# Capacity and the Potential Consequences of Getting it Wrong for Estate Planning Attorneys: A Litigator's Perspective

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This Estate Planning article explains the different legal standards for capacity in California and emphasizes the estate planners' ethical obligation to competently assess capacity when preparing estate plan documents for clients.

## INTRODUCTION

Capacity can be described as an enigma within an enigma. While the concept of capacity and its application to testamentary instruments, real property deeds, powers of attorney, etc. often seems intuitive, estate planners must be wary of falling into this dangerous trap; capacity is hardly a one size fits all construct.

While California law presumes that a person has capacity to make decisions and be responsible for their acts or decisions, it is folly to rely on this presumption and accept that a client has the necessary capacity to execute a specific legal document without investigating whether that is, in fact, the case. To do so ignores the damaging consequences that getting it wrong can have for the estate planner, the client, and those impacted by the client's decision. Too often when deposing estate planners, it becomes evident to probate and trust litigators that planners are unable to articulate, for example, the difference between testamentary capacity and contractual capacity. Similarly, estate planners frequently misapply these capacity standards, resulting in grievous consequences. Failure to properly evaluate a client's capacity can lead to several years of post-death litigation costing the litigants hundreds of thousands of dollars, or more. While avoiding post-death litigation is not always possible, an estate planner's understanding of the varying levels of capacity under California law and how to assess capacity before a client executes estate planning and other legal documents may dramatically lessen instances of such litigation.

The purpose of this article is to discuss capacity under California law, its applications to the execution of various legal documents consequential to the estate planning process, and to remind estate planning practitioners of their ethical duties to evaluate a client's capacity to execute legal documents before inviting a client to do so.

While this article will be a refresher for many readers, it will introduce important concepts to the novice estate planner. The overall intent of this article, however, regardless of the experience of the reader, is to assist estate planning practitioners navigate the murky water that is capacity so that the intended recipients of testamentary gifts enjoy those gifts rather than packing court dockets with time consuming and expensive litigation.

## TESTAMENTARY CAPACITY

Testamentary Capacity is the starting point for any analysis of the capacity required to execute testamentary instruments and other legal documents in the state of California.

In California, "[a]n individual 18 or more years of age who is of sound mind may make a will."[1] More than a century ago, case law defined what it means for a testator to be of "sound mind"; particularly, a person of "sound mind is one that is capable of rationally thinking, reasoning, acting and determining for himself, or in other words, a person of sound and disposing mind . . . is in possession of the natural mental faculties of mind free from delusions and capable of rationally thinking and acting for himself."[2]

In 1985, California Senate Bill 421 (SB 421) was proposed to establish a clear statutory standard for ascertaining legal competency to make a will. This bill became part of the Probate Code on July 1, 1991, as Probate Code section 6100.5 which sets out in specific detail the circumstances under which a testator is determined *not to have* the necessary capacity to execute a will. Pursuant to Probate Code section 6100.5, a person is not mentally competent to execute a will ". . . if, at the time of making the will, either of the following is true: (1) The individual does not have the sufficient mental capacity to be able to do any of the following: (A) [u]nderstand the nature of the testamentary act[;] (B) [u]nderstand and recollect the nature and situation of the individual's property[; and] (C) [r]emember and understand the individual's relations to living descendants, spouse, and parents, and those whose interests are affected by the will."

Admittedly, the standard to execute a simple will is not an especially difficult hill to climb. As discussed more fully below, mental capacity is measured on a sliding scale and "changes depending on the issue at hand . . . with marital capacity requiring the least amount of capacity, followed by testamentary capacity . . ."[3] As noted above,"[t]he presumption is always that a person is sane, and the

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burden is always upon the contestants of the will to show affirmatively, and by a preponderance of the evidence, that the [testator] was of unsound mind at the time of the execution of the will. [Citation]. The standard for testamentary capacity is exceptionally low."[4] It is a maxim that "not every degree of mental unsoundness or mental weakness will suffice to destroy testamentary capacity. The question of capacity is related to the mental condition at the time of the execution of the will."[5]

whether a person lacks the capacity "to perform a specific act, should be based on evidence of a deficit in one or more of the person's mental functions rather than on a diagnosis of a person's mental or physical disorder."[10] "To overcome the presumption of sanity the contestant must show affirmatively . . . that the testator was of unsound mind at the time he executed his will."[11]

Probate Code section 811 sets out a litany of "mental functions" California trial courts analyze in determining whether a person is of unsound mind or lacks the capacity to execute testamentary instruments such as wills.

> The statute organizes the mental functions into four categories: (1) alertness and attention (§ 811, subd. (a)(1)); (2) information processing (§ 811, subd. (a)(2)); (3) thought processes (§ 811, subd. (a)(3)); and (4) ability to modulate mood and affect (§ 811, subd. (a)(4)). A deficit in one of the listed mental functions 'may be considered 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 with regard to the type of act or decision in question.[12]

Probate Code section 811(d), similar to section 810(b) and (c), is clear that the mere diagnosis of a physical or mental disorder "shall not be sufficient in and of itself to support a determination that a person is of unsound mind or lacks the capacity to do a certain act." As such, in analyzing a testator's capacity to execute a testamentary instrument such as a will, it is important that an estate planner not prejudge a testator based on a particular physical or mental health diagnosis and other complaints which intuitively lead to false conclusions that a testator is not of sound and disposing mind.

While California law presumes that a person has capacity to make decisions and be responsible for their acts or decisions, it is folly to rely on this presumption and accept that a client has the necessary capacity to execute a specific legal document without investigating whether that is, in fact, the case.

It is axiomatic that the determination of whether a testator understands that they are partaking in the testamentary act, recalls the nature and extent of their property, and their relationship to the heirs at law cannot be based on "isolated acts, foibles, idiosyncrasies, mental irregularities or departures from the normal which do not bear directly upon and influence the testamentary act."[6] So too, the fact that a testator is of "feeble health, suffering from disease, aged and infirm, [are facts] not sufficient of themselves to establish testamentary incapacity . . ."[7] It is incontrovertible "that to set aside a will for mental unsoundness, the abnormalities of mind must have had a direct bearing on the testamentary act."[8]

Thus, for example, a testator's advanced age, forgetfulness, a dementia diagnosis, a history of psychosis, drug or alcohol dependency, evidence of cognitive decline, etc., while useful in evaluating a testator's testamentary capacity, are not dispositive factors in and of themselves that can be used to determine a testator's capacity to execute a will. "A person who has a mental or physical disorder may still be capable of contracting, conveying, marrying, making medical decisions, executing wills or trusts, and performing other actions."[9] Additionally, Dementia, for example, is a progressive disease and the symptoms associated with cognitive decline gradually worsen over time. The rate of progression varies greatly for each patient; thus, with early detection and appropriate treatment, a dementia patient may retain testamentary capacity for years after diagnosis. Similarly, while medications and therapy may not cure psychosis and other mental illnesses, both have the ability to manage the symptoms and provide the stability necessary to maintain one's testamentary capacity. Likewise, the fact that a testator may have been suffering from substance or alcohol use disorders at the time they executed their will does not alone invalidate the instrument. Rather, "[i]t must affirmatively appear that the mind of the testator was totally destroyed, and that he was so far under the influence . . . at the instant of its execution that he was incapable of comprehending the nature of his act, the extent of his property and those who had a claim upon his bounty."[13]

As will be discussed in greater detail below, however, it should not be assumed that a person of "sound mind" possessing the requisite capacity to execute a simple testamentary instrument such as a will has the necessary capacity essential to execute a more complex instrument such as a trust or fully restated trust.

## CONTRACTUAL CAPACITY

Contractual capacity is the stalwart capacity level required to execute trusts and complete restatements of existing trusts in California. It is not sufficient that a person executing a complex testamentary instrument understand only that they are engaging in the testamentary act, understand the nature and situation of their property, and their relationship to their legal heirs. Rather, in layman's terms, the paramount consideration is whether the person executing an involved testamentary instrument such as a revocable trust is able to weigh the pros and cons of that decision. If the answer is "no," then such person likely lacks the necessary mental capacity to engage in more complicated decision-making than the decision to create a will.

Probate Code section 812 discusses the capacity necessary for a person to execute these more complex testamentary instruments beyond simple wills, and as discussed in greater detail below, simple trust amendments.

Pursuant to Probate Code section 812, a person lacks the capacity to make decisions requiring a greater level of cognitive functioning if that person cannot communicate their decision, "and appreciate, to the extent relevant, all of the following: (a) [t]he rights, duties, and responsibilities created by, or affected by the decision[;] (b) [t]he probable consequences for the decisionmaker and, where appropriate, the persons affected by the decision[; and] (c) [t]he significant risks, benefits, and reasonable alternatives involved in the decision."

It is obvious that there is significant interplay between Probate Code sections 810, 811, and 812, and courts will routinely look at all three statutes in ascertaining whether contractual capacity exists. "Probate Code sections 810 through 812 provide that a party lacks legal capacity to enter into a contract where deficits in the person's mental functioning significantly impair the ability to understand and appreciate the attendant consequences, risks, and benefits of the contract."[14] "Sections 811 and 812 deal with the standards for finding mental *incapacity* because *capacity is presumed.*"[15]

Thus, while tempting, a dementia diagnosis, a history of mental health issues, drug and alcohol addiction, a polypharmacy patient, etc., are not, by themselves, dispositive evidence of lack of contractual capacity sufficient for an estate planning attorney to conclude that a client cannot execute a trust or fully restated trust. To the contrary, it is incumbent on the estate planning attorney to operate from the presumption under Probate Code section 810 that the client has capacity to execute the document.

From that starting point, the estate planner must analyze whether the client has a deficit or deficits in one or more of the mental functions set out in Probate Code section 811(a), and determine whether that deficit or deficits significantly impairs the client's ability to understand and appreciate the risks and consequences of their decision.

For example, a client acknowledges to their estate planning attorney that they were diagnosed with Alzheimer's disease three years ago, that they have difficulty with loss of short term memory, but a relatively intact long term memory. Moreover, the client discloses the fact that they have been taking anti-dementia medication since their diagnosis, and it appears to the estate planner that the client has maintained a relatively high level of cognitive function. In this scenario, it would be rash for the estate planner to turn away the client simply because of their dementia diagnosis. "The law in this state is clear that senile dementia does not render one incapable of executing contracts or transacting business."[16]

Rather, the estate planner should test the client pursuant to the four categories of mental functioning set out in Probate Code section 811(a), *i.e.,* alertness and attention, information processing, thought processes, and ability to modulate mood and affect. If, for example, the potential client is oriented to person, place, time, and situation; is able to communicate their testamentary intent in a clear manner; and is focused and not easily distracted, then the estate planner can test under Probate Code section 812 if the client understands the rights, duties, and responsibilities involved in executing a trust, appreciates the potential consequences, if any, to themselves and those affected by their decision to execute the trust, and whether their decision to execute a trust carries with it any risks.

Once the estate planning attorney has analyzed the client's capacity to execute a trust under Probate Code sections 810-812, and satisfied themselves that the potential client has the necessary capacity to execute the document, then the estate planning attorney has appropriately fulfilled their ethical duties to the client. A majority of estate planning attorneys will engage in this analysis prior to commencing drafting. While certainly not discouraged, it is paramount that such analysis also take place at the time of execution. Similar to the execution of a simple will, the determination of whether a person has the requisite capacity to execute a trust turns on a trial court's determination that such person possessed contractual capacity at the time the trust was executed, not before and not after.[17]

## THE INTERSECTION OF TESTAMENTARY AND CONTRACTUAL CAPACITY

As previously discussed, capacity is not a one size fits all proposition; reality is rarely so simple and estate planning practitioners are frequently called upon by clients to prepare testamentary documents that are neither simple wills nor complex trusts. What then is the appropriate capacity to require of a signatory to such a document? The answer is equally muddling; capacity must necessarily be evaluated on a sliding scale.

In *Lintz v. Lintz,*[18] defendant Lois Lintz appealed a judgment finding her culpable of financial elder abuse, undue influence, breach of fiduciary duty, conversion of separate property, and constructive trust. Lois was the third wife of decedent Robert Lintz. Lois and Robert married in 1999, divorced six months later, and remarried in 2005; the second marriage ended with Robert's death in October 2009. At the time of the 2005 marriage, Robert was a retired real estate developer worth millions, and his trust had various amendments created between May 2005 and 2008. With each amendment, Robert gifted more of his trust estate to Lois. In 2008, Lois and Robert executed a trust as joint settlors designating all of Robert's property as community property, providing Lois an exclusive lifetime interest in Robert's estate, granting Lois the right to disinherit Robert's youngest child, and permitting Lois to leave any unspent residue to Lois's two children from a prior marriage.

Upon Robert's death, his eldest child, plaintiff Susan Lintz, filed a second amended complaint alleging that Lois was culpable of fiduciary abuse of an elder, breach of fiduciary duty, conversion, constructive trust, and undue influence. After a 15-day bench trial, Lois was found liable for financial elder abuse, breach of fiduciary duty, conversion of separate property funds, and a finding

that Lois was constructive trustee of Robert's converted funds and trust property. While the trial court ruled that Robert had testamentary capacity to execute the trust instruments, it nonetheless found Lois liable for undue influence in procuring Robert's estate plan. The trial court voided all trusts and trust amendments following the tenth trust amendment which Robert executed in May 2005.

In assessing Robert's capacity to execute the various amendments and the 2008 trust, the trial court applied the significantly lower standard of testamentary capacity under Probate Code section 6100.5. On appeal, the Sixth District Court of Appeal, however, held that the Probate Code section 6100.5 was improperly applied to the 2008 trust and trust amendments.[19] Rather the Sixth District ruled that the more appropriate test was a "sliding-scale contractual standard as set out in Probate Code sections 810 through 812."[20] According to the Sixth District, the trust instruments were more complex than a simple will or codicil; rather, "[t]hey addressed community property concerns, provided for income distribution during the life of the surviving spouse, and provided for the creation of multiple trusts, one contemplating estate tax consequences, upon the death of the surviving spouse."[21]

The Sixth District's ruling reaffirmed the ruling of the Second District Court of Appeal's ruling in *Andersen v Hunt*,[22] that the more complex a testamentary instrument, the greater the capacity is required of a signatory to the document. According to the Second District in *Andersen:*

> When determining whether a trustor had capacity to execute a trust amendment that, in its content and complexity, closely resembles a will or codicil, we believe it is appropriate to look to section 6100.5 to determine when a person's mental deficits are sufficient to allow a court to conclude that the person lacks the ability "to understand and appreciate the consequences of his or her actions with regard to the type of act or decision in question." (§ 811, subd. (b).) In other words, while section 6100.5 is not directly applicable to determine competency to make or amend a trust, it is made applicable through section 811 to trusts or trust amendments that are analogous to wills or codicils.[23]

Thus, an estate planner's evaluation of a client's capacity to execute a testamentary instrument is inevitably fact specific. As the testamentary instrument changes, so does the level of capacity, and in many circumstances estate planners must engage in a commonsense analysis. "The basic starting point for any mental capacity determination is the Due Process in Competence Determinations Act found in Probate Code sections 810 to 813, 1801, 1881, 3201, and 3204 . . . The Act expressly states it broadly covers the capacity of such persons to perform all types of actions, 'including, but not limited to' contracting, conveying, executing wills and trusts, marrying, and making medical decisions."[24] "[T]he required level of understanding depends entirely on the complexity of the decision being made."[25]

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Accordingly, a client requesting that an estate planner create only a simple will need only demonstrate testamentary capacity under Probate Code section 6100.5 to execute the document. On the other hand, a client wishing to amend a trust may require a higher level of capacity based on the type of amendment required. If, for example, the amendment is merely a change in beneficiaries, the types or amounts of testamentary gifts, and nominating a new successor trustee, then an analysis under the sliding scale discussed in *Andersen* and *Lintz* would suggest that such an amendment is no more complicated than a simple will, and the client would likewise only be required to demonstrate testamentary capacity to execute the document.

Things, however, become more problematic the more complex the amendment. For example, significantly restructuring a revocable trust to deal with significant changes to a settlor's life (such as remarriage), decanting an irrevocable trust to update antiquated terms, modifying a trustee's authority to engage in certain acts, or modifying a trustee's discretion regarding investment strategies, incontrovertibly require a more involved understanding of the risks, consequences, and benefits of such decisions, necessitating a higher level of capacity beyond testamentary capacity.

Decisions by estate planners regarding how to modify a trust's terms can have serious consequences if post death litigation incepts. For instance, an estate planner may advise a client to fully restate a revocable trust rather than adding yet another amendment, especially when there are numerous prior amendments. While this may be cleaner, a completely restated declaration of trust that is tens of pages with multiple articles and various sub-sections may create capacity issues where none would have existed had the estate planner simply created one more amendment. Instead, the execution of a completely restated trust opens the door for an argument that the client required contractual capacity instead of testamentary capacity to execute the document.

The above is obviously less a concern where the client is in good physical and mental condition, demonstrates no obvious defects in information processing, can problem solve, and has intact long- and short-term memory. When, however, the client is older, has a documented history of illness, and the client expresses concern that the changes to the trust may not be popular with those adversely impacted by the client's decision, then a careful analysis of the client's capacity is necessary to ensure that their testamentary wishes are followed after death. An estate plan safe from attack regardless of the number of amendments may be preferred to an organized plan that is open to criticism based on capacity grounds.

Assessing capacity can be a quagmire. While determining whether a client has capacity to execute a revocable trust vis-à-vis an amendment to a revocable trust vis-à-vis restating a revocable trust appears to be relatively straightforward; the real world is never so simple, however. An estate planning attorney's careful assessment of a client's capacity under the guidelines set out in Probate Code sections 810, 811, and 812 can be the difference between a smooth post-death trust administration and years of expense in litigating a trust contest. Taking the time to assess capacity can be as important to the client as the testamentary instruments themselves.

## MALPRACTICE AND ETHICAL CONSIDERATIONS FOR THE ESTATE PLANNING ATTORNEY WHEN CAPACITY IS A CONCERN

It is axiomatic that the laws governing legal malpractice in the State of California are as applicable to estate planning as they are to any other area of law. For those readers practicing in the area of estate planning, you are no stranger to insurance premiums that are some of the highest in the state. "A lawyer retained to draft a client's will or trust has a duty to 'use such skill, prudence, and diligence as members of the legal profession commonly possess and exercise.' [Citation]. If the lawyer fails to do so, the client can sue for legal malpractice."[26]

While it is generally true that an attorney's duty ends with their client as the duty arises from the privity of contract that creates the attorney-client relationship, that duty can extend to a nonclient if the nonclient is the intended beneficiary of the attorney's legal work, *i.e.*, when a client retains a lawyer to draft an estate plan that is intended to benefit a third person.[27]

But what is an estate planner's malpractice liability to non-clients if, for example, a testator or settlor's capacity is not sufficiently ascertained prior to a client's execution of a testamentary instrument? It is axiomatic that a "lawyer's duty—and the concomitant right to sue for legal malpractice—can extend to nonclients, but only if the client's intent to benefit the nonclient is 'clear,' 'certain' and 'undisputed.'"[28]

The question of whether an attorney owes a duty to a nonclient where the issue of a settlor's capacity is in controversy was a question of first impression for the First Appellate District Court of Appeal in *Moore v. Anderson Zeigler Disharoon Gallagher & Gray.*[29] Particularly, the First Appellate District Court of Appeal ruled that an attorney retained to prepare a will and trust amendments for a client owes no duty to the beneficiaries of such instruments, or to the beneficiaries under a prior instrument, to ascertain and document the client's capacity.

> The standard for testamentary capacity is exceptionally low.

In *Moore*, five of settlor Clyde P. Smith's nine adult children, sued their father's estate planning counsel for malpractice alleging that their father lacked the capacity to execute amendments to his estate plan in June 2000. The settlor's children argued that their father's estate planning counsel should have known that their father's capacity was "questionable," and that the defendant estate planner was negligent "in failing to 'assure, confirm and document' that [the settlor] had capacity and was competent to execute his will and trust amendments."[30] The children argued that as a result of the estate planner's negligence, they received less from a settlement ending their trust litigation than they would have received under their father's trust prior to the June 2000 amendments. The trial court sustained the estate planner's demurrer without leave to amend.

At the time settlor executed the June 2000 amendments, settlor's children alleged that he was "extremely sick, debilitated, and confused" having undergone chemotherapy and was under the influence of "powerful medications."[31] At the time the June 2000 amendments were prepared, settlor's estate planning counsel knew he was terminally ill and weak, but prepared the new estate planning documents regardless of this knowledge, fundamentally changing the distribution of settlor's estate upon his death. The ensuing trust litigation was settled without any finding on settlor's capacity. Following settlement, settlor's five children sued the estate planner for malpractice. The children argued that:

> A competent estate planning attorney in the circumstances should have recognized that [settlor's] testamentary capacity was "questionable because of [settlor's] weakened and confused condition and medical treatment. A competent attorney in such circumstances should exercise reasonable care to confirm his client's capacity, competence, and intentions regarding the client's property dispositions, and should document such confirmation."[32]

The estate planner demurred to the children's first amended complaint arguing that as a matter of law, the estate planner owed no duty of care to the children, nonclients, to determine whether settlor had capacity to execute the June 2000 amendments and will. The demurrer was sustained without leave to amend, and the children filed a timely appeal.

The First District Court of Appeal affirmed, finding that settlor's estate planner had no professional obligation to the children as nonclients. Specifically, the First District held that an "attorney preparing a will for a testator *owes no duty to the beneficiary of the will or to the beneficiary under a previous will* to ascertain and document the testamentary capacity of the client."[33]

According to the First District Court of Appeal, "we believe the duty of loyalty of the attorney to the client may be compromised by imposing a duty to beneficiaries in these circumstances."[34] In cases where the capacity of a client is the grounds of a challenge to the validity of a testamentary instrument, the intent of the client is the central query; "that intent cannot be ascertained from the will or other challenged estate plan document itself."[35]

Thus:

> The attorney who is persuaded of the client's testamentary capacity by his or her own observations and experience, and who drafts the will accordingly, fulfills that duty of loyalty *to the testator.* In so determining, the attorney should not be required to consider the effect of the new will on beneficiaries under a former will or beneficiaries of the new will."[36]

According to the First District Court of Appeal, extending the duty to intended beneficiaries "would place an intolerable burden upon attorneys" as they would face conflicting duties to the client and to potential beneficiaries, "but counsel also could be subject to conflicting duties to different sets of beneficiaries."[37] The First District believed the facts in *Moore* were a perfect example of this where one set of beneficiaries benefited under a prior iteration of a settlor's estate plan, but a second set benefited under the amended instruments. Rather, the First District argued that any doubts of a client's capacity can be solved by the estate planning counsel's refusal to draft the requested testamentary instrument. Specifically, the estate planner turns the presumption of capacity "on its head" by forcing the client to prove his capacity.[38]

Additionally, the First District Court of Appeal reasoned that a malpractice action against an estate planning attorney for drafting a testamentary instrument on behalf of an incompetent client is not the only avenue of relief for a disinherited beneficiary. Instead, disinherited beneficiaries have the opportunity to challenge the validity of a testamentary document in probate court on the grounds that the estate planning attorney's client lacked capacity.

The First District Court of Appeal did not accept the appellants' argument that placing a duty on an estate planning attorney to ascertain a client's capacity before drafting a testamentary instrument would reduce challenges to such instruments in post-death litigations based on lack of capacity. To the contrary, the First District found that ascertaining capacity "is often difficult and the potential for liability to beneficiaries who might deem any investigation inadequate would unjustifiably deny many persons the opportunity to make or amend their wills."[39] After all, if estate planning attorneys were culpable for failing to appropriately assess a client's capacity, they will be less inclined to take up estate planning; the risks would simply be too high.

Thus, while malpractice liability to beneficiaries of testamentary instruments may not be of paramount concern to estate planning attorneys if a client's capacity is raised in post-death will and trust contests, ethical considerations should cause an estate planning attorney to take stock of whether a client has the necessary capacity to execute a proposed testamentary instrument, particularly where signs of potential incompetence are readily apparent.

It is an incontrovertible fact that attorneys have a duty of competence in California. California Rule of Professional Conduct 1.1(a) states that "[a] lawyer shall not intentionally, recklessly, with gross negligence, or repeatedly fail to perform legal services with competence." " . . . [C]ompetence . . . shall mean to apply the (i) learning and skill, and (ii) mental, emotional, and physical ability reasonably necessary for the performance of such service."[40]

An estate planning attorney retained by a client to prepare testamentary documents has a duty to counsel their client and prepare all requested documents with competence. Thus, competency not only requires that an estate planning attorney possess the skillset necessary to draft a client's estate plan, but also the competency to appropriately assess a client for their capacity to execute whatever legal instrument the client has retained the attorney to prepare. To conduct such an assessment effectively, the estate planning attorney should possess a thorough understanding of the presumption that all persons have capacity to make decisions under Probate Code section 810, how that presumption is tested by the considerations set out in Probate Code section 811, the factors comprising testamentary capacity under Probate Code section 6100.5, and an understanding of the heightened contractual capacity standard set out in Probate Code section 812.

Additionally, to competently carry out their duties to their clients, it is necessary that estate planning attorneys understand the intersection of testamentary and contractual capacity discussed above before crafting documents that do not fit neatly into either category. A failure to appreciate these differences is too often evident when probate and trust litigators depose estate planners or take their testimony at an evidentiary hearing as part of a post-death will or trust contest. When an estate planner is unable to testify regarding their efforts to ascertain whether the client had testamentary vis-à-vis contractual capacity, it can lead to uncomfortable periods of questioning for the estate planner. On the other hand, when an estate planner can effortlessly navigate these questions because they clearly understand the differences in capacity standards to execute certain documents, the testimony becomes much less useful to the litigator advocating for the instrument's invalidity.

In addition to competence, ethical considerations require that an estate planning attorney act with "reasonable diligence in representing a client."[41] "Reasonable diligence" requires that the attorney act with "commitment and dedication to the interests of the client and does not neglect or disregard … a legal matter entrusted to the lawyer."[42] It is certainly reasonable to conclude that appropriately assessing a client's capacity to execute a testamentary document is necessary to act with "commitment and dedication" to a client. To invite a client to execute a testamentary instrument which they do not have the required capacity to sign creates temptation for a disgruntled beneficiary to litigate the document's validity after the client's death.

Furthermore, competency also requires that estate planning attorneys raise capacity concerns with their clients, especially if the client volunteers their concerns of post-death litigation

> Another useful tool often overlooked by estate planning attorneys that can be used to efficiently and economically measure capacity to make decisions is to administer all or a portion of either the Mini-Mental State Examination or the Montreal Cognitive Assessment.

in the form of a will or trust contest. As discussed above, while an estate planning attorney may not have a duty to beneficiaries to assess a client for the requisite capacity to execute an estate planning document, doing so may be in the attorney's best interest, and is very likely in the client's best interests. Rule of Professional Conduct 2.1 discusses the role of an attorney as a client's advisor. Specifically, Rule 2.1 states that "[i]n representing a client, a lawyer shall exercise independent professional judgment and render candid advice." Comment 1 to Rule 2.1 specifically addresses an attorney "initiat[ing] advice to a client when doing so appears to be in the client's interest." To elect not to discuss with a client concerns regarding their capacity to execute a testamentary instrument does the client a huge disservice, and brings into question whether the estate planning attorney has represented their client with the necessary competence required by Rule 1.1.

For example, a client with a documented diagnosis of early onset Alzheimer's disease and taking Aricept to control her symptoms requests that an attorney: (1) fully restate her survivors trust to disinherit her son in favor of her daughter, and to remove her son as the nominated successor trustee; and (2) revoke her existing powers of attorney for financial and healthcare decisions naming her son as agent and to create new powers of attorney designating her daughter as agent. The client also advises her estate planning counsel that she is concerned that disinheriting her son may result in a trust contest after her death.

The estate planning attorney evaluates her client for the necessary capacity and is comfortable that the client understands the risks, benefits, and potential consequences of her decisions. The attorney has acted with competence under Rule 1.1 and diligence under Rule 1.3 in fulfilling her duties to her client. The attorney's competency, however, must necessarily go beyond the simple analysis of the client's capacity under these circumstances. Rather, given the client's concerns that her son may contest the restated trust post-death, it would be reasonable for the attorney under Rule 2.1 to advise the client that she first be evaluated by a psychiatrist to opine as to her capacity to both execute the restated trust and choose her surrogate decision makers. In doing so, the attorney has not only fulfilled her ethical obligations to her client with competence and reasonable diligence, but her advice may play an important part in deterring the son from initiating a post-death trust contest.

## ASSESSING CAPACITY

Estate planning attorneys are not doctors, and no probate and trust litigator deposing an estate planner or questioning an estate planner at an evidentiary hearing expects that the client was put through extensive psychological testing (unless court ordered) before executing a testamentary instrument. It is often surprising, however, concerning the lack of effort exhibited by some attorneys in assessing their client's capacity, and on the other side of the spectrum, the extent to which some attorneys will go to ensure that their clients are capable of executing complex testamentary instruments.

> Certainly, the application of the wrong capacity standard when evaluating a client's competency to execute a particular legal document can have serious negative implications.

There is no "one size fits all" to assessing capacity; no brightline test. There are, however, various techniques that estate planning attorneys can use to assess capacity where there is doubt, but also to head off to the extent possible expected challenges to the validity of a testamentary instrument based on allegations of lack of capacity.

The first and most obvious tool an estate planner has at their disposal to evaluate a client's capacity to execute a testamentary instrument is the client interview. While estate planning questionnaires serve a purpose, they should not be the end of the inquiry. For example, it is not uncommon when deposing an estate planner for probate and trust litigators to discover that the estate planner has no understanding if the questionnaire is written in the client's handwriting.

Estate planning attorneys should sit the client down in person, and preferably at the attorney's office free of interested witnesses. Do not conduct the interview via telephone if it can be avoided. If the client insists on a remote meeting, then the estate planning attorney should be equally insistent that the meeting at least take place via video-conference. It is important that the estate planner observe the client so as to recognize red flags such as confusion, memory lapses, issues with decision making, or an inability to articulate the reasons for their decisions.

In situations where capacity is a concern or there is a threat of a post-death contest, many estate planners will do as the First District Court of Appeal suggested in *Moore*; they flip the burden on its head and force the client to prove their capacity. This can be done in varying ways including having the client agree to an evaluation by a psychiatrist or psychologist for an opinion as to the client's capacity to make decisions related to the distribution of their estate after death, making inter-vivos gifts, or choosing surrogate decision makers. It is incumbent on the estate planning attorney to insist that the psychiatrist or psychologist document their opinions in a written report and that the practitioner specifically references the relevant Probate Code section supporting their opinion. For example, if an expert psychiatrist opines that the client has the necessary contractual capacity to fully restate their trust, then the psychiatrist should indicate that in their opinion, the client meets the three prongs of Probate Code section 812, *i.e.,* the client understands the risks, consequences, and benefits of such decisions, not only to themself, but those impacted by their decisions.

Another option along similar lines, although with less gravitas, is for the client to obtain an opinion letter from their primary care physician that they have the capacity to make relevant decisions concerning the disposition of their estate after their death, to make

inter-vivos gifts, or to choose their surrogate decision makers.

Another further tool often overlooked by estate planning attorneys that can be used to efficiently and economically measure capacity to make decisions is to administer all or a portion of either the Mini-Mental State Examination or the Montreal Cognitive Assessment. These tests are known for their simplicity, and they are very useful cognitive screening tools. In fact, given their simplicity, these tests need not be administered by doctors; in fact they are frequently used by individuals in a variety of professions such as social workers where quickly evaluating a person's competency to make decisions is necessary.

It is important to remember that the purpose of such tests is to screen for cognitive issues; these tests are not diagnostic in nature. Thus, if the estate planner has significant concerns as to a client's capacity rather than a desire to confirm their suspicions that the client has capacity, the best course of action is to refuse to draft the client's documents or refer the client for psychological testing. At the very least, a mid-to-low score on either test is an indication that the client requires further evaluation.

An evaluation tool not necessarily considered by estate planning attorneys in evaluating capacity, but which is useful, is to seek a second opinion. In cases where undue influence is a concern, most especially in the case of testamentary gifts to statutory care custodians, estate planning attorneys will request that an "independent" attorney evaluate the client and issue a Certificate of Independent Review. Nothing prevents estate planning attorneys from using a similar independent analysis when capacity is a concern, especially when the client has expressed concern that their testamentary wishes may not be popular with some, and may lead to a post-death challenge. In such circumstances, it may be useful to have more than one cook in the kitchen.

Other useful mechanisms employed by estate planning attorneys when it is anticipated that a client's estate planning will be the subject of a post-death contest is to videotape both their analysis of the client's capacity immediately before the client's execution of the estate planning documents, and the signing itself. As an extra layer of protection, these signings may take place "on the record" in front of a deposition officer that places the testator or settlor under oath.

Certainly, the above is not intended as an exhaustive list of methods available to estate planning attorneys to test capacity to execute testamentary instruments. To the contrary, there are varying techniques available. The objective was simply to introduce concepts and ideas that are not often considered, or deemed too drastic, but in reality, can prove very effective in substantiating the validity of a testamentary instrument under attack in a post-death will or trust contest based on claims of lack of capacity.

## THE CONSEQUENCES OF APPLYING THE WRONG CAPACITY STANDARD

Certainly, the application of the wrong capacity standard when evaluating a client's competency to execute a particular legal document can have serious negative implications. In terms of testamentary instruments, perhaps the most serious and common consequence is the document's invalidation post-death. As noted above, completely avoiding post-death contests as a result of estate planners engaging in a more comprehensive evaluation of a client's capacity is unrealistic; other bases for contests including undue influence and financial elder abuse are popular claims to attack the validity of testamentary instruments post-death, and are beyond the scope of this article. Certainly, however, a more careful analysis of a client's capacity using the tools suggested above, would invariably cut down on the number of filed contests grounded entirely on allegation of lack of capacity.

It is not only testamentary instruments that are the subject of post-death contests based on lack of capacity. For example, it is routine for persons to seek to invalidate real property transfers effectuated by deeds executed while a person is living. Like wills and trusts, deeds transferring real property interests can be contested on grounds that the grantor lacked capacity at the time of execution.

A deed is a type of contract; thus, the grantor must have possessed the capacity to contract at the time of execution. It is not uncommon for persons to seek to avoid the probate of their real property assets, or the time involved in administering a trust, by executing deeds which transfer ownership in real property upon death. Examples include deeds titling property in joint tenancy with right of survivorship, deeds executed by married couples titling real property as community property with right of survivorship, transfer on death deeds, and life-estate deeds. Care must be taken, however, to ensure that the person executing such deeds has the necessary contractual capacity to do so; if a grantor possessed only testamentary capacity at the time of execution, then the transfer is subject to set aside, potentially leaving the intended beneficiary with no interest in the real property whatsoever.

As an example, wife remarries years after the death of her first husband. In the several years between marriages, wife created a separate property trust gifting upon her death all her real and personal property to the two children of her first marriage. Five years after her remarriage, wife is diagnosed with terminal cancer and decides to transfer her separate property home out of her trust and to retitle the real property in joint tenancy naming her second husband as joint tenant. Thus, if wife predeceases husband as is expected, husband would take a 100 percent interest in the real property upon wife's death. Wife made no other changes to her separate property trust.

Unfortunately for wife, the attorney she retained to prepare the joint tenancy deed did not evaluate wife for contractual capacity despite his awareness that wife was taking pain medication known to be mind-altering in some patients. Upon wife's death, wife's two children filed suit to invalidates the joint tenancy deed. Had wife's attorney utilized one or more of the tools suggested above to ascertain wife's contractual capacity at the time of the deed's execution, the challenge to the deed's validity may have been avoided.

Further, the misapplication of capacity standards may not only have deleterious consequences post-death. As

an example, Jane suffers from various medical maladies that have caused her to need the services of a caregiver for the past five years. Jane retains an estate planning attorney to restate her trust disinheriting her two estranged children in favor of her caregiver. Despite the estate planner's knowledge of Jane's various health issues, the estate planner does nothing more to satisfy himself that Jane has contractual capacity than to speak to Jane on the phone for ten minutes. Moreover, despite the fact that Jane is restating her trust to gift her entire estate to her caregiver, Jane's estate planner does not advise Jane to obtain a Certificate of Independent Review from independent counsel.

A year after Jane restates her trust, her two children learn of the changes and immediately file for a Probate Conservatorship of Jane's estate based on claims that Jane lacks the capacity to make decisions related to her finances as evidence by her restated trust. The children's goal, if appointed, is to file with the court a petition for substituted judgment to seek court approval of a trust naming them as beneficiaries once again which the children argue more appropriately represents Jane's true testamentary intent. Had Jane been appropriately evaluated for contractual capacity at the time she executed her restated trust, and a Certificate of Independent Review obtained, the conservatorship proceedings may have been avoided.

As with the example assessment tools to evaluate capacity set out above, the foregoing is not intended as an exhaustive list of potential consequences that can result if capacity is not properly evaluated. Rather, it is intended as a sample of how the failure to appropriately assess a person's capacity can have consequences beyond post-death will and trust contests.

## CONCLUSION

It is worth repeating that capacity is a complicated construct, and a thorough understanding of the differing levels of capacity under California law and their application to various legal documents is a necessary skill for estate planning attorneys. Testamentary capacity, governed by Probate Code section 6100.5, sets a relatively low threshold, while contractual capacity, outlined in sections 810–812, demands a higher level of cognitive functioning, especially for complex instruments like trusts and fully restated trusts. Assessing a client for the wrong capacity can have serious consequences in the form of a post-death will or trust contest and efforts to set aside real property transfers, especially where a beneficiary is disinherited or has their testamentary share significantly reduced.

Unlike other challenges to the validity of testamentary instruments such as undue influence and financial elder abuse, there is generally evidence of capacity in the form of medical records. While there may not be records contemporaneous with the date of execution of the contested document, a talented expert can look at the client's medical history in the months leading up to the execution of a testamentary instrument or real property deed to cast doubt on the client's ability to execute such document.

Thus, understanding testamentary and contractual capacity, and the intersection of both depending on the document the client wants drafted, is vital for estate planning attorneys practicing in California today. Indeed, such understanding is key to properly assessing clients under the "sliding scale" discussed above, and paramount to competently and diligently representing estate planning clients.

Furthermore, this article underscores the ethical and professional obligations of estate planners to evaluate capacity and prepare estate planning documents. Although estate planning attorneys may not owe a legal duty to non-clients such as beneficiaries, they must still act competently and with reasonable diligence under California's Rules of Professional Conduct to ensure that a client has the necessary capacity to execute the testamentary instrument they are asking the attorney to prepare. As demonstrated above, there are serious negative consequences for clients and those impacted by their decisions if the wrong capacity standard is applied.

If necessary, estate planning attorneys must ask the tough questions and require that a client prove their capacity to execute estate planning and other documents. Practical strategies for assessing capacity such as psychiatric evaluations and cognitive screening tools often prove very successful in assisting estate planning attorneys meet these ethical obligations.

## End Notes

1 Cal. Prob. Code § 6100.

2 *In re Higgins' Estate*, 156 Cal. 257, 266 (1909).

3 *In re Marriage of Greenway*, 217 Cal.App.4th 628, 639 (2013).

4 *Eyford v. Nord*, 62 Cal.App.5th 112, 122 (2021).

5 *In re Dunne's Estate*, 130 Cal.App.2d 216, 220 (1955).

6 *In re Ligenfelter's Estate*, 38 Cal.2d 571, 580 (1952).

7 *Estate of Llewellyn*, 83 Cal.App.2d 534, 553 (1948).

8 *Estate of DeMont*, 132 Cal.App.2d 720, 724 (1955).

9 Cal. Prob. Code § 810(b).

10 *Id.* at § 810(c).

11 *Estate of Smith*, 200 Cal. 152, 158 (1926).

12 *Gomez v. Smith*, 54 Cal.App.5th 1016, 1037-38 (2020).

13 *Estate of Smethurst*, 15 Cal.App.2d 322, 331-32 (1936).

14 *Algo-Heyres v. Oxnard Manor LP*, 88 Cal.App.5th 1064, 1067 (2023).

15 Note 12, *supra*, at 1040. (*italics* in original).

16 *Holman v. Stockton Savings & Loan Bank*, 49 Cal.App.2d 500, 508 (1942).

17 *Eyeford*, Note 4, *supra*, at 123; *Estate of Dunne,* Note 5, *supra*, at 220.

18 222 Cal.App.4th 1346 (2014).

19 *Id.* at 1352.

20 *Id.*

21 *Id.* at 1352-53. Notwithstanding the trial court's incorrect application of testamentary capacity to the trust and trust amendments, the judgment was affirmed based on ample evidence.

22 196 Cal.App.4th 722 (2011).

23 *Id.*at 731.

24 Note 3, *supra*, at 640.

25 *Id.* at 641.

26 *Gordon v. Ervin Cohen & Jessup LLP*, 88 Cal.App.5th 543, 549 (2023).

27 *Id.* at 554-555.

28 *Id.* at 549.

[29] 109 Cal.App.4th 1287 (2003).

[30] *Id.* at 1290.

[31] *Id.* at 1292.

[32] *Id.*

[33] *Id.* at 1298 (*italics* in original).

[34] *Id.*

[35] *Id.* at 1299.

[36] *Id.* at 1299 (*italics* in original).

[37] *Id.*

[38] *Id.*

[39] *Id.* at 1300.

[40] Cal. Rules of Prof. Conduct, rule 1.1(b).

[41] Cal. Rules of Prof. Conduct, rule 1.3(a).

[42] Cal. Rules of Prof. Conduct, rule 1.3(b).