proponent of the instrument if

there is proof of a confidential relationship, active participation in procuring the instrument, and undue profit. See *Estate of Baird* (1917) 176 C 381, 384.

Duress or menace must be pleaded with specificity. See *Estate of Streeton* (1920) 183 C 284.

§6.31 VI. MISTAKE

Generally, there is consistency between the rules applicable to the grounds for will contests and the grounds for trust contests. The rules applicable to mistake of law or fact, however, are a rare exception. What would suffice to set aside a trust often will not be enough to set aside a will.

A trust may be rescinded when there was a substantial mistake of law or fact in its execution. *Walton v Bank of Cal.* (1963) 218 CA2d 527, 542; Restatement (Third) of Trusts §12, Comment c, §62, Comment a. When the settlor received no consideration for creating the trust, the settlor's unilateral mistake is ordinarily a ground for rescission, although the mistake must have been material, *i.e.,* it must be relevant to the essence of the settlor's conduct. 218 CA2d at 543. If the settlor did receive consideration, the court would apply the rules pertaining to contracts (CC §§1576–1579). Furthermore, although mistake is a ground for setting aside a trust, it does not necessarily support a claim for reformation. *Getty v Getty* (1986) 187 CA3d 1159, 1178 (to support reformation, mistake must occur in reducing settlors' intent to writing).

By contrast, a will cannot be overturned on the basis of mistake when the will as a whole was executed with testamentary intent. *Estate of Smith* (1998) 61 CA4th 259, 270. The mistake must go to execution or to the formation of testamentary intent in its entirety, as when the testator executes an apparently testamentary instrument under the misapprehension that it is something else. 61 CA4th at 270 (citing example in which the testator signed an apparently testamentary instrument under the mistaken belief that it was a mortgage). See also *Estate of Carson* (1920) 184 C 437, 447; *Estate of Strong* (1966) 244 CA2d 250, 255.

Under Prob C §8252(a), mistake, along with lack of capacity, undue influence, fraud, and duress, is a claim for which the contestant bears the burden of proof in a will contest.

VII. LIMITATIONS ON TRANSFERS TO DRAFTERS AND OTHERS

§6.32 A. Disqualified Transferees

Two statutory schemes operate to invalidate donative transfers to certain persons, with the schemes' applicability depending on when the donative instrument became irrevocable. The scheme at former Prob C §§21350–21356 applies to instruments that became irrevocable on or after September 1, 1993, and before January 1, 2011. Former Prob C §21355(a). The scheme at Prob C §§21360–21392 applies to instruments that became irrevocable on or after January 1, 2011. Prob C §21392(a).

These statutes either invalidate donative transfers or impose a presumption of fraud or undue influence on those transfers when they are made to various categories of persons who have a certain relationship to the donor. These persons, referred to as "prohibited transferees," generally include drafters of the donative instrument and their law partners; fiduciaries who transcribe the instrument or cause it to be transcribed; care custodians of a donor who is a dependent adult; and blood relatives, spouses, domestic partners, cohabitants, or employees of the drafter, fiduciary-transcriber, or care custodians of a donor who is a dependent adult. Prob C §21380(a), former Prob C §21350(a).

Gifts made to prohibited transferees are invalid or presumed to be the product of fraud or undue influence unless a statutory exception applies. These exceptions include transfers made to persons related by blood or marriage to the transferor, or made to the transferor's cohabitant or registered domestic partner. Prob C §21382(a)–(b), former Prob C §21351. A prohibited transferee who does not fall under an exception is referred to as a "disqualified person" or "disqualified transferee."

For full discussion of disqualified transferees, see chap 6A.

§6.33 B. Statute of Limitations

There are statutory time limits for an action to establish the invalidity of a transfer under former Prob C §21350. Former Prob C §21356. The scheme at Prob C §§21360–21392, applicable to instruments that became irrevocable on or after January 1, 2011 (Prob C §21392(a)), does not include a statute of limitations.

If the transfer was by will, an action under former Prob C §21350 must be commenced after letters are first issued to a general representative and before an order for final distribution is made. Former Prob C §21356(a). If

the transfer is made by some instrument other than a will, it must be commenced within the later of 3 years after the transfer becomes irrevocable or 3 years from the date the person bringing the action discovers, or reasonably should have discovered, the facts regarding the transfer. Former Prob C §21356(b).

NOTE➤ It is unclear whether the statute of limitations for trust contests under Prob C §16061.8 will control when there is conflict with the rules under former Prob C §21356(b). Under Prob C §16061.8, a trust contest must be brought not more than 120 days after notification by the trustee that the trust has become irrevocable (Prob C §16061.7(f)), or 60 days from the day on which a copy of the terms of the trust is mailed or personally delivered to the beneficiary, whichever is later.

GC-335

ATTORNEY OR PARTY WITHOUT ATTORNEY *(Name, State Bar number, and address)*:	*FOR COURT USE ONLY*
TELEPHONE NO.: FAX NO. *(Optional)*: E-MAIL ADDRESS *(Optional)*: ATTORNEY FOR *(Name)*:	
SUPERIOR COURT OF CALIFORNIA, COUNTY OF STREET ADDRESS: MAILING ADDRESS: CITY AND ZIP CODE: BRANCH NAME:	
CONSERVATORSHIP OF THE ☐ PERSON ☐ ESTATE OF *(Name)*: ☐ CONSERVATEE ☐ PROPOSED CONSERVATEE	
CAPACITY DECLARATION—CONSERVATORSHIP	CASE NUMBER

TO PHYSICIAN, PSYCHOLOGIST, OR RELIGIOUS HEALING PRACTITIONER

The purpose of this form is to enable the court to determine whether the (proposed) conservatee *(check all that apply)*:

A. ☐ is able to attend a court hearing to determine whether a conservator should be appointed to care for him or her. The court hearing is set for *(date)*: ☐ . *(Complete item 5, sign, and file page 1 of this form.)*

B. ☐ has the capacity to give informed consent to medical treatment. *(Complete items 6 through 8, sign page 3, and file pages 1 through 3 of this form.)*

C. ☐ has dementia and, if so, (1) whether he or she needs to be placed in a secured-perimeter residential care facility for the elderly, and (2) whether he or she needs or would benefit from dementia medications. *(Complete items 6 and 8 of this form and form GC-335A; sign and attach form GC-335A. File pages 1 through 3 of this form and form GC-335A.)*

(If more than one item is checked above, sign the last applicable page of this form or form GC335A if item C is checked. File page 1 through the last applicable page of this form; also file form GC-335A if item C is checked.)

COMPLETE ITEMS 1– 4 OF THIS FORM IN ALL CASES.

GENERAL INFORMATION

1. *(Name)*:

2. *(Office address and telephone number)*:

3. I am
   a. ☐ a California licensed ☐ physician ☐ psychologist acting within the scope of my licensure ☐ with at least two years' experience in diagnosing dementia.
   b. ☐ an accredited practitioner of a religion whose tenets and practices call for reliance on prayer alone for healing, which religion is adhered to by the (proposed) conservatee. The (proposed) conservatee is under my treatment. *(Religious practitioner may make the determination under item 5 ONLY.)*

4. (Proposed) conservatee *(name)*:
   a. I last saw the (proposed) conservatee on *(date)*:
   b. The (proposed) conservatee ☐ is ☐ is NOT a patient under my continuing treatment.

ABILITY TO ATTEND COURT HEARING

5. A court hearing on the petition for appointment of a conservator is set for the date indicated in item A above. *(Complete a or b.)*
   a. ☐ The proposed conservatee is able to attend the court hearing.
   b. ☐ Because of medical inability, the proposed conservatee is NOT able to attend the court hearing *(check all items below that apply)*
      (1) ☐ on the date set *(see date in box in item A above)*.
      (2) ☐ for the foreseeable future.
      (3) ☐ until *(date)*:
      (4) **Supporting facts** *(State facts in the space below or check this box* ☐ *and state the facts in Attachment 5)*:

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date:

(TYPE OR PRINT NAME) ▶ (SIGNATURE OF DECLARANT)

Form Adopted for Mandatory Use
Judicial Council of California
GC-335 [Rev. January 1, 2004]

Probate Code, §§ 811, 813, 1801, 1825, 1881, 1910, 2356.5

CONSERVATORSHIP OF THE ☐ PERSON ☐ ESTATE OF *(Name)*: ☐ CONSERVATEE ☐ PROPOSED CONSERVATEE	CASE NUMBER:

5. EVALUATION OF (PROPOSED) CONSERVATEE'S MENTAL FUNCTIONS

Note to practitioner: This form is ***not*** a rating scale. It is intended to assist you in recording your *impressions* of the (proposed) conservatee's mental abilities. Where appropriate, you may refer to scores on standardized rating instruments.
(Instructions for items 6A–6C): *Check the appropriate designation as follows:* ***a*** *= no apparent impairment;* ***b*** *= moderate impairment;* ***c*** *= major impairment;* ***d*** *= so impaired as to be incapable of being assessed;* ***e*** *= I have no opinion.)*

A. **Alertness and attention**

(1) Levels of arousal (lethargic, responds only to vigorous and persistent stimulation, stupor)
a ☐ b ☐ c ☐ d ☐ e ☐

(2) Orientation (types of orientation impaired)
a ☐ b ☐ c ☐ d ☐ e ☐ Person
a ☐ b ☐ c ☐ d ☐ e ☐ Time (day, date, month, season, year)
a ☐ b ☐ c ☐ d ☐ e ☐ Place (address, town, state)
a ☐ b ☐ c ☐ d ☐ e ☐ Situation ("Why am I here?")

(3) Ability to attend and concentrate (give detailed answers from memory, mental ability required to thread a needle)
a ☐ b ☐ c ☐ d ☐ e ☐

B. **Information processing.** Ability to:

(1) Remember (ability to remember a question before answering; to recall names, relatives, past presidents, and events of the past 24 hours)
i. Short-term memory a ☐ b ☐ c ☐ d ☐ e ☐
ii. Long-term memory a ☐ b ☐ c ☐ d ☐ e ☐
iii. Immediate recall a ☐ b ☐ c ☐ d ☐ e ☐

(2) Understand and communicate either verbally or otherwise (deficits reflected by inability to comprehend questions, follow instructions, use words correctly, or name objects; use of nonsense words)
a ☐ b ☐ c ☐ d ☐ e ☐

(3) Recognize familiar objects and persons (deficits reflected by inability to recognize familiar faces, objects, etc.)
a ☐ b ☐ c ☐ d ☐ e ☐

(4) Understand and appreciate quantities (deficits reflected by inability to perform simple calculations)
a ☐ b ☐ c ☐ d ☐ e ☐

(5) Reason using abstract concepts. (deficits reflected by inability to grasp abstract aspects of his or her situation or to interpret idiomatic expressions or proverbs)
a ☐ b ☐ c ☐ d ☐ e ☐

(6) Plan, organize, and carry out actions (assuming physical ability) in one's own rational self-interest (deficits reflected by inability to break complex tasks down into simple steps and carry them out)
a ☐ b ☐ c ☐ d ☐ e ☐

(7) Reason logically.
a ☐ b ☐ c ☐ d ☐ e ☐

C. **Thought disorders**

(1) Severely disorganized thinking (rambling thoughts; nonsensical, incoherent, or nonlinear thinking)
a ☐ b ☐ c ☐ d ☐ e ☐

(2) Hallucinations (auditory, visual, olfactory)
a ☐ b ☐ c ☐ d ☐ e ☐

(3) Delusions (demonstrably false belief maintained without or against reason or evidence)
a ☐ b ☐ c ☐ d ☐ e ☐

(4) Uncontrollable or intrusive thoughts (unwanted compulsive thoughts, compulsive behavior).
a ☐ b ☐ c ☐ d ☐ e ☐

(Continued on next page)

CONSERVATORSHIP OF THE ☐ PERSON ☐ ESTATE OF *(Name)*: ☐ CONSERVATEE ☐ PROPOSED CONSERVATEE	CASE NUMBER:

6. *(continued)*

D. **Ability to modulate mood and affect.** The (proposed) conservatee ☐ has ☐ does NOT have a pervasive and persistent or recurrent emotional state that appears inappropriate in degree to his or her circumstances. *(If so, complete remainder of item 6D.)* ☐ I have no opinion.

***(Instructions for item 6D:** Check the degree of impairment of each inappropriate mood state (if any) as follows: **a** = mildly inappropriate; **b** = moderately inappropriate; **c** = severely inappropriate.)*

Anger	a ☐	b ☐	c ☐	Euphoria	a ☐	b ☐	c ☐	Helplessness	a ☐	b ☐	c ☐			
Anxiety	a ☐	b ☐	c ☐	Depression	a ☐	b ☐	c ☐	Apathy	a ☐	b ☐	c ☐			
Fear	a ☐	b ☐	c ☐	Hopelessness	a ☐	b ☐	c ☐	Indifference	a ☐	b ☐	c ☐			
Panic	a ☐	b ☐	c ☐	Despair	a ☐	b ☐	c ☐							

E. The (proposed) conservatee's periods of impairment from the deficits indicated in items 6A–6D

(1) ☐ do NOT vary substantially in frequency, severity, or duration.

(2) ☐ do vary substantially in frequency, severity, or duration *(explain; continue on Attachment 6E if necessary):*

F. ☐ *(Optional)* Other information regarding my evaluation of the (proposed) conservatee's mental function (e.g., diagnosis, symptomatology, and other impressions) is ☐ stated below ☐ stated in Attachment 6F.

ABILITY TO CONSENT TO MEDICAL TREATMENT

7. Based on the information above, it is my opinion that the (proposed) conservatee

a. ☐ has the capacity to give informed consent to any form of medical treatment. The opinion is limited to medical consent capacity.

b. ☐ lacks the capacity to give informed consent to any form of medical treatment because he or she is ***either*** (1) unable to respond knowingly and intelligently regarding medical treatment ***or*** (2) unable to participate in a treatment decision by means of a rational thought process, ***or both***. The deficits in the mental functions described in item 6 above significantly impair the (proposed) conservatee's ability to understand and appreciate the consequences of medical decisions. This opinion is limited to medical consent capacity.

8. Number of pages attached: _____

(Declarant must initial here if item 7b applies: _____ ***.)***

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date:

_____ ▶ _____

(TYPE OR PRINT NAME) (SIGNATURE OF DECLARANT)

CONSERVATORSHIP OF THE ☐ PERSON ☐ ESTATE OF *(Name):* ☐ CONSERVATEE ☐ PROPOSED CONSERVATEE	CASE NUMBER:

ATTACHMENT TO FORM GC-335, *CAPACITY DECLARATION—CONSERVATORSHIP,* ONLY FOR (PROPOSED) CONSERVATEE WITH DEMENTIA

9. It is my opinion that the (proposed) conservatee ☐ HAS ☐ does NOT have dementia as defined in the current edition of *Diagnostic and Statistical Manual of Mental Disorders.*

a. ☐ **Placement of (proposed) conservatee.** *(If the (proposed) conservatee requires placement in a secured-perimeter residential care facility for the elderly, please complete items 9a(1)–9a(5).)*

(1) The (proposed) conservatee needs or would benefit from placement in a restricted and secure facility because *(state reasons; continue on Attachment 9a(1) if necessary):*

(2) The (proposed) conservatee's mental function deficits, based on my assessment in item 6 of form GC-335, include *(describe; continue on Attachment 9a(2) if necessary):*

(3) ☐ The (proposed) conservatee HAS capacity to give informed consent to this placement.

(4) ☐ The (proposed) conservatee does NOT have capacity to give informed consent to this placement. The deficits in mental function assessed in item 6 of form GC-335 and described in item 9a(2) above significantly impair the (proposed) conservatee's ability to understand and appreciate the consequences of his or her actions with regard to giving informed consent to placement in a restricted and secure environment.

(5) A locked or secured-perimeter facility ☐ is ☐ is NOT the least restrictive environment appropriate to the needs of the (proposed) conservatee.

b. ☐ **Administration of dementia medications.** *(If the (proposed) conservatee requires administration of psychotropic medications appropriate to the care of dementia, please complete items 9b(1)–9b(5).)*

(1) The (proposed) conservatee needs or would benefit from the following psychotropic medications appropriate to the care of dementia, for the reasons stated in item 9b(5) *(list medications; continue on Attachment 9b(1) if necessary):*

(2) The (proposed) conservatee's mental function deficits, based on my assessment in item 6 of form GC-335, include *(describe; continue on Attachment 9b(2) if necessary):*

(3) ☐ The (proposed) conservatee HAS capacity to give informed consent to the administration of psychotropic medications appropriate to the care of dementia.

(4) ☐ The (proposed) conservatee does NOT have the capacity to give informed consent to the administration of psychotropic medications appropriate to the care of dementia. The deficits in mental function assessed in item 6 of form GC-335 and described in item 9b(2) above significantly impair the (proposed) conservatee's ability to understand and appreciate his or her actions with regard to giving informed consent to the administration of psychotropic medications for the treatment of dementia.

(5) The (proposed) conservatee needs or would benefit from the administration of the psychotropic medications listed in item 9b(1) because *(state reasons; continue on Attachment 9b(5) if necessary):*

10. Number of pages attached: _____

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date:

(TYPE OR PRINT NAME)

▶ (SIGNATURE OF DECLARANT)

Form Adopted for Mandatory Use
Judicial Council of California
GC-335A [New January 1, 2004]

DEMENTIA ATTACHMENT TO CAPACITY DECLARATION—CONSERVATORSHIP