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TRUST AND ESTATE LAW

**ANTICIPATING AND ADDRESSING THE
DILEMMA POSED BY A “FADING” TRUSTEE,
OR AT LEAST TRYING**

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DIMENSIONS OF THE PROBLEM

The Population of Elderly Persons is Growing

U.S. Demographics

- In the United States in 2016, the population age 65 and over numbered 49.2 million (approximately 15.2% of the population, or one in every seven Americans)
- The 85 and over population is projected to more than double from 6.4 million in 2016 to 14.6 million in 2040
- In January-June 2017, the percentage of older adults age 85 and over needing help with personal care (22%) was more than twice the percentage for adults ages 75–84 (9%) and more than six times the percentage for adults ages 65–74 (3%)

<https://acl.gov/sites/default/files/Aging%20and%20Disability%20in%20America/2017/OlderAmericansProfile.pdf>

DIMENSIONS OF THE PROBLEM

Alzheimer's Disease

- Accounts for est. 60-80% of dementias
- Initial symptom: difficulty remembering new information
- As disease progresses, cognitive and functional abilities decline
- People 65+ on average survive 4-8 years from diagnosis, but some live 20 years

DIMENSIONS OF THE PROBLEM

Dementia Is Becoming Increasingly Prevalent

- Dementia found in 5% of people in their 70's
- Dementia found in 25% of people in their 80's
- Dementia found in 35% of those beyond 90 years old
- *As many as 15% of the population over 71 may be cognitively compromised, significantly demented or incapacitated*

Plassman BL, Langa KM, Fisher GG, et al. Prevalence of dementia in the United States: the aging, demographics, and memory study. *Neuroepidemiology*. 2007;29(1-2):125-132.

DIMENSIONS OF THE PROBLEM

Alzheimer's Disease Grows with Aging Population

- Current Prevalence
 - Est. 5.4 million (5.2 million age 65+)
 - Two-thirds are women
 - Age 65+: 13% (1 in 8), Age 85+: 43%
- Future Prevalence
 - 2030: est. 7.7 million
 - 2050: est. 11-16 million

DIMENSIONS OF THE PROBLEM

The Elderly Have More Wealth

- Wealth gap
 - In 2009, typical net worth of a US household headed by person age 65 or older is **47 times** greater than a household headed by person under 35
 - Gap more than doubled since 2005 and nearly 5 times what was 25 years ago

“The Rising Age Gap in Economic Well-Being: The Old Prosper Relative to the Young,”
by Fry, R., Cohn, D., Livingston, G., and Taylor, P., 11/7/2011, Pew Research Center

DIMENSIONS OF THE PROBLEM

The Transfer of Wealth is Increasing

Estimated Wealth Transfer in the U.S.

- Estimated transfer of about \$12 trillion in wealth from those born in 1920s/1930s to Baby Boomers in the coming years
- Estimated transfer of about \$30 trillion in wealth from Baby Boomers to their heirs over the next 30 to 40 years

<https://www.businessinsider.com/biggest-transfer-of-wealth-in-history-2014-6>

DIMENSIONS OF THE PROBLEM

Financial Elder Abuse Occurs Frequently

- Estimated 7.6%–10% of elderly are abused each year
- Five million victims per year
- Suspected that only 1 in 14 cases are reported
- Self-reported financial abuse reported at higher rate than other abuse
- 90% of abuse perpetrated by family members

National Center on Elder Abuse, Administration on Aging, “Statistics/Data”

THE PROBLEM: A “FADING” TRUSTEE

Attorney suspects their client-trustee is beginning to lose capacity; *what can the attorney do?*

- California Rules of Professional Conduct forbid the attorney from disclosing facts and communications adverse to the fiduciary who is serving
- The attorney representing a fiduciary is considered to have a duty only to the fiduciary; disclosure would expose the attorney to claims by the fiduciary and possible disciplinary action (Bus. & Prof. Code § 6068(e))
- Attorney’s dilemma: ethical duties to the client weighed against protecting the client from civil liability to third parties

Compounding the problem:

A lack of guidance regarding the *capacity* required to serve as a fiduciary

“Capacity” Can Be a Hydra of Many Heads

HE CAN'T STOP GIVING PEOPLE GIFTS...
I'M WORRIED ABOUT HIS MENTAL
CAPACITY



VARYING CAPACITY STANDARDS

To do what?

- Contracts/Property Transfers – Civ. Code §§ 38-39, 1556
- Conservatorship of the Estate – Prob. Code § 1801(b)
- Medical Decisions – Prob. Code § 813
- “Simple” Estate Planning – Prob. Code § 6100.5
- “Complex” Estate Planning – Prob. Code § 812
- Catch-All – Prob. Code § 812, e.g., to marry, to make a gift
- Testify – Evid. Code § 701
- Serve as Trustee – Prob. Code §§ 812 and 15642; but what is the *decision*?
(Difficult to apply when the concerns are prospective rather than retrospective)
- Estate planning documents using one of those standards or creating another

GENERAL PRINCIPLES APPLICABLE TO ALL CAPACITY DETERMINATIONS

- Due Process in Competency Determinations Act (“DPCDA”)
 - Presumption of Capacity – Prob. Code § 810(a)
 - Diagnosis alone cannot support finding of incapacity – must tie deficit to one or more mental findings (e.g., memory)
 - Prob. Code § 810(c) – burden of proof
 - Prob. Code § 811 – evidence
- Determined at time of decision in question – evidence from other times still relevant, becomes more attenuated the longer it is from the act
- Need to distinguish “permanent” from transitory conditions
- Finding of incapacity at one time can create inference or presumption of subsequent incapacity
- Settlor can define capacity in the trust instrument (*Rands v. Rands* (2009) 178 Cal.App.4th 907)
- Expensive to litigate the issue of capacity

CURRENT STATE OF CAPACITY LAW – DPCDA

Evidentiary rules applicable in *all* cases:

- Dementia is not a bogeyman: a mere diagnosis of a mental disorder (e.g., Alzheimer's-type dementia) is insufficient alone to support an incapacity determination
- Any incapacity determination must be supported by evidence of one or more mental function deficits and evidence that the deficit(s) significantly impaired the person's *ability* to understand and appreciate the consequences of **the act or decision in question****

***Difficult to apply in the context of prospective decision-making*

CURRENT STATE OF CAPACITY LAW –DPCDA

Types of mental functions:

- ***Alertness and attention*** including consciousness level, orientation to time, place, person, and situation, and ability to concentrate
- ***Information processing*** including short-and long-term memory; recognition of familiar things and people; ability to understand and communicate, reason, plan, organize, and carry out actions in one's self-interest
- ***Thought processes*** (deficits include severely disorganized thinking, hallucinations, delusions, and uncontrollable, repetitive or intrusive thoughts)
- ***Ability to modulate mood and affect*** (deficits include pervasive and persistent or recurrent euphoria, anger, anxiety, fear, panic, depression, hopelessness, helplessness, or apathy that is inappropriate to the individual circumstances)

DPCDA virtually necessitates using expert witnesses

OPTIONS: CONSERVATORSHIP – Prob. Code § 1801(b)

- Substantially unable to manage finances
- Substantially unable to resist fraud and undue influence

Effects of Conservatorship

- Prob. Code § 1871 (transactions)
- Prob. Code § 1872 (but not ...)
- Prob. Code § 1900 (marry)
- Prob. Code § 1910 (vote)

Substituted Judgment – Prob. Code § 2580

OPTIONS: FINANCIAL ELDER ABUSE ACTION

No requirement to prove cognitive impairment to prevail in financial elder abuse case

Obtaining testamentary or donative transfer (*inter vivos* or at death) by undue influence is financial elder abuse

Definition of “undue influence” – Welf. & Inst. Code § 15610.70

“Vulnerability,” *i.e.*, ***susceptibility to undue influence***, is the first factor

Cognitive deficits correlate to vulnerability

OPTIONS: SUGGEST VOLUNTARY RESIGNATION

ESTATE PLANNING ATTORNEY'S CAPACITY "ASSESSMENTS"

- Open ended; not yes/no questions
- Emphasize questions geared towards applicable legal test: you are an attorney not a neuropsychologist
- Understand your client's background: "Who is the President?" may be completely irrelevant
- Testing client's ability to distinguish what are and aren't his/her assets
- Clear, contemporaneous notes
- Request permission to contact others (e.g., accountant)

NOTE: attorney cannot take action against client without their consent; cannot share confidential information

OPTIONS: SUGGEST VOLUNTARY RESIGNATION

ESTATE PLANNING ATTORNEY'S CAPACITY "ASSESSMENTS"

Optimize conditions:

- Time of day when client is at his/her "best"?
- Familiar surroundings v. away from outside influences
- No distractions
- Good night's sleep
- Make sure the client can hear you and clearly see any documents

Consider neuropsychological evaluation

Discussions with family members and others close to the client

OPTIONS: SUGGEST VOLUNTARY RESIGNATION

DETECTION OF COGNITIVE CHANGES/PREVENTION OF ELDER ABUSE

- Involvement in your client's life
- Knowing your client's trusted advisors (accountant, securities broker, insurance agents)
- Knowing and being able to communicate with health care providers
- ***Prevent isolation:*** encourage other family members and friends to visit and stay involved.
- Sensitivity to changes, no denial

OPTIONS: SUGGEST VOLUNTARY RESIGNATION

DETECTION AND PREVENTION OF ELDER ABUSE

- Changes in selection of appropriate fiduciaries (Persons to hold powers of attorney for financial and health care decisions/successor trustees/procedures for transferring authority to new trustee)
- Advance consent to procedure/test to establish incapacity
- Open family discussions counteract secretive behavior
- Selection of professional/reputable caregivers; costs an issue

OPTIONS: SUGGEST VOLUNTARY RESIGNATION

GATHERING INFORMATION FROM OTHERS

- Advance permission may be needed
- Avoid questions calling for opinions, conclusions, and speculation (e.g., “Did he answer your question?”, not “Did he understand your question?”)
- Focus on obtaining facts
- Opinions may not have a legitimate basis; focus on basis for opinion.
- Important topics
- Client’s statements to others about:
 - Family, persons close to him
 - Significant assets
 - Prior interests/activities/values
 - Himself/herself

OPTIONS: SUGGEST VOLUNTARY RESIGNATION

GATHERING INFORMATION FROM OTHERS

- Client's management of his/her own affairs (*e.g.*, paying bills, depositing checks, following finances, shopping)
- Client's independence/dependence on others (*e.g.*, ability to feed self, maintain hygiene, maintain home, take medicines)
- But what was "baseline" ? (*e.g.*, if client is uninterested in his/her finances, ignorance about this is less meaningful)
- Client's behavior/personality changes
- Significant external changes (*e.g.*, death of spouse/child, relocation) potentially affecting cognition
- External factors influencing client's cognition/behavior (*e.g.*, time of day, unfamiliar surroundings, unfamiliar faces)
- Other physical impairments (*e.g.*, poor vision or hearing)

OPTIONS: SUGGEST VOLUNTARY RESIGNATION

RELEVANCE OF INFORMATION FROM OTHERS

- Duration of relationship/knowledge of “baseline”
- Proximity of interactions to decision
- Frequency of interactions
- Depth/superficiality of relationship
- Shared interests/activities
- Witnesses’ own ability to recall events
- Witnesses’ bias

OPTIONS: SUGGEST VOLUNTARY RESIGNATION

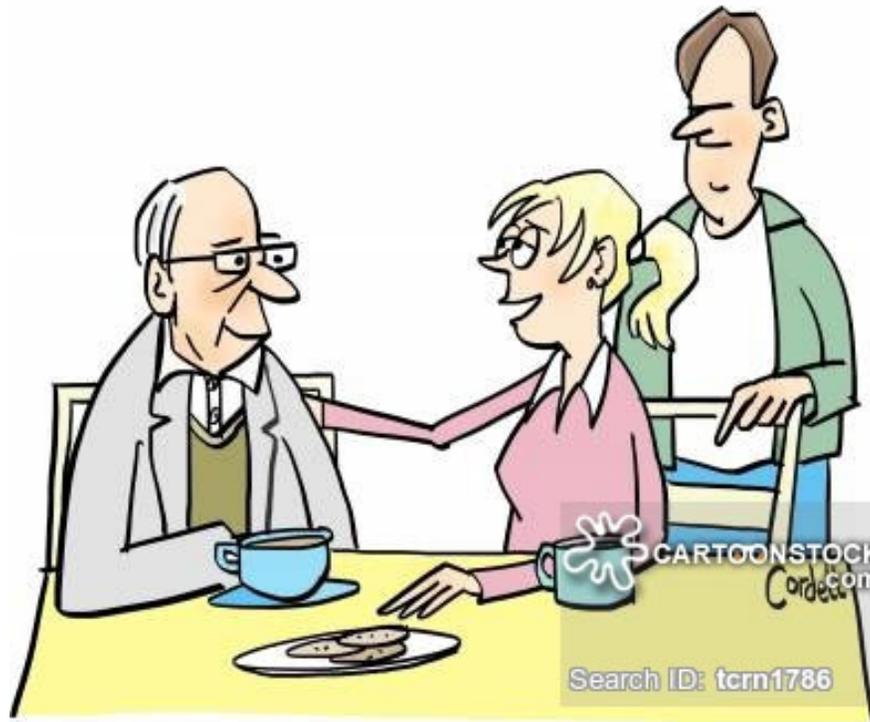
WRITINGS

Writings

- Can be dispositive, but
 - Composed independently?
 - Facts accurate?
 - Consistent style of prose?
 - Legible? Shaky?

OPTIONS: MECHANISMS FOR REMOVAL OF A “FADING” TRUSTEE

- Trustee’s voluntary resignation – this is generally the best resolution; but not always practical; may be too late or difficult to persuade the trustee
- According to the terms of the trust instrument
 - A thoughtfully-drafted trust instrument should anticipate and grant one or more persons the power to remove an incumbent trustee, for specified reasons or on specified contingencies (e.g., the “committee” method)
 - See article by John A. Hartog, “*Sunrise, Sunset: What to Do About a Trustee with Diminishing Capacity*,” (California Trusts and Estates Quarterly, Vol. 20, Issue 4 (2014)) for **sample trust provisions**
- Court petition filed by a settlor, co-trustee, or beneficiary pursuant to Prob. Code § 17200; Prob. Code § 15642 grounds for removal include:
 - Trustee substantially unable to manage trust’s financial resources or otherwise properly execute the duties of office
 - Trustee substantially unable to resist fraud or undue influence



**“Don’t worry - the Power of Dad still trumps
the Power of Attorney.”**

CONCLUSIONS

- Complexity, high cost, high risk uncertainty in proving or disproving capacity
- Emotionally-driven litigation adds to the costs – financial and psychic
- Well-drafted trustee removal provision (committee approach as an alternative to conservatorship)
- Need for alternative dispute resolution mechanisms, creative lawyering

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