

THE HIGH-RISK WILL: WHERE PLANNING AND LITIGATION COLLIDE

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I. INTRODUCTION

It can be difficult for estate planners, who often are not litigators, to anticipate which of the instruments they draft will be contested, or how the instruments will be attacked. Moreover, estate planners sometimes need to act quickly to memorialize the client's testamentary wishes, especially when faced with a dying client. This article provides guidance which estate planners can use when confronted with the daunting task of preparing estate planning documents for clients whose capacity may be questioned, or who may be alleged to be under the influence of others. The advice is from the perspective of the litigator who will be defending the validity of the instruments. By following the recommendations in this article, the planner can reduce the chances of a postmortem challenge to the instruments and, if a challenge is made, provide defense counsel with powerful evidence to defend the instruments.

II. TIPS TO HELP ESTATE PLANNERS AVOID A CONTEST

A. Be Alert for Fact Patterns that Increase the Likelihood of a Challenge

Warning bells should ring in the head of an estate planner who encounters certain circumstances that may provoke a challenge to a will or trust. The Legislature has identified some of these circumstances, such as gifts to caretakers,¹ and case law provides a wide array of others. They include: (a) a second marriage,² especially when there are children from a prior marriage;³ (b) commingled community and separate property;⁴ (c) a diagnosis of Alzheimer's disease or dementia;⁵ (d) a medical condition associated with severe pain or the regular use of barbiturates, alcohol, or opiates; (e) someone other than the proposed testator setting up the appointment with the lawyer;⁶ (f) meeting with the testator in the hospital;⁷ (g) potential beneficiaries seeking to be present during the interview with the testator;⁸ and (h) a beneficiary who stands to inherit a substantial portion of the estate who is either an existing client of the planner,⁹ or the person who recommended the planner to the testator.¹⁰

Although the fact patterns described above should make a planner wary, the greatest predictor of a contest continues to be dispositive provisions which differ dramatically from the testator's existing instrument – or, if the testator has no existing instrument, from what the laws of intestate succession provide. A contest only makes sense when, if successful, the contestant stands to inherit a substantial portion of the estate. If the contestant would gain little or nothing by defeating the instrument, there will be little or no reason to file a contest. Therefore, the estate planning attorney should

review the testator's existing instrument, or confirm that there is no existing instrument. If the proposed change from the status quo is significant, the attorney should follow the tips described below.

B. Tailor Questions to the Provisions of Probate Code Section 6100.5

1. Assessing Testamentary Capacity

Over the years, courts have consistently affirmed that the level of mental capacity necessary to make a valid will or trust is quite low. The testator need not be able to reason logically,¹¹ be free from delusions or hallucinations,¹² or be devoid of filthy habits, forgetfulness, or mental illness¹³ in order to make a valid will. The testator can even be conserved and still have testamentary capacity.¹⁴ The testator must, however, meet the three requirements of Probate Code section 6100.5(a), that is, he or she must be able to: (1) "understand the nature of the testamentary act," (2) "understand and recollect the nature and situation of [his or her] property," and (3) "remember and understand [his or her] relations to living descendants, spouse, and parents, and those whose interests are affected by the will."¹⁵

In assessing capacity, the planner should ask open-ended questions such as, "Why are you here?," "What do you own?," and "Who are the members of your family?" It is important that the testator articulate his understanding, not simply answer "yes" or "no" to leading questions, which may not indicate a true ability to understand. In our view, the planner should take extensive notes, writing down the testator's answers verbatim if possible. If an answer is incomprehensible or nonresponsive, the planner should write that answer down too.¹⁶ Following the testator's death, the drafting attorney's entire file becomes discoverable,¹⁷ and her notes of the meetings with the testator often become the focus of the trial of the validity of the instruments. Remember, the attorney is the gatekeeper to creating a binding will or trust. If the testator clearly does not meet the capacity standard, the attorney should not prepare a will or trust for signature.¹⁸

If the planning attorney anticipates a high likelihood of a post-mortem contest, the safest approach is for the lawyer to retain the original instruments in her fireproof safe, rather than return the originals to the client. It is presumed in California that if the original will was in the testator's possession at the time of death and cannot be found after death, the testator intended to revoke it.¹⁹ Returning the original to the testator creates a risk that a disappointed legatee may find and destroy the original will after the testator's death.

a. The Testamentary Act

The "testamentary act" referred to in Section 6100.5 is commonly understood to be the making of a disposition of property to take effect after the testator's death.²⁰ Therefore, virtually any answer the testator gives that indicates he understands that by signing the will or trust he is disposing of his property at his death will satisfy the first requirement.

b. The Nature and Situation of Testator's Property

The standard for the testator's knowledge of the nature and extent of his assets is low. The testator need not know specifics, but only be able to convey such information as his ownership of real estate, bank accounts, stocks, etc.²¹ He is not required to know the value of what he owns or, for example, the name of the bank that holds his money. It may be that at the time of the interview, a family member or conservator may have been actually handling the testator's funds for some time, and the testator may no longer know any specifics as to the assets he owns. Under such circumstances, accurate statements of what the testator owned when he last controlled his assets should suffice to satisfy this prong of testamentary capacity (and show that his long-term memory is still intact).²²

c. Relationship with People Closest to Testator

The attorney should ask questions to determine who are the people closest to the testator. She should not assume that his immediate family members are necessarily the natural objects of his bounty.²³ The testator may have been estranged from his close relatives for years, and the true natural objects of his bounty may be close friends, or even such distant relatives as nieces and cousins.²⁴ Once again, open-ended questions are the best way to see if the testator is still tracking the people to whom he is closest. A lawyer can check whether the testator is an accurate reporter of the people closest to him (and not delusional or subject to undue influence) by asking questions based on the testator's last estate plan. Indeed, it is hard to see how the planner can determine if the testator understands the effect the new plan will have on the people closest to him unless the planner knows whose interests are adversely affected if the testator signs the new will.

2. Assistance from Medical Professionals

Sometimes the planner turns to the testator's physician for an opinion on whether the proposed testator has testamentary capacity.²⁵ In doing so, the planner may feel that it is particularly appropriate to seek guidance from a physician on what, after all, seems to be a medical determination. In our experience, however, this rarely improves the chances of defending the will and can often boomerang on the planner. First, the physician is unlikely to know the legal standard for testamentary capacity unless the planner explains it.

Second, the standard is mostly a functional test, i.e., is the testator able to identify his loved ones and his property? In our view, the lawyer can make that determination as well as a physician. Moreover, whereas the lawyer can control whether she asks the critical questions, she cannot control whether the doctor does so.

Third, the physician may rely on the Folstein Mini Mental Examination,²⁶ the most widely used test to determine cognitive acuity, to determine testamentary capacity.²⁷ However, that test is not directed to testamentary capacity. Although a very low score might show lack of testamentary capacity, a moderate score does not assure that the testator has testamentary capacity. Thus a contestant may later use a "moderate" score to undermine the planner's determination of capacity.

Fourth, the planner could ask the physician to complete a Capacity Declaration,²⁸ the Judicial Council form physicians fill out in connection with a conservatorship proceeding. But though more detailed than the Folstein Mini Mental Examination form, the form does not ask the physician to render an opinion of testamentary capacity. Rather, it is designed to elicit a physician's determination whether a patient continues to have the ability to manage his own financial affairs or make decisions regarding placement or medical treatment. A patient who lacks capacity to make financial decisions can still have testamentary capacity.²⁹ Thus the Capacity Declaration will not directly answer the question whether the testator has testamentary capacity. On the other hand, the form is based on Probate Code section 811, which identifies categories of evidence of incapacity, and requires evidence of a deficit in at least one of the categories to show a testator's lack of capacity to execute wills or trusts.³⁰

Finally, the planner can retain a neuropsychologist or neuropsychiatrist to make a determination of testamentary capacity.³¹ Neuropsychologists, in particular, will employ a battery of tests to uncover mental deficits, and are often skilled in making detailed findings regarding testamentary capacity and susceptibility to undue influence. If time allows, and the proposed testator is willing, use of these types of experts can be an excellent course of action.

In the face of these alternatives, the planner must keep in mind that the law is absolutely clear that the question of testamentary capacity is made at the time the testamentary document is signed.³² Accordingly, on the day the will is to be signed, the planner must ask the same series of questions she did at the initial conference to assure herself that the capacity the testator showed that day still remains at the time of signing. A checklist of the critical questions to ask the testator, prepared prior to signing, can help the planner to be thorough during what may be an emotional, pain-filled signing. Asking those questions in front of the subscribing witnesses to the will can reassure the witnesses as to the testator's capacity as they sign their names at the bottom of the will.

3. Witnesses

The Evidence Code provides an opportunity for the planner to ensure that there will be competent witnesses to testify as to the testator's capacity. Evidence Code section 870 provides, in relevant part, "A witness may state his opinion as to the sanity of a person when ... [t]he witness was a subscribing witness to a writing, the validity of which is in dispute, signed by the person whose sanity is in question and the opinion relates to the sanity of such person at the time the writing was signed"

Although this section uses the word "sanity" to describe a testator's mental condition, whereas the Probate Code uses "capacity," it clearly prequalifies every subscribing witness to testify as to capacity of the testator at the moment the will is signed.³³ Thus, it is often best if the estate planner does not herself act as a subscribing witness, thereby ensuring that at least three people will be able to testify as to the testator's capacity at the critical moment of signing.³⁴ Moreover, by carefully selecting the witnesses, the plan-

ner can ensure there will be convincing witnesses at trial to support a determination that the testator had capacity.

The importance of Evidence Code section 870 was underlined by the opinion in *In re Huston's Estate* (1912) 163 Cal. 166, 172, wherein the Supreme Court carefully drew the distinction between a general observer at the time of the signing, who can testify as to the testator's appearance, and a subscribing witness, who can render his opinion as to the testator's capacity at the moment of signing.

C. Be Alert to Signs of Undue Influence, and Take All Appropriate Steps to Eliminate Such Influence upon the Testator Before the Instruments are Signed

The mere fact that a lawyer prepares the will or trust and supervises the signing of that instrument does not prevent the document from being overturned because of undue influence.³⁵

Probate Code section 6104 provides, "The execution ... of a will ... is ineffective to the extent the execution ... was procured by duress, menace, fraud, or undue influence."³⁶ Undue influence has been defined as conduct that subjugates the testator's will to that of another, causing a disposition different from that which the testator would have made if permitted to follow his or her own inclinations.³⁷ The trial judge³⁸ is entitled to look at the "totality of circumstances" to determine whether the testator was subject to undue influence.³⁹

From the point of view of the planner, the fact patterns mentioned earlier in this article often present warning signs of undue influence. Abraham Nievod, Ph.D., an expert on undue influence,⁴⁰ has testified that testators subject to undue influence often have a "siege mentality," which is associated with: (1) physical and psychological weakness, (2) the influencer's active participation in procuring the testamentary document, and (3) the influencer unnaturally profiting from the new plan.⁴¹ There are at least two occasions when an estate planner should be especially diligent in assuring that the proposed plan is the product of the testator's own free will — when the plan includes gifts to a "care custodian," and when the estate planner must meet with the testator in a skilled nursing facility or hospital.

1. Donative Transfers to Care Custodians

Probate Code section 21350 provides in relevant part:

"[N]o provision of any instrument shall be valid to make any donative transfer to ... (6) A care custodian of a dependent adult who is the transferor ... [or] (7) A person who is related by blood or marriage to, is a domestic partner of, is a cohabitant with, or is an employee of, a person who is described in paragraph (6)"

The section goes on to define a "dependent adult" as someone 65 years or older, or a developmentally disabled adult between the ages of 18 and 64.⁴² The Supreme Court has given a very broad interpretation to "care custodian,"⁴³ which can include anyone providing "health or social services" to the elderly person. Thus, the planner

should investigate whether any beneficiary who is not a relative who performed such seemingly innocuous tasks for the testator as buying groceries or picking up medications at the pharmacy, or is related to someone who did.⁴⁴ Failure to appreciate that such a beneficiary may be a caregiver, and recommend that the client obtain a certificate of independent review, can subject the lawyer to liability to the care custodian whose bequest is subsequently disqualified.⁴⁵

2. Meeting the Client in a Care Facility or Hospital

When faced with meeting a client in the hospital, the planner should gauge the risk of a contest and, if it is high, act to protect the validity of testamentary instruments. As always, the first step is to review the current estate plan. Seeing the existing will and trust, and all codicils and amendments, is essential for the attorney undertaking such an engagement. Without seeing those instruments, or knowing that no other plan exists, the planner cannot fully evaluate the risk of a contest. The planner should also review the testator's chart both before the initial conference and before the signing of the instruments. The attorney should be permitted to see the chart, if the patient tells the staff that he or she authorizes it.⁴⁶ When viewing the chart, the attorney should pay particular attention to whether the testator is taking certain medications that can adversely affect his or her level of arousal, such as morphine, methadone and Dilaudid, or drugs that may indicate that the testator is suffering from depression, hopelessness or despair, such as Haldol, Xanax and Ativan. A review of the nurses' notes can reveal whether the testator has been suffering from hallucinations or delusions, and whether the nurses have observed significant cognitive impairments. On some occasions, the testator will be in hospice care. The hospice case manager, who is usually a registered nurse, can be an excellent source of information and judgment regarding the testator's mental condition.

Estate planning attorneys are not required to provide medical experts. However, a planner's careful attention to information available about the testator's cognitive abilities can be very persuasive support for her testimony at trial that the testator had testamentary capacity.

When visiting a testator in the hospital, always assure that all potential beneficiaries are outside the room, and not within earshot. An excellent question to ask the testator is whether he has spoken about the contents of the plan with anyone, and if so, the nature of the conversations. Whose idea was it to make a will at this late date? If the planner does go forward with preparing the instruments, she should consider having an ombudsman present at the signing, even if not technically required.⁴⁷ The planner should also always be alert to the presence of the three elements which can shift the burden of proving the lack of undue influence to the proponent of the will: (1) the alleged influencer had a confidential relationship with the testator; (2) the alleged influencer actively participated in procuring the instrument's preparation or execution; and (3) the alleged influencer unduly benefited from the plan.⁴⁸ Since estate litigators know well that the final result in will contests is often dependent on whether a presumption applies, the planner should be particularly vigilant when these elements pop up, especially when called to the hospital.

3. *Payment for Estate Planning Legal Services*

Finally, the planner should always pay careful attention to who pays her bill.⁴⁹ If one of the beneficiaries writes the check, the question arises whether payment from the beneficiary adversely affected the drafting attorney's exercise of independent judgment, and the possible existence of undue influence. Moreover, such payments may satisfy the "active participation" prong of the burden-shifting presumption. Further, the planner would never wish to "tee up" for the contestant the argument that the attorney was actually representing a beneficiary at the time she prepared estate planning instruments for the testator.⁵⁰ At a minimum, accepting payment from a beneficiary will call into question the lawyer's ethical sensitivity at a time when her credibility is crucial.⁵¹

D. Include in the Fee Agreement Provisions that Authorize the Testator's Successor-in-Interest to Pay the Estate Planner Her Normal Hourly Rate When Producing Documents, or Testifying at Deposition or Trial

Once a will contest is filed, everyone's attention becomes focused on the estate planner who drafted the instruments. Frequently she becomes the most important witness at the trial. She may spend many hours reviewing the file for privileged attorney work product⁵² and to refresh her recollection of events, and testifying at deposition and trial. The hours an estate planning attorney spends preparing for depositions, discovery, and trial to defend the estate plan she drafted are hardly justly compensated by ordinary witness fees.⁵³ Shouldn't the planner be compensated for such work? After all, the work would seem to be an integral part of the engagement to prepare an enforceable estate plan. On the other hand, if the pur-

pose of the retention was to draft certain instruments, perhaps the retention ended upon their completion.

Rather than face the uncertainty of when the attorney-client relationship ends, the better practice is to obtain a client's informed written consent to a fee arrangement that covers the planner's participation and testimony in any subsequent litigation related to the plan.⁵⁴ Inclusion of language in the planner's fee agreement for the payment of such work by the testator's successor-in-interest allows her to take on the difficult task of preparing testamentary instruments for a person whose capacity is questionable without also taking on the risk of spending many unbillable hours testifying as a witness or otherwise participating in the contest.

Nevertheless, fee agreements that contain clauses providing for the payment of the planner's fees in the event she is called to testify as witness in a will contest remain controversial. State Bar Rules of Professional Conduct prohibit attorneys from entering into an illegal agreement or collecting an "unconscionable fee."⁵⁵ One factor in determining conscionable fees is the nature and length of the professional relationship with the client.⁵⁶ In our view, if the fee agreement classifies the professional relationship as one where the attorney's services to her client begin with drafting the estate plan and continue through defense of that estate plan in any subsequent litigation, the fee agreement should pass ethical muster.

An example of a provision outlining obligations regarding future legal proceedings follows:

"Attorney may be required to testify as a witness or provide documents to litigation counsel in a future legal proceeding re-

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garding the creation, interpretation or validity of Client's estate planning documents. Attorney and Client agree that any potential action, contest, or litigation attacking the validity or seeking the interpretation of Client's estate planning documents is included within the professional engagement of attorney under this agreement. If, as part of a substituted judgment motion in a conservatorship proceeding for the Client⁵⁷ or following Client's death, requests are made to Attorney to produce copies of Attorney's files, billing records, computer records, or any other documents in Attorney's possession or control, and/or Attorney is called to testify at deposition or trial, Client will be billed at Attorney's then-current hourly rates for all time spent by Attorney on the case or matter, and Client will be obligated to pay for all costs and attorneys' fees in connection with Attorney responding to informal requests for documents or subpoenas from litigation counsel. The provisions of this paragraph are binding on Client's successors-in-interest, including conservators, executors, and successor trustees."

The attorney may also consider whether to put similar language in the trust agreement itself. Enforcing the fee provision in such a trust provision might, however, become problematic if the trust is challenged.

E. Include an Effective No Contest Clause in Your Trust and Will

Despite years of controversy, it appears as if no contest clauses will continue to be a part of California estate planning for years to come.⁵⁸ Such "in terrorem" clauses are favored by the public policies of discouraging litigation and giving effect to the purposes and intent expressed by the testator.⁵⁹ Unfortunately, as many litigators know, uncertainty over the exact scope and reach of no contest provisions often results in more litigation as beneficiaries apply to courts to determine if their challenge is a "contest" in the eyes of the law. New law passed in 2008, to take effect in 2010, will hopefully clarify no contest clauses, and alleviate the strain of "safe harbor" filings.⁶⁰ Regardless, no contest clauses will continue to be used to support a testator's intent to dispose of his property as he provides in his will or trust. Estate planners should therefore continue to use such clauses to attempt to foreclose postmortem challenges to the testamentary instruments they prepare.⁶¹

No contest clauses are effective only if a potential contestant is left something under the challenged plan. When faced with a high risk of a challenge, the attorney should identify who potential contestants are, and recommend to the testator that he leave those contestants enough so they will think long and hard before filing a contest. Sometimes the client simply will not agree to make such a gift, and other times he will immediately recognize its benefit. The planner should be aware, however, that if she drafts a will for a testator who appears to lack testamentary capacity, a beneficiary who offers it for probate may be violating the no contest clause in a previous will.⁶²

Under the current statutory scheme, the planner can either include or exclude petitions under Probate Code section 850 as contests when drafting the no contest clause.⁶³ Section 850 authorizes

petitions to determine the character, title, or ownership of property. Surviving spouses have often used that section for a court determination of whether community property is included in the assets that the other spouse has purportedly added to his or her trust. Changes to Probate Code section 21300 et seq. expressly provide that no contest clauses are enforceable against certain property ownership claims. The drafting attorney should consider including a challenge to such claims as one of the actions which will cause a beneficiary to forfeit his or her inheritance. This is especially so when an estate planner represents both husband and wife, and has spent significant time with them exploring the community and separate character of their property, and they have agreed on which of their assets are community and which are separate.

III. CONCLUSION

When an estate planner faces a client whose capacity or ability to resist undue influence is in doubt, she often does so under extreme pressure. The planner may have received an emotional call from an existing client about a loved one's impending death, or received a frantic call from a new client saying he or she is dying and needs a will. The planner's natural instincts are to take whatever steps are necessary, including trips to the hospital or the client's home, to complete the task before death occurs. This article has outlined various steps the planner can take to assure that the plan she prepares in fact accords with the client's wishes. Having decided the testator has testamentary capacity and is not subject to undue influence, the planner can also use this article to determine what steps she can take to minimize the risk that the instruments she prepares will be successfully challenged following the client's death.

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ENDNOTES

1. Prob. Code, § 21350 et seq.
2. *Burch v. George* (1994) 7 Cal.4th 246; *Ferraro v. Camarlinghi* (2008) 161 Cal.App.4th 509.
3. *Estate of Pittman* (1998) 63 Cal.App.4th 290.
4. *Estate of Neilson* (1962) 57 Cal.2d 733; *In re Estate of Bryant* (1935) 3 Cal.2d 58; *Estate of Pittman*, *supra*, 63 Cal.App.4th 290.
5. *Estate of Callahan* (1967) 67 Cal.2d 609. For an excellent summary of the types of dementia from which a testator may suffer see Diagnostic and Statistical Manual of Mental Disorders (DSM-IV) (American Psychiatric Association 1994) pp. 147-171.
6. *Estate of Beckley* (1965) 233 Cal.App.2d 341; *Estate of Bliss* (1962) 199 Cal.App.2d 630.
7. *Estate of Fritschi* (1963) 60 Cal.2d 367.
8. *Estate of Jacobs* (1938) 24 Cal.App.2d 649.
9. One of the well-recognized indicia of undue influence is a beneficiary's attorney preparing the estate plan for the testator. Attorneys often try to avoid the



claim of divided loyalties by arguing that their representation of the beneficiary had concluded. However, there are numerous cases (usually arising in a legal malpractice context) in which courts have opined that an attorney's representation was ongoing because there was no dismissal by the client, or letter from the attorney to the client, terminating the relationship. (See, e.g., *Worthington v. Rusconi* (1994) 29 Cal.App.4th 1488, 1497 [representation not complete until agreed tasks or events have occurred, client consents to termination, or court grants an application by counsel for withdrawal]; *Hensley v. Caietti* (1993) 13 Cal.App.4th 1165, 1173.) Note also that Civil Code section 340.6 tolls an attorney malpractice action for as long as the attorney continues to provide representation. State Bar Rules of Professional Conduct, rule 3-310, prohibits an attorney from representing interests adverse to a current or former client. (But see *In re Estate of Bacigalupi* (1927) 202 Cal. 450 [upholding estate plan drafted by beneficiary's attorney]; see also Evid. Code, § 962 [waiving privilege when an attorney represents joint clients].)

10. *Estate of Baker* (1982) 131 Cal.App.3d 471.
11. *In re Estate of Scott* (1900) 128 Cal. 57; *Estate of Gilbert* (1957) 148 Cal.App.2d 761, 768.
12. *In re Estate of De Laveaga* (1913) 165 Cal. 607.
13. *Estate of Wynne* (1966) 239 Cal.App.2d 369; *Rollins v. Smith* (1925) 72 Cal.App. 773.
14. *Estate of Jamison* (1953) 41 Cal.2d 1, 13.
15. Prob. Code, § 6100.5(a). If the testator cannot meet the standard, consider the effect of medication. If the testator is in the hospital or skilled nursing facility, obtain his permission to review his chart, make a list of the medications he is on, and speak to his doctor about their possible impact on his cognition. Can the testator be taken off some medications for a short period of time to allow his mental processes to clear so he can sign estate planning documents?
16. If the testator appears lucid, but the estate plan will be signed in a hospital or nursing facility, pay attention to the testator's stamina. Reviewing the provisions of a long trust can mentally and physically fatigue a weakened testator who may have refused pain medication until after your visit. Take care to use plain language and assess the comfort of the testator throughout the review of his estate plan.
17. Evid. Code, §§ 957, 960, 961.
18. The rule in California appears to be that the same principles governing the existence or nonexistence of undue influence apply to "an estate plan formalized by simultaneously executed inter vivos trust and pour-over will as to a will alone." *Hagen v. Hickenbottom* (1995) 41 Cal.App.4th 168, 182.
19. Prob. Code, § 6124.
20. *In re Estate of Hall* (1906) 149 Cal. 143.
21. *In re Estate of Phillips* (1927) 202 Cal. 490, 496; *Estate of Glass* (1958) 165 Cal.App.2d 380.
22. See, e.g., *Estate of Lingenfelter* (1952) 38 Cal.2d 571, 583 (citing *Estate of Sexton* (1926) 199 Cal. 759, 769): "A person who has mental power to understand and to transact the ordinary business affairs of life doubtless has capacity to make a valid will. But the converse is not necessarily true. Mental perception and power to think and reason of a lesser degree than that which is required in the understanding and transaction of ordinary business may be all that is requisite to the full understanding of everything involved in the execution of a will."
23. *Estate of Bullock* (1956) 140 Cal.App.2d 944, 950; *Estate of Glass, supra*, 165 Cal.App.2d at p. 383; *Estate of Gilbert, supra*, 148 Cal.App.2d at p. 767.
24. See, e.g., *Estate of Wolf* (1959) 174 Cal.App.2d 144, 149-150.
25. See, e.g., *id.* at p. 146.
26. See Mini Mental Status Examination (MMSE). (Folstein et al., *Mini-Mental State: A Practical Method for Grading the Cognitive State of Patients for the Clinician* (1975) 12 J. Psychiatric Research 189-198.
27. Boyer, *Representing the Client With Marginal Capacity: Challenges for the*

Elder Law Attorney – A Resource Guide (Spring 1999) 12 NAELA Q. 3.

28. See Judicial Council Forms, form GC-335.
29. *Estate of Jamison, supra*, 41 Cal.2d 1; *Estate of Wynne, supra*, 239 Cal.App.2d 369; *Estate of Dopkins* (1949) 34 Cal.2d 568; *In re Estate of Young* (1940) 38 Cal.App.2d 588.
30. Prob. Code, § 811(a).
31. *Estate of Lauth* (1960) 180 Cal.App.2d 313, 317.
32. *Estate of Byrne* (1889) 3 Cal. 69; *Estate of Lingenfelter, supra*, 38 Cal.2d 571; *Estate of Fritschi, supra*, 60 Cal.2d 367. However, proof of incompetency at prior and subsequent periods can be used to establish incompetency on a given day. See *Estate of Fosselman* (1957) 48 Cal.2d 179, 185. If testamentary incapacity is caused by dementia at one time, there is a strong inference that the incompetence continues at other times, because the mental disorder is a continuous one that progressively worsens. *Id.* at p. 186.
33. See generally Cal. Law Revision Com. comment to Evid. Code, § 870.
34. See *Camperi v. Chiechi* (1955) 134 Cal.App.2d 485 (lay witness's testimony regarding testator's mental capacity to make will at the time of execution can provide substantial support to finding of competency).
35. *Estate of Gonzalez* (2002) 102 Cal.App.4th 1296; *David v. Hermann* (2005) 129 Cal.App.4th 672. By contrast, *Burch v. George, supra*, 7 Cal.4th at p. 259, provides an excellent example of when an attorney's testimony (there, through a declaration) can play a critical role in the court's decision concerning an estate plan.
36. See also *Estate of Ricks* (1911) 160 Cal. 467.
37. *Ibid.*; *Estate of Baker* (1982) 131 Cal.App.3d 471, 480.
38. Jury trials have long been eliminated in will or trust contests. "Except as otherwise expressly provided in this code, there is no right to a jury trial in proceedings under this code." (Prob. Code, § 825.)
39. *David v. Hermann, supra*, 129 Cal.App.4th at p. 684; *Estate of Graves* (1927) 202 Cal. 258.
40. See *David v. Hermann, supra*, 129 Cal.App.4th at p. 687.
41. Nievod, *Undue Influence in Contract and Probate Law* (1993) *Cultic Studies Journal*, vol. 10, No. 1, p. 10.
42. Welf. & Inst. Code, § 15610.23.
43. *Bernard v. Foley* (2006) 39 Cal.4th 794.
44. *Id.* at p. 808. ("For us to construe the statute [Prob. Code, § 21350] as excluding uncompensated or nonprofessional care on the ground the word 'services' implies such exclusion would fly in the face of the broad introductory phraseology cast thus in the disjunctive.")
45. *Osornio v. Weingarten* (2004) 124 Cal.App.4th 304, 337.
46. Health & Safety Code section 123100 provides that every person having ultimate responsibility for decisions respecting his or her own health care also possesses the right to complete information respecting his or her condition and care provided. Accordingly, a patient can view his or her own medical records at any time, or grant access to his or her attorney under Evidence Code section 1158.
47. Probate Code section 4675 requires an ombudsman to be present and to sign any Advance Health Care Directive signed by a patient while in a hospital or skilled nursing facility.
48. Prob. Code, § 8252; see also *Estate of Lingenfelter, supra*, 38 Cal.2d at p. 585; *Rice v. Clark* (2002) 28 Cal.4th 89, 97; *David v. Hermann, supra*, 129 Cal.App.4th at p. 684.
49. Rule 3-310(f) of the State Bar Rules of Professional Conduct provides:

A member shall not accept compensation for representing a client from one other than the client unless: (1) There is no interference with the member's independence of professional judgment or with the client-



- lawyer relationship; and (2) Information relating to representation of the client is protected as required by Business and Professions Code section 6068, subdivision (e); and (3) The member obtains the client's informed written consent, provided that no disclosure or consent is required if: (a) such nondisclosure is otherwise authorized by law; or (b) the member is rendering legal services on behalf of any public agency which provides legal services to other public agencies or the public.
50. But see *Estate of Watkins* (1947) 81 Cal.App.2d 465, 475 (beneficiary's acts in calling attorney, being present during signing, and paying lawyer's bill insufficient to show active participation in procuring will).
 51. Rules Prof. Conduct, rule 3-310.
 52. A writing that reflects an attorney's impressions, conclusions, opinions, legal research or theories is not discoverable under any circumstances. The work product of an attorney, other than a writing described in subdivision (a), is not discoverable unless the court determines that denial of discovery will unfairly prejudice the party seeking discovery in preparing that party's claim or defense or will result in an injustice. (Code Civ. Proc., § 2018.030, subs. (a) and (b).)
 53. Except as otherwise provided by law, witness fees for each day's actual attendance, when legally required to attend a civil action or proceeding in the superior courts, are thirty-five dollars (\$35) a day and mileage actually traveled, both ways, twenty cents (\$0.20) a mile. (Gov. Code, § 68093.)
 54. Rules Prof. Conduct, rule 4-200(b)(11).
 55. Rules Prof. Conduct, rule 4-200(a). A member shall not enter into an agreement for, charge, or collect an illegal or unconscionable fee.
 56. Rules Prof. Conduct, rule 4-200(b)(7).
 57. See, e.g., *Murphy v. Murphy* (2008) 164 Cal.App. 4th 376.
 58. See Hartog & Wolff, *The Dead Hand Writes—And, Having Writ, Moves On: The Increasing Prevalence of No Contest Litigation in California* (Winter 2003) Cal. Trusts and Estates Q., vol. 9, No. 4; MacDonald & Godshall, *California's No Contest Statute Should Be Reformed Rather than Repealed* (2004) Cal. Trusts and Estates Q., vol. 10, No. 3; Hartog & Kovar, *Why Repealing the No Contest Clause is a Good Idea* (2004) Cal. Trusts and Estates Q., vol. 10, No. 3; Horton, *A Legislative Proposal to Abolish Enforcing No Contest Clauses in California* (2004) Cal. Trusts and Estates Q., vol. 10, No. 3; Hartog & Kovar, *And Now the Rest of the Story: No Contest Clauses Under the New Rules of Section 21305* (2005) Cal. Trusts and Estates Q., vol. 11, No. 3; Kovar & Hartog, *Can You Hear Me Now? Drafting a No Contest Clause Under the New Rules* (2005) Cal. Trusts and Estates Q., vol. 11, No. 4.
 59. *Burch v. George*, supra, 7 Cal.4th at p. 254; *Estate of Hite* (1909) 155 Cal. 436, 439-441.
 60. See Prob. Code, §§21310-21315. Estate planners should follow the effects of this law closely, and make every effort to incorporate enforceable no contest provisions into post-2010 wills and trusts.
 61. However, see Kovar & Hartog, *Can You Hear Me Now? Drafting a No Contest Clause Under the New Rules*, supra, for strong arguments why practitioners should be including carefully crafted no contest clauses in their wills and trusts only after consultation with their clients.
 62. See *Estate of Gonzalez* (2002) 102 Cal.App.4th 1296, in which a beneficiary named in a will signed three weeks before the testator's death filed a petition to probate that will. The petition was denied on grounds that the beneficiary had unduly influenced the testator to name him as sole beneficiary of the will. The Court of Appeal affirmed the probate judge's ruling that the petition to probate the later will (which revoked all prior wills) was a contest of the earlier will. As a result, the beneficiary who brought the petition lost his one-fourth share under the earlier will.
 63. Prob. Code, § 21305(a)(2).



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