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*28 MIND OVER MATTERS

The Question of an Elder's Legal Capacity Nearly Always Involves Issues of Fraud and Undue Influence

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Determinations and decisions regarding capacity, diminished capacity, and incapacity are at the heart of elder law, which addresses the ramifications of mental and physical impairment due to age. However, while elder law has recently been viewed as a separate substantive area of law, a variety of lawyers have grappled with the issues at its core for years. For example, trust and estates practitioners have always dealt with questions of capacity in numerous circumstances, including when they assess a client's ability to make a trust, will, or gift; plan for a client's future disability; or litigate in probate conservatorship proceedings or in evidentiary hearings on the validity of documents and transactions. These practitioners have done so without the help of special legislation for their elderly clients. So why is elder law now necessary to address capacity issues that have traditionally been resolved by applying time-tested principles familiar to many lawyers, especially trust and estates practitioners?

A possible answer to this question lies in the California Legislature's 1996 findings as presented in Welfare and Institutions Code Section 9001. In 1996, persons over 60 represented 14 percent of California's population, but by 2020 older individuals will represent 21 percent of California's population. In 2010, the first wave of baby boomers will constitute 29.2 percent of California's over-60 population--and *30 in 2020, baby boomers will comprise 70.2 percent of California's over-60 population. While dementia affects only 1 percent of 60-year-olds, that percentage jumps to 30 percent to 45 percent for 85-year-olds. [FN1]

The aging of the baby boom generation in the coming years will put all traditional methods of dealing with diminished capacity and incapacity to the test by the sheer numbers in that group. All lawyers, no matter what their area of specialization, increasingly will be asked to resolve issues of capacity and will find themselves, like it or not, becoming elder law practitioners in two basic ways: 1) determining the capacity of

their elder clients, or 2) determining whether a specific document or transaction is tainted by the possible incapacity of an elder or is the product of possible undue influence exerted upon an elder. While these capacity determinations have in the past arisen nearly exclusively in the province of trusts and estates law, due to the increasing numbers of aging clients, attorneys in every area of the law will find themselves grappling with these issues.

In determining an elder client's capacity, attorneys are required, practically and ethically, to resolve a series of critical questions:

- Is my client competent, or does my client suffer from diminished capacity?

- How does my client's diminished capacity affect his or her ability to execute a will or trust? A durable power of attorney? A deed? A pay on death contract with a bank? Any other document or transaction?

- Is my client susceptible to undue influence? Is my client being unduly influenced?

In determining whether a specific document or transaction is invalid because it was executed or entered into by a principal who lacked capacity or who was subject to undue influence, an attorney is required to make an analysis based upon the following criteria:

- Statutory provisions on capacity.

- Presumptions and burdens of proof.

- Decisional law.

- The facts particular to a case.

- The availability of evidence to prove or disprove capacity or undue influence.

Basic Guidelines and Definitions

The capacity of elders is addressed in the Probate Code and in Welfare and Institutions Code sections on special treatment of elders and on elder abuse. Testamentary capacity and contractual capacity are addressed in the Civil Code as well as in Probate Code sections enacted pursuant to the Due Process in Competence Determinations Act. [FN2] Fundamental to any discussion of capacity within the elder law context are a few key statutory guidelines:

1) An elder is anyone age 65 or older. [FN3]

2) All persons are presumed to have the legal capacity to take action and make decisions on their own account. The presumption of capacity is a rebuttable presumption affecting the burden of proof. [FN4]

3) A determination that a person is of unsound mind or lacks the capacity to do an act or make a decision must be supported by evidence of the existence of at least one of the deficits listed at Probate Code Section 811 as well as evidence that the deficit correlates with the act or decision in question.

4) A person lacks capacity to make a decision if he or she cannot communicate the decision verbally or by any other means and cannot appreciate the rights, duties, consequences, risks, benefits, and alternatives involved with the decision. [FN5]

5) Persons lack testamentary capacity if they are unable to understand the nature of the testamentary act, unable to understand and recollect the nature and extent of their assets, or unable to remember and understand their relationship to their living relations and those whose interests would be affected by their will. Testamentary capacity is also lacking if a person suffers from a mental disorder that causes the person to make a disposition of property that he or she would not have made were it not for the mental disorder. [FN6]

6) A conservator may be appointed for persons who are unable to properly provide for their personal needs or are substantially unable to manage their financial resources or resist fraud or undue influence. The standard for the showing required for the appointment of a conservator is clear and convincing evidence. [FN7]

7) A spouse's capacity to deal with community property is measured by the same standards of capacity applicable to noncommunity property transactions. The spouse with legal capacity has exclusive management and control of community property, including the power to dispose of the property. [FN8]

Against the backdrop of these fundamental principles, practitioners must be cognizant that each act or decision by an elder may have a different legal standard for capacity. The applicability and meaning of terms used in statutory and decisional law--such as “unsound mind,” “lack of capacity” or “understand and recollect”--will depend on the nature and complexity of the act or decision in question and on the elder's mental and physical condition at the time of the act. Similarly, the term “ability to resist fraud or undue influence” may have different meanings in different fact situations: “In one case it takes but little to unduly influence a person; in another case much more ....” [FN9]

Threshold Assessment

Prior to determining whether a client has the capacity to engage in the transaction for which the client has consulted the attorney, the attorney must make the important threshold evaluation regarding the client's competence to retain an attorney. The ease or

difficulty with which an attorney makes this initial evaluation will depend to a large extent on whether there is a preexisting relationship with the client. If the attorney has, for example, prepared estate planning documents for the client in the past, the capacity assessment will be easier because the attorney will be able to gauge whether the client's behavior and cognitive skills seem the same as they were or have changed.

If the attorney has no history with the client, greater reliance must be placed on the client interview and possibly on conversations with the client's family and friends. With new, unfamiliar clients, the attorney must be alert not only regarding the potential client's capacity but also the identity and relationship of the person or persons bringing the elder to the attorney's office. Perhaps the elder was brought to the attorney's office by a “disqualified” person as defined in Probate Code Section 21350. [FN10] If so, the attorney must ascertain whether the elder is planning a testamentary devise to the disqualified person and whether a Certificate of Independent Review pursuant to Probate Code Section 21351 [FN11] is required. Someone besides the elder may be paying for the legal services. In that circumstance, the attorney must obtain the informed written consent of the elder prior to accepting that payment arrangement. [FN12]

Furthermore, present California Rules of Professional Conduct and state ethics opinions strictly construe an attorney's duties of loyalty and confidentiality to a client without making any special provision for a client with diminished capacity. The duty of loyalty strictly prohibits an attorney from initiating conservatorship proceedings regarding a client with diminished capacity without the client's consent. The duty of confidentiality constrains an attorney from disclosing confidential information to individuals, institutions, agencies, and even family members who might help a client with diminished capacity.

The American Bar Association directly addresses an attorney's duty to a client with diminished capacity in its Model Rules of Professional Conduct. Model Rule 1.14 provides three general guidelines for attorneys dealing with these clients:

1) An attorney shall maintain a normal lawyer-client relationship insofar as is reasonably possible.

2) If an attorney believes that a client with diminished capacity is at risk of substantial physical, financial, or other harm, an attorney may take reasonably necessary protective *31 action. This includes consulting with individuals and entities that have the ability to take action to protect the client, such as seeking the appointment of a conservator.

3) An attorney taking protective action for a client with diminished capacity may reveal otherwise confidential information about the client, to the extent necessary to protect the client's interest.

The ABA model rule was adopted by a majority of states, but not by California. In fact, the State Bar of California's Formal Opinion No. 89-112 specifically rejected the model rule provision allowing an attorney to seek a conservatorship. However, beginning in

2004 the State Bar proposed the adoption of a rule similar to the model rule. This effort was paired with a proposal for a new Business and Professions Code Section 6068.5 that would not only codify the new rule but also thereby create exceptions to Business and Professions Code Section 6068(e)'s duty for attorneys to “maintain inviolate the confidence and preserve the secrets of [the] client.”

Section 6068.5 has not yet become law, but the new California Rule of Professional Conduct is scheduled to be published this year--and it will be substantially the same as ABA Model Rule 1.14, with the exception that an attorney in California may not seek appointment of a conservator. The new rule, and proposed legislation if enacted, will relieve the attorney to some extent from the conflict that naturally arises from the duties of loyalty and confidentiality to the client and the duty to question and assess the capacity of a client.

Until--or whether--these proposed changes in the law become official, practitioners confronted with a client whose capacity is questionable or whose capacity could be subject to question in the future must assume that they will be held to the strictest duty to represent the client's interest even when that interest diverges from what practitioners believe to be the client's best interest. [FN13] Thus, if an attorney makes an initial determination that the client lacks capacity to engage in the transaction for which the client consulted with the attorney, then the attorney must decline to act and permit the client to seek other representation. The attorney may make a recommendation to the client for a conservatorship, always subject to the caveat that an attorney may not initiate conservatorship proceedings without the client's consent. [FN14]

It is important to note that even though the probable issuance of a new ethics rule and the possibility of upcoming statutory enactments seemingly offer guidance to attorneys in their future dealings with a client whose capacity is questionable, attorneys must always proceed with caution in taking action or violating a confidence to protect a client. Language in the proposed legislation refers to clients that are “significantly impaired” and also states that the new law would be applied to cases in which a client is “completely unable to make decisions.” [FN15]

Capacity for Specific Acts and Decisions

In addition to making a determination that a client has the capacity to retain counsel, a determination regarding the client's capacity to engage in the transaction for which the client is consulting the attorney must be made. In the end an attorney is usually left to make his or her own determination of capacity using common sense, the Probate Code Section 811 “unsound mind” deficit criteria, the Probate Code Section 812 “capacity to make a decision” criteria, the Probate Code Section 6100.5 “testamentary capacity” criteria, and a general knowledge of existing case law.

Even when an attorney makes a determination that the client clearly knows what he or she is doing, the practitioner would do well to take precautionary steps to document an elder client's present physical and mental state. Keeping meticulous notes regarding the client's demeanor and verbal communications during the client interview and, if there is a past history of dealings with the client, preparing a memorandum to file out-lining how the present action differs from or conforms to the client's past actions, will be effective means for maintaining the integrity of an elderly but competent client's actions and documents in the face of subsequent attack during litigation.

If an attorney suspects that an elder client's actions might be subject to question because of advanced age; diagnosis of a debilitating illness; or simply because the elder's actions are eccentric, whimsical, arbitrary, or cruel, additional documentary evidence might be desirable to preempt future litigation. Supporting evidence of the client's capacity is particularly critical when acts or documents are challenged after the client can no longer speak on his or her behalf because the client's condition has drastically deteriorated or the client has died. The most common forms of supporting evidence are videotapes and a clinical capacity assessment report prepared by a doctor, psychologist, or other professional expert in assessing capacity.

These tools should be used deliberately and with caution, because tapes and clinical assessment reports are double-edged swords. Sometimes, in cases involving a client of advanced age or marginal competence, a videotaped interview of the client or the client's execution of documents can backfire and make the client appear to be less competent then he or she actually is. It is not uncommon, for example, for an elderly client to quickly and accurately name all of his or her children and their birth dates off camera and then, when asked to name the children on camera, forget to mention one or two. This captured performance may demonstrate nothing more than nerves or stage fright or a momentary mistake, memory lapse, or lack of concentration. But none of these explanations will overcome the deleterious impact of the videotape in subsequent litigation over the client's capacity. The videotape will provide opposing counsel with a classic “gotcha” moment.

If a decision is made to use videotape, the attorney should follow a general script or outline. Counsel should avoid even the appearance of asking excessively leading questions. Also, practitioners should not try to ask the kind of yes-or-no questions that not only reveal nothing about the client's competence but also invite accusations that the attorney is acting in the interest of someone other than the client. For example, consider this question and answer: “Is it true that you have disinherited Child A because he has not visited or called for 10 years?” “Yes.” This is an example of an exchange to be avoided. It reveals little or nothing about the client's capacity to understand the nature and consequences of the act involved and gives the impression that the attorney might favor another child or beneficiary. However, asking clients to state the reasons for their actions might result in a rambling, disconnected narrative that could undermine an *32 argument for their capacity.

Similarly, a clinical capacity assessment report can result in formal documentation of a client's shortcomings rather than his or her strengths. Moreover, these reports are discoverable if the clinician is designated an expert in future proceedings. There are two methods of using clinical opinions:

1) An informal consultation between the clinician and attorney, in which the client's name is not disclosed and the attorney obtains the clinician's opinion on capacity based upon information provided by the attorney.

2) A referral for a formal assessment, in which the client consents to an examination by a clinician for a formal assessment of capacity to perform a certain act. [FN16]

Even when a formal assessment is used, it is important to remember that a clinical assessment of capacity is merely one factor in establishing a legal determination regarding capacity. Indeed, the clinician's assessment is not the final determination of legal capacity. The attorney and the trier of fact, not the clinician, must arrive at a conclusion on legal capacity.

In most cases, attorneys will find that their client's capacity is good and proceed with the transaction. In close cases, or in cases that might be litigated when the client is no longer competent or alive, attorneys must be mindful when they create and execute legal documents with their client of the varying standards of capacity and undue influence by which the legal documents will be evaluated and scrutinized.

While attorneys owe no duty to third parties to document an assessment of client capacity, [FN17] California law requires attorneys to be satisfied that their client is competent to sign a document or participate in a transaction and is not acting as a result of fraud or undue influence. [FN18] Also, attorneys owe duties of competence and loyalty to their client to assist in the accomplishment of the client's objectives. In cases of borderline capacity, an inherent conflict exists between the prohibition against an attorney's preparation of a will or other dispositive instrument if the attorney believes the client lacks capacity and an attorney's duty to assist a client whose testamentary capacity appears to be borderline. The court in Moore v. Anderson Zeigler Disharoon Gallagher & Gray, P.C. articulated this conflict in dicta:

Because of the importance of testamentary freedom a lawyer may properly assist clients whose capacity appears to be borderline ....
It may be that prudent counsel should refrain from drafting a will for a client the attorney reasonably believes lacks testamentary capacity or should take steps to preserve evidence regarding the client's capacity in a borderline case. [FN19]

Attacking or Defending Acts and Documents

Determinations regarding the validity or invalidity of a document or transaction due to lack of capacity are made after the fact of their creation and execution, with a few

exceptions--such as at evidentiary hearings on a conservatee's ability to enter into a transaction or make a decision. These determinations are frequently accompanied by questions of fraud and undue influence.

Most often issues concerning capacity come under scrutiny by courts in the context of litigation over wills, trusts, and other testamentary documents. The Probate Code Section 6100.5 criteria provide that an individual is not mentally competent to make a will if he or she is unable to understand the nature of the testamentary act, understand and recollect the nature of his or her assets, or remember and understand his or her relationship to family members, friends, and those whose interests are affected by the will. Further, the individual lacks mental competence if he or she suffers from a mental disorder with symptoms such as delusions or hallucinations that cause an individual to devise property in ways that the individual would not otherwise have done. Notwithstanding the seemingly straightforward provisions of Section 6100.5, however, endless litigation has resulted in case law interpretations that create a standard for testamentary capacity that is extremely low.

One of the most oft-cited cases regarding the standard for testamentary capacity is Estate of Selb. [FN20] This 1948 case is still good law and ably encapsulates California case law regarding testamentary capacity:

It has been held over and over in this state that old age, feebleness, forgetfulness, filthy personal habits, personal eccentricities, failure to recognize old friends or relatives, physical disability, absent-mindedness and mental confusion do not furnish grounds for holding that a testator lacked testamentary capacity.
The Selb court lists and cites no less than 18 cases in which courts validated wills under attack because of the testator's alleged lack of capacity. [FN21] Each case adds to Selb's litany of facts that are insufficient to establish lack of testamentary capacity, including delusions and hallucinations not related to the provisions of the will or act, [FN22] the testator being subject to a conservatorship, [FN23] continual drunkenness, [FN24] and a medical diagnosis of mental derangement and insanity. [FN25]

So what constitutes sufficient evidence to rebut the presumption of testamentary capacity? One criteria consistently referred to in case law is evidence of the testator's incapacity, delusion, confusion, insanity, or drunkenness coupled with evidence of the Probate Code Section 6100.5 criteria for lack of testamentary capacity at the time of the execution of the will. Successful attacks based on lack of testamentary capacity are also often accompanied by allegations of fraud or undue influence. For example, in Estate of Martin, [FN26] the decedent's will left his estate to an attorney who had probated the decedent's predeceased wife's will and a bank official at the decedent's bank. The will omitted the decedent's nephew, who was the primary beneficiary in the prior will. Evidence showed that at the time the will was executed, the decedent--who died in a mental hospital--suffered from unsoundness of mind and insanity sufficient to establish mental incapacity and was also the victim of delusions that directly affected the testamentary act. Testimony established that the beneficiaries of the will had told the decedent that his nephew was attempting to put him in an asylum and take all of his

money and that the beneficiaries would protect the decedent from these actions. [FN27] The court invalidated the decedent's will based on his lack of testamentary capacity.

The standard for the capacity to contract--which is the same as the standard for the capacity to convey, to create a trust, to make gifts, and to grant powers to an attorney--is higher than the standard for testamentary capacity. This is to be expected. Bluntly stated, a decedent will not suffer the havoc wreaked by capricious or pernicious testamentary documents. However, a living individual will be affected by the negative consequences of an inappropriate inter vivos conveyance, an inadvisable lifetime gift, or a foolish grant of a power of attorney.

In addition to the criteria in Probate Code Sections 811 and 812 for unsound mind and the legal capacity to make a decision, the Civil Code also contains guidelines for determining the capacity to contract. Civil Code Section 39(b) provides that if a person is "substantially unable to manage his or her own financial resources or resist fraud or undue influence," a rebuttable presumption of unsound mind exists. The standard is the same as that in Probate Code Section 1801 regarding the showing required for establishment of a conservatorship. Once the Civil Code Section 39(b) presumption arises, the burden is placed on the party claiming capacity to contract to prove that while he or she may be unable to manage his or her financial resources or resist fraud or undue influence, the party is nevertheless still of sound mind pursuant to Probate Code Section 811 and therefore capable of contracting.

*33 Additionally, under Civil Code Section 38, a person "entirely without understanding" cannot contract. According to Probate Code Section 810(c), "[a] judicial determination that a person is totally without understanding" should be based on evidence of a deficit in one or more of the mental functions listed in Probate Code Section 811. Thus, a determination of capacity to contract appears to depend upon an analysis of the facts pursuant to Probate Code Section 811. If an individual had the capacity to contract at the time of the act, then that individual also had the requisite capacity to create a trust, to execute a deed, or to make conveyances, including those intended as gifts. Civil Code Section 2296--which governs the appointment of agents--and Probate Code Section 4120--which governs the appointment of an attorney in fact--both use identical language to state simply that any person with the capacity to contract may appoint an agent or attorney in fact.

As with testamentary capacity, however, the clear statutory language can be obscured by the complex facts of cases. In spite of statutory provisions and guidelines, California cases have held that the rules governing capacity to execute and deliver deeds are generally the same as those governing testamentary capacity. [FN28] In the 1947 case of Hughes v. Grandy, [FN29] which was decided prior to the enactment of Probate Code Section 811, the court struggled to define capacity to execute a valid deed: [FN30]

It is difficult to formulate any rule determining the degree of mental weakness which will destroy a person's capacity to convey property .... Old age alone does not render a person incompetent to execute a deed. Nor will sickness, extreme distress or debility of body

affect the capacity of the grantor to make a conveyance if sufficient intelligence remains. Therefore, the issue of competency must be determined from all of the circumstances surrounding the transfer.
The standards for capacity that are required for the valid execution of deeds, contracts, and powers of attorney are not, according to statutes and codes, as low as those for testamentary capacity. Nevertheless, the courts often analyze the validity of deeds and transactions along the same lines as the analysis used for testamentary capacity, because a party's acts in the last stage of his or her life are being questioned, and all the disputed acts thus take on a type of testamentary significance.

In Allen v. Samuels, [FN31] a grantor executed a deed with a mark that was made with the assistance of another holding and guiding the grantor's hand. The grantor had suffered a stroke that paralyzed him and made him incapable of speech. The court voided the deed based on the grantor's lack of capacity. Similarly, in Reiger v. Rich, [FN32] the grantor executed a deed the day before the grantor's death, while the grantor was under heavy medication for extreme pain. The court held that the deed was invalid because of the grantor's lack of capacity. The court also found invalidity based on undue influence, because it found that the grantees were in a confidential relationship with the grantor and unduly profited from the procurement of the deed at a time when the grantor was incapacitated.

Undue Influence

Cases in which the validity of deeds, contracts, powers of attorney, and the making of gifts are disputed on the basis of lack of capacity nearly always involve allegations of fraud and undue influence. The Civil Code, Probate Code, and Welfare and Institutions Code are replete with use of the phrase "substantially unable to manage his or her own financial resources or resist fraud or undue influence"--language that links the issue of capacity with undue influence. [FN33]

Civil Code Section 1575 provides that undue influence can be found:

1. In the use, by one in whom a confidence is reposed by another, or who holds a real or apparent authority over him, of such confidence or authority for the purpose of obtaining an unfair advantage over him;
2. In taking an unfair advantage of another's weakness of mind; or,
3. In taking a grossly oppressive and unfair advantage of another's necessities or distress.

This section is drafted to include all manner of undue influence, not only undue influence of an incapacitated elder. Individuals with substance abuse problems or physical handicaps that make them dependent on others come within the scope of Section 1575.

There is a large body of California probate case law that addresses issues arising out of an elderly person's susceptibility to undue influence. In Campbell v. Genshlea [FN34] and a

subsequent long line of cases, California courts have held that the burden to show that there was no undue influence in a transaction falls on the person who will benefit from the transaction being declared valid, if a set of conditions exist:

• The parties to the transaction are in a confidential relationship.

• There is a transfer for no consideration.

• There is an opportunity to exert undue influence.

• One party to the transaction is susceptible to having his or her will overcome by the will of another for an undue benefit.

• One party receives an undue benefit and was an active participant in the procurement of the deed, contract, or gift.

The law of undue influence involves the operation of a presumption or its lack. Once the basic facts of a confidential relationship, opportunity, participation, and undue or unnatural profit are established, a presumption of undue influence arises, and the burden then is on the proponent of the deed or gift to establish that the questioned document or transaction was an act of an individual with capacity:

In every transaction of this kind, one who holds such confidential relation will be presumed to have taken undue advantage ... unless it shall appear that such person had independent advice and acted not only of his own volition but with full comprehension of the results of his action. [FN35]
In the absence of a presumption of undue influence, the burden rests on the individual disputing the validity of a document or transaction to establish the elements of undue influence:

• The grantor has a propensity to have his or her free will usurped.

• The disputed action was inconsistent with the grantor's voluntary actions.

• The person exerting influence on the grantor gained something that he or she ordinarily would not have received. [FN36]

The influence exercised must effectively destroy the grantor's free agency and substitute another's will for the will of the grantor. [FN37] It is not enough that a person profits as a result of a confidential relationship; there must also be a showing that the person has unduly or unnaturally profited because the grantor's execution of a deed or other document was not an expression of the grantor's wishes. For example, if a child--who is presumptively in a confidential relationship with a parent--is deeded the family home to the exclusion of other children, it must be proved that the gift was contrary to, or not an expression of, the parent's wishes. A parent may favor one child over another without being subject to undue influence. Affection by a parent for one of his or her children or a

wish to please that child does not amount to undue influence, and so a gift to one child would not be rendered void. [FN38]

Attorneys must be aware of their duty to a client with diminished capacity. An understanding of California case law on capacity and undue influence is essential to the practice of elder law. There is perhaps no other area of law in which an attorney's documents are so often subject to the unforgiving scrutiny of a client's friends and family and by triers *34 of fact. Knowledge of the standards promulgated by decisional law and statutes can enable attorneys to prophylactically prepare an effective defense against attacks on intended documents and gifts and to assist rightful beneficiaries and heirs in voiding unintended documents and gifts.

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[FN1]. American Bar Association Commission on Aging, Assessment of Older Adults with Diminished Capacity: A Handbook for Lawyers [hereinafter ABA Handbook) (citing National Institute on Aging, National Institute of Health, U.S. Department of Health and Human Services) (1999).

[FN2]. Due Process in Competence Determinations Act, Prob. Code §§810-813, 1801, 1881, 3201, 3204.

[FN3]. Welf. & Inst. Code § 15610.27; Prob. Code §2951(b).

[FN4]. Prob. Code §810(a).

[FN5]. Prob. Code §812.

[FN6]. Prob. Code §6100.5.

[FN7]. Prob. Code § 1801.

[FN8]. Prob. Code §§3012, 3051, 3071.

[FN9]. Estate of Sarabia, 221 Cal. App. 3d 599, 607 (1990).

[FN10]. Probate Code §21350 provides that provisions in an instrument for donative transfers to seven categories of individuals--including, among others, care custodians, the drafter of the instrument, and the drafter's relatives by blood or marriage--are invalid. However, Probate Code §21351(b) establishes the requirements for review by an independent attorney of an instrument making a donative transfer to a care custodian or the instrument's drafter. Meeting these requirements validates the instrument and the transfer.

[FN11]. See Prob. Code §21351(b).

[FN12]. Cal. Rules of Prof'l Conduct R. 3-310(F).

[FN13]. Linsk v. Linsk, 70 Cal. 2d 272, 278 (1969).

[FN14]. Moore v. Anderson Zeigler Disharoon Gallagher & Gray, P.C., 109 Cal. App. 4th 1287, 1306 (2003).

[FN15]. Sept. 9, 2005, Report on the Board Referral of Trust and Estates Section Legislative Proposal 2005-02 (re: Impaired Clients) and Proposed Section 6068.5, Legislative Proposal (T&E-2006-07): Mentally Impaired Clients: Attorney Authority to Protect & Confidentiality Exception.

[FN16]. See ABA Handbook, supra note 1, for a detailed and helpful exposition of the use of capacity assessment reports by attorneys.

[FN17]. Disharoon, 109 Cal. App. 4th at 1303.

[FN18]. San Diego County Bar Ass'n Op. 1990-3 (1990).

[FN19]. Disharoon, 109 Cal. App. 4th at 1307.

[FN20]. Estate of Selb, 84 Cal. App. 2d 46, 49 (1948).

[FN21]. Id. at 50-53.

[FN22]. Estate of Chevallier, 159 Cal. 161, 169 (1911).

[FN23]. Estate of Mann, 184 Cal. App. 3d 593, 605 (1986); see also Estate of Swetmann, 85 Cal. App. 4th 807 (2000).

[FN24]. Estate of Arnold, 16 Cal. 2d 573 (1940).

[FN25]. Estate of Shay, 196 Cal. 355, 359 (1925).

[FN26]. Estate of Martin, 270 Cal. App. 2d 506 (1969).

[FN27]. Id. at 509.

[FN28]. Hemenway v. Abbott, 8 Cal. App. 450, 461 (1908).

[FN29]. Hughes v. Grandy, 78 Cal. App. 2d 555, 564 (1947).

[FN30]. 9 Cal. Jur. 117, §21.

[FN31]. Allen v. Samuels, 204 Cal. App. 2d 710 (1962).

[FN32]. Reiger v. Rich, 163 Cal. App. 2d 651 (1958).

[FN33]. Prob. Code §§259, 1801, 2952; Civ. Code §§38, 39.

[FN34]. Campbell v. Genshlea, 180 Cal. 213 (1919).

[FN35]. Ross v. Conway, 92 Cal. 632, 635 (1892).

[FN36]. Estate of Mann, 184 Cal. App. 3d 593, 606-14 (1986); Estate of Sarabia, 221 Cal. App. 3d 599, 607-09 (1990).

[FN37]. Goldman v. Goldman, 116 Cal. App. 2d 227, 234 (1953).

[FN38]. Id. at 235.

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