THE UNDULY INFLUENCED LITIGANT: HOW TO LITIGATE AGAINST PARTIES WITH DIMINISHED CAPACITY

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I. Overview of the Problem

II. Ethical Issues

A. California Rules of Professional Responsibility

1. Rule 1.2: "(a) Subject to rule 1.2.1, a lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by rule 1.4, shall reasonably consult with the client as to the means by which they are to be pursued. Subject to Business and Professions Code section 6068, subdivision (e)(1) and rule 1.6, a lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation. A lawyer shall abide by a client's decision whether to settle a matter."

2. Rule 1.4: "(a) A lawyer shall: (1) promptly inform the client of any decision or circumstance with respect to which disclosure or the client's informed consent is required by these rules or the State Bar Act; (2) reasonably consult with the client about the means by which to accomplish the client's objectives in the representation; (3) keep the client reasonably informed about significant developments relating to the representation …."

3. "Informed consent" means a person's agreement to a proposed course of conduct after the lawyer has communicated and explained (i) the relevant circumstances and (ii) the material risks, including any actual and reasonably foreseeable adverse consequences of the proposed course of conduct.

4. The Rules imply that if a client lacks capacity to engage with the lawyer in order to provide informed consent and make appropriate decisions to direct counsel that it is a violation of the Rules to purport to represent a client for any purpose. If a

client lacks capacity, there are means to represent the interests of the client by and through a guardian ad litem or conservator of the estate. California has reaffirmed its decision not to adopt ABA Model Rule 1.14, which allows disclosures regarding a diminished-capacity client "to the extent reasonably necessary to protect client's interests." A lawyer may not make any disclosures to third persons or take any protective actions (except to prevent a criminal act). There are limited circumstances in which a court may appoint a lawyer to represent the interests of a client with diminished capacity. A lawyer must decline a representation or withdraw if the client lacks the capacity to maintain a normal attorney-client relationship consistent with the Rules.

B. Deciding whether to represent a client with capacity issues

1. California law provides statutory guidance to practitioners to assess a client's capacity, but does not provide much guidance regarding what to do in the event that the assessment reveals that the client lacks capacity. Due Process in Competence Determinations Act (DPCDA) Probate Code §§ 810–813, 1801, 1881, 3201, 3204; *see also* §§ 6100, 6100.5.

2. SDBA Opinion (1990). "[A] lawyer must be satisfied that the client is competent to make a will and is not acting as a result of fraud or undue influence." Once the attorney has reason to be concerned about capacity, the issue must be resolved. "The attorney should schedule an extended interview with the client without any interested parties present and keep a detailed and complete record of the interview. ***If the lawyer is not satisfied that the client has sufficient capacity and is free of undue influence and fraud, no will should be prepared.*** The attorney may simply decline to act and permit the client to seek other counsel or may recommend the immediate initiation of a conservatorship." [If the appropriate ethical decision is to decline to prepare a will for a client who lacks capacity or can act of her own free will, it stands to reason that a lawyer's ethical responsibility is to decline to represent such a client for any other purpose such as in litigation.]

3. Although California has declined to adopt Model Rule 1.14, there is a useful comment that pertains to accepting a representation of a client who indicates an intent to make a will.

One can extrapolate from it the type of discussion a lawyer might be well advised to have with a client whom the lawyer suspects may lack capacity or is subject to undue influence. Comment to MR 1.14: "In determining the extent of the client's diminished capacity, the lawyer should consider and balance such factors as: the client's ability to articulate reasoning leading to a decision, variability of state of mind and ability to appreciate consequences of a decision; the substantive fairness of a decision; and the consistency of a decision with the known long-term commitments and values of the client. In appropriate circumstances, the lawyer may seek guidance from an appropriate diagnostician."

C. Testamentary/Contractual Capacity v. Functional Capacity

1. Testamentary or contractual capacity (also known as "decisional capacity") refers to the capacity to make a decision that, in its simplest form, involves deciding whom to gift one's property, and can involve decisions that require a greater appreciation for their consequences such as taking advantage of tax planning techniques. Functional capacity requires greater "executive functioning" of the brain, also known as "judgment" and requires problem-solving and more complex decision-making skills.

2. The data indicates that while a person may be able to retain decisional capacity until they are severely impaired, a person may lose functional capacity with mild cognitive impairment. *See* Aretouli & Brandt, "Everyday functioning in mild cognitive impairment and its relationship with executive cognition", Int J Geriatr Psychiatry. 2010 Mar; 25(3): 224–233.

3. The following is an explanation of functional capacity from an article published in "Dementia & Neuropsychologica" entitled "Judgment in Mild Cognitive Impairment and Alzheimer's Disease" by Patrícia Helena Figueirêdo Vale Capucho and Sonia Maria Dozzi Brucki:

Judgment can be defined as the capacity to make decisions after careful consideration of available information, contextual factors, possible solutions and probable outcomes. It is intimately linked with the process of problem solving and

decision-making, and these terms are often used interchangeably in the neuropsychological literature.

The conceptual template for a decision includes three components: courses of action, uncertain events and consequences. Decision-making refers to the entire process of choosing a course of action. Judgment refers to the components of the decision-making process that are concerned with assessing, estimating and inferring what events will occur and what the decision-maker's evaluative reactions to those outcomes will be.

From this perspective, judgment is more an evaluative process (the act of settling on a decision/solution after going through the stages of active problem solving) and can be considered one of the last stages of active problem solving. Stating that a person has "bad judgment" means that this person made a poor decision after considering the information/context available.

Thus, it can be understood that the outcomes of the decisions are based on judgment. For the execution of good judgment it is necessary to attempt to comprehend a situation, to create adequate strategies to approach a problem, identify appropriate goals, make choices between one idea or another, evaluate potential consequences of different courses of action, inhibit inappropriate responses, initiate purposeful behaviors and monitor the effects of a chosen solution.

From a neuropsychological perspective, the concept of judgment involves many cognitive aspects including memory, language, sustained attention and reasoning but especially engages the executive functions. Beyond cognitive functions, judgment is also involved with emotional aspects and social conventions.

Executive function refers to the capacity to engage in complex and objective behaviors, which require working memory, planning, organization, sequencing and abstraction. People with deficits in executive functions can present poor judgment for many reasons, such as taking impulsive decisions, focusing on only one solution because of reduced mental flexibility or failing to consider long-term outcomes.

D. Evaluating Capacity

1. A client is of unsound mind or lacks capacity to make a decision or do a certain act if there is evidence of a deficit in at least one

of the following mental functions that impairs the client's ability to understand and appreciate the consequences of his or her actions with regard to the type of act or decision in question:

2. Alertness and attention – This includes the client's level of arousal or consciousness; orientation to time, place, person, and situation, and ability to attend and concentrate. Prob. Code § 811(a)(1).

3. **What to look for**: does the client focus on you when you are speaking to him or her; can the client keep his or her attention on you for a reasonable period of time; etc.

4. **What to ask**: do you know where you are; do you know who brought you here; do you know why you are here; etc.

5. Information processing – This includes the client's short- and long-term memory, including immediate recall; ability to understand or communicate with others, either verbally or otherwise; recognition of familiar objects and familiar persons; ability to understand and appreciate quantities; ability to reason using abstract concepts; ability to plan, organize, and carry out actions in one's own rational self-interest; and ability to reason logically. Prob. Code § 811(a)(2).

6. Thought processes – A client's deficit in thought processing may be demonstrated by the presence of severely disorganized thinking; hallucinations; delusions; uncontrollable, repetitive, or intrusive thoughts. Prob. Code § 811(a)(3).

7. Ability to modulate mood and affect – A client's deficit in this ability may be demonstrated by the presence of a pervasive and persistent or recurrent state of euphoria, anger, anxiety, fear, panic, depression, hopelessness or despair, helplessness, apathy or indifference, that is inappropriate in degree to the individual's circumstances. Prob. Code § 811(a)(4).

8. Prob. Code § 812: Except where otherwise provided by law, including, but not limited to, Section 813 and the statutory and decisional law of testamentary capacity, a person lacks the capacity to make a decision unless the person has the ability to communicate verbally, or by any other means, the decision, and

to understand and appreciate, to the extent relevant, all of the following: (a) The rights, duties, and responsibilities created by, or affected by the decision. (b) The probable consequences for the decisionmaker and, where appropriate, the persons affected by the decision. (c) The significant risks, benefits, and reasonable alternatives involved in the decision.

E. Looking for indicia of undue influence

1. Who referred the client?

2. Who contacted you about the potential representation?

3. If a person other than the client, what was the nature of the communication?

4. Who made the appointment?

5. Who brought the client to meet you?

6. What role did this third person attempt to play in communicating the client's objectives?

7. What was the relationship of this person with the client? What was the dynamic between them?

8. How effectively did the client communicate independently? Did he rely on notes prepared before the meeting?

9. Was the client previously represented by different counsel? What was the nature of that relationship? Why was the client seeking to make a change?

10. How do the client's goals compare with prior actions or goals? How do those goals impacts others with whom the client has or had relationships?

11. If there were a change, can the client articulate the reasons for the changes? Do those reasons make logical sense under the circumstances explained by the client?

12. How are you expected to communicate with the client going forward?

III. Trustee Removal (The Sterling Problem)

A. Functional Capacity

B. Capacity to Revoke

IV. Powers of Attorney

A. Prob. Code § 4120: A natural person having the capacity to contract may execute a power of attorney.

B. Prob. Code § 4124: A durable power of attorney is a power of attorney by which a principal designates another person as attorney-in-fact in writing and the power of attorney contains any of the following statements: (a) "This power of attorney shall not be affected by subsequent incapacity of the principal." (b) "This power of attorney shall become effective upon the incapacity of the principal." (c) Similar words showing the intent of the principal that the authority conferred shall be exercisable notwithstanding the principal's subsequent incapacity.

C. Prob. Code § 4125: All acts done by an attorney-in-fact pursuant to a durable power of attorney during any period of incapacity of the principal have the same effect and inure to the benefit of and bind the principal and the principal's successors in interest as if the principal had capacity.

D. Prob. Code § 4264: An attorney-in-fact under a power of attorney may perform any of the following acts on behalf of the principal or with the property of the principal only if the power of attorney expressly grants that authority to the attorney-in-fact:

> (a) Create, modify, revoke, or terminate a trust, in whole or in part. If a power of attorney under this division empowers the attorney-in-fact to modify or revoke a trust created by the principal, the trust may be modified or revoked by the attorney-in-fact only as provided in the trust instrument.

(b) Fund with the principal's property a trust not created by the principal or a person authorized to create a trust on behalf of the principal.

(c) Make or revoke a gift of the principal's property in trust or otherwise.

(d) Exercise the right to reject, disclaim, release, or consent to a reduction in, or modification of, a share in, or payment from, an estate, trust, or other fund on behalf of the principal. This subdivision does not limit the attorney-in-fact's authority to disclaim a detrimental transfer to the principal with the approval of the court.

(e) Create or change survivorship interests in the principal's property or in property in which the principal may have an interest.

(f) Designate or change the designation of beneficiaries to receive any property, benefit, or contract right on the principal's death.

(g) Make a loan to the attorney-in-fact.

E. Prob. Code § 4265: "A power of attorney may not authorize an attorney-in-fact to make, publish, declare, amend, or revoke the principal's will."

F. Prob. Code § 4230: (a) Except as provided in subdivisions (b) and (c), a person who is designated as an attorney-in-fact has no duty to exercise the authority granted in the power of attorney and is not subject to the other duties of an attorney-in-fact, regardless of whether the principal has become incapacitated, is missing, or is otherwise unable to act. (b) Acting for the principal in one or more transactions does not obligate an attorney-in-fact to act for the principal in a subsequent transaction, but the attorney-in-fact has a duty to complete a transaction that the attorney-in-fact has commenced. (c) If an attorney-in-fact has expressly agreed in writing to act for the principal, the attorney-in-fact has a duty to act pursuant to the terms of the agreement. The agreement to act on behalf of the principal is enforceable against the attorney-in-fact as a fiduciary regardless of whether there is any consideration to support a contractual obligation.

G. Prob. Code § 4206: (a) If, following execution of a durable power of attorney, a court of the principal's domicile appoints a conservator of the estate, guardian of the estate, or other fiduciary charged with the management of all of the principal's property or all of the principal's property except specified exclusions, the attorney-in-fact is accountable to the fiduciary as well as to the principal. Except as provided in subdivision (b), the fiduciary has the same power to revoke or amend the durable power of attorney that the principal would have had if not incapacitated, subject to any required court approval. (b) If a conservator of the estate is appointed by a court of this state, the conservator can revoke or amend the durable power of attorney only if the court in which the conservatorship proceeding is pending has first made an order authorizing or requiring the fiduciary to modify or revoke the durable power of attorney and the modification or revocation is in accord with the order.

V. Benefits and Limitations of Conservatorship

A. Considerations

1. Estate v. Person

a. A conservator of the person cares for and protects a person when the judge decides that the person (called the "conservatee") can't do it.

b. A conservator of the estate handles the conservatee's financial matters – like paying bills and collecting a person's income – if the judge decides the conservatee can't do it.

2. Standard

a. Prob. Code § 1800.3(b): No conservatorship of the person or of the estate shall be granted by the court unless the court makes an express finding that the granting of the conservatorship is the least restrictive alternative needed for the protection of the conservatee.

b. Prob. Code § 1801(a): A conservator of the person may be appointed for someone who is unable to provide properly

for his or her personal needs for physical health, food, clothing or shelter.

c. Prob. Code § 1801(b): A conservator of the estate may be appointed for someone who is substantially unable to manage his or her financial resources or resist fraud or undue influence.

d. Prob. Code § 1801(e): The standard of proof for the appointment of a conservator pursuant to this section shall be clear and convincing evidence.

e. Prob. Code § 1802: Subject to Section 1800.3, a conservator of the person or estate, or both, may be appointed for a person who voluntarily requests the appointment and who, to the satisfaction of the court, establishes good cause for the appointment.

3. Standing

a. Prob. Code § 1820: A petition for the appointment of a conservator may be filed by any of the following: (1) The proposed conservatee. (2) The spouse or domestic partner of the proposed conservatee. (3) A relative of the proposed conservatee. (4) Any interested state or local entity or agency of this state or any interested public officer or employee of this state or of a local public entity of this state. (5) Any other interested person or friend of the proposed conservatee.

4. Legal power to litigate

a. Prob. Code § 1872(a): Except as otherwise provided in this article, the appointment of a conservator of the estate is an adjudication that the conservatee lacks the legal capacity to enter into or make any transaction that binds or obligates the conservatorship estate….

b. Prob. Code § 2462: Subject to Section 2463, unless another person is appointed for that purpose, the guardian or conservator may: (a) Commence and maintain actions and proceedings for the benefit of the

ward or conservatee or the estate. (b) Defend actions and proceedings against the ward or conservatee, the guardian or conservator, or the estate….

5. Rights not limited.

   a. Prob. Code § 1871: Conservatorship does not limit conservatee's right to make a will (assuming conservatee retains testamentary capacity).

   b. "As I always say, if you haven't yet been disinherited, you will be now"

6. Nomination and Selection of Conservator

   a. Prob. Code § 1810 allows for a proposed conservatee to nominate his or her own conservator, "if the proposed conservatee has sufficient capacity at the time to form an intelligent preference." The court "shall" appoint that nominee unless the court finds that the appointment is not in the best interests of the proposed conservatee.

   b. Proposed conversatee's nomination of a conservator can be done via a DPOA executed at a time when he or she had capacity. See Prob. Code § 4126.

   c. Prob. Code § 1811: The spouse, domestic partner, or an adult child, parent, brother, or sister of the proposed conservatee may nominate a conservator.

   d. Selection of conservator is solely in discretion of court based on considerations of best interests of conservatee, but if equally qualified candidates are put forth, the order of preference is generally the conservatee's (1) spouse or domestic partner (or someone nominated by the spouse or domestic partner), (2) adult child (or someone nominated by the adult child), (3) parent ((or someone nominated by the parent), (4) sibling (or someone nominated by the sibling), then (5) any other person or entity eligible for appointment. Prob. Code § 1812.

7. Capacity declaration

a. To establish a Conservatorship in California, the Petitioner is required to file a Capacity Declaration with the Court

(1) These declarations are done via Judicial Council forms available online

(2) If seeking conservatorship of the person, the petitioner must have a physician or licensed psychologist fill out a "Capacity Declaration - Conservatorship GC-335" form

(3) If seeking conservatorship of the estate only (not the person), the petitioner has the option to either: (1) Have a physician or licensed psychologist fill out a "Capacity Declaration - Conservatorship GC-335" form and the local form "PB 4015 Professional Declarant's Attachment to Form GC-335", OR (2) Fill out local form "PB 4016 LayPerson's Declaration Re: Legal Capacity him- or herself

8. 730 Expert

a. Evid. Code § 730: When it appears to the court, at any time before or during the trial of an action, that expert evidence is or may be required by the court or by any party to the action, the court on its own motion or on motion of any party may appoint one or more experts to investigate, to render a report as may be ordered by the court, and to testify as an expert at the trial of the action relative to the fact or matter as to which the expert evidence is or may be required. The court may fix the compensation for these services, if any, rendered by any person appointed under this section, in addition to any service as a witness, at the amount as seems reasonable to the court. Nothing in this section shall be construed to permit a person to perform any act for which a license is required unless the person holds the appropriate license to lawfully perform that act.

9. Discovery

a. Evid. Code § 765. (a) The court shall exercise reasonable control over the mode of interrogation of a witness so as to make interrogation as rapid, as distinct, and as effective for the ascertainment of the truth, as may be, and to protect the witness from undue harassment or embarrassment. (b) With a witness under the age of 14 or a dependent person with a substantial cognitive impairment, the court shall take special care to protect him or her from undue harassment or embarrassment, and to restrict the unnecessary repetition of questions. The court shall also take special care to ensure that questions are stated in a form which is appropriate to the age or cognitive level of the witness. The court may, in the interests of justice, on objection by a party, forbid the asking of a question which is in a form that is not reasonably likely to be understood by a person of the age or cognitive level of the witness.

10. Trial

a. A witness' competency, i.e., ability to comprehend and relate events, is a preliminary fact to be determined under Evid. Code § 405.

b. Evid. Code § 701. (a) A person is disqualified to be a witness if he or she is: (1) Incapable of expressing himself or herself concerning the matter so as to be understood, either directly or through interpretation by one who can understand him; or (2) Incapable of understanding the duty of a witness to tell the truth. (b) In any proceeding held outside the presence of a jury, the court may reserve challenges to the competency of a witness until the conclusion of the direct examination of that witness.

c. A finding of temporary confusion or disorientation isn't equivalent to a finding of incompetency. *Sanders Constr. Co. v San Joaquin First Fed. Sav. & Loan Ass'n* (1982) 136 CA3d 387, 395 (diabetic witness was found competent even though he suffered momentary diabetic confusion and disorientation while testifying).

11. Right to counsel

a. Prob. Code § 1470(a) The court may appoint private legal counsel for a ward, a proposed ward, a conservatee, or a proposed conservatee in any proceeding under this division if the court determines the person is not otherwise represented by legal counsel and that the appointment would be helpful to the resolution of the matter or is necessary to protect the person's interests.

b. Prob. Code § 1471:

(a) If a conservatee, proposed conservatee, or person alleged to lack legal capacity is unable to retain legal counsel and requests the appointment of counsel to assist in the particular matter, whether or not such person lacks or appears to lack legal capacity, the court shall, at or before the time of the hearing, appoint the public defender or private counsel to represent the interest of such person in the following proceedings under this division:

(1) A proceeding to establish a conservatorship or to appoint a proposed conservator. (2) A proceeding to terminate the conservatorship. (3) A proceeding to remove the conservator. (4) A proceeding for a court order affecting the legal capacity of the conservatee. (5) A proceeding to obtain an order authorizing removal of a temporary conservatee from the temporary conservatee's place of residence.

(b) If a conservatee or proposed conservatee does not plan to retain legal counsel and has not requested the court to appoint legal counsel, whether or not such person lacks or appears to lack legal capacity, the court shall, at or before the time of the hearing, appoint the public defender or private counsel to represent the interests of such person in any proceeding listed in subdivision (a) if, based on information contained in the court investigator's report or obtained from any other source, the court determines that the appointment would be helpful to the resolution of the matter or is necessary to protect the interests of the conservatee or proposed conservatee….

12. Guardians Ad Litem

a. C.C.P. § 372: (a) (1) When a minor, a person who lacks legal capacity to make decisions, or a person for whom a conservator has been appointed is a party, that person shall appear either by a guardian or conservator of the estate or by a guardian ad litem appointed by the court in which the action or proceeding is pending, or by a judge thereof, in each case. A guardian ad litem may be appointed in any case when it is deemed by the court in which the action or proceeding is prosecuted, or by a judge thereof, expedient to appoint a guardian ad litem to represent the minor, person lacking legal capacity to make decisions, or person for whom a conservator has been appointed, notwithstanding that the person may have a guardian or conservator of the estate and may have appeared by the guardian or conservator of the estate. The guardian or conservator of the estate or guardian ad litem so appearing for any minor, person who lacks legal capacity to make decisions, or person for whom a conservator has been appointed shall have power, with the approval of the court in which the action or proceeding is pending, to compromise the same, to agree to the order or judgment to be entered therein for or against the ward or conservatee, and to satisfy any judgment or order in favor of the ward or conservatee or release or discharge any claim of the ward or conservatee pursuant to that compromise. Money or other property to be paid or delivered pursuant to the order or judgment for the benefit of a minor, person lacking legal capacity to make decisions, or person for whom a conservator has been appointed shall be paid and delivered as provided in Chapter 4 (commencing with Section 3600) of Part 8 of Division 4 of the Probate Code. (2) Where reference is made in this section to "a person lacking legal competence to make decisions," the reference shall be deemed to include "a person for whom a conservator may be appointed."….

VI. Pre-Death Trust Contests

A. Prob. Code § 15800. Except to the extent that the trust instrument otherwise provides or where the joint action of the settlor and all beneficiaries is required, during the time that a trust is revocable and the person holding the power to revoke the trust is competent: (a) The

person holding the power to revoke, and not the beneficiary, has the rights afforded beneficiaries under this division. (b) The duties of the trustee are owed to the person holding the power to revoke.

B. Prob. Code § 16069. The trustee is not required to account to the beneficiary, provide the terms of the trust to a beneficiary, or provide requested information to the beneficiary pursuant to Section 16061, in any of the following circumstances: (a) In the case of a beneficiary of a revocable trust, as provided in Section 15800, for the period when the trust may be revoked. (b) If the beneficiary and the trustee are the same person.

C. Prob. Code § 16061.7. (a) A trustee shall serve a notification by the trustee as described in this section in the following events: (1) When a revocable trust or any portion thereof becomes irrevocable because of the death of one or more of the settlors of the trust, or because, by the express terms of the trust…. (h) If the notification by the trustee is served because a revocable trust or any portion of it has become irrevocable because of the death of one or more settlors of the trust, or because, by the express terms of the trust, the trust becomes irrevocable within one year of the death of a settlor because of a contingency related to the death of one or more of the settlors of the trust, the notification by the trustee shall also include a warning, set out in a separate paragraph in not less than 10-point boldface type, or a reasonable equivalent thereof, that states as follows: "You may not bring an action to contest the trust more than 120 days from the date this notification by the trustee is served upon you or 60 days from the date on which a copy of the terms of the trust is delivered to you during that 120-day period, whichever is later."

D. *Estate of Giraldin* (2012) 55 Cal.4th 1058. "Property transferred into a revocable inter vivos trust is considered the property of the settlor for the settlor's lifetime … the beneficiaries' interest in that property is merely potential and can evaporate in a moment at the whim of the [settlor]." Implication that a trust might be subject to attack during life if it became irrevocable, such as due to incapacity of settlor.

E. Restatement Third of Trusts. "When the settlor or donee lacks the requisite mental capacity, the other beneficiaries are ordinarily entitled to exercise, on their own behalf, the usual rights of trust beneficiaries and the trustee is ordinarily under a duty to provide them with accountings and other information concerning the trust and its administration."

F. *Johnson v. Kotyck* (1999) 76 Cal.App.4th 83. The Court of Appeal held that the beneficiaries had no right to an accounting because the trust remained revocable despite the settlor's incapacity. The settlor was under conservatorship. The trust did not preclude the conservator from petitioning the court to revoke the trust; hence, the conservator "working together with the superior court as the conservatee's decision making surrogate, is a 'person holding the power to revoke the trust.'"

G. Prob. Code § 2580. (a) The conservator or other interested person may file a petition under this article for an order of the court authorizing or requiring the conservator to take a proposed action for any one or more of the following purposes: (1) Benefiting the conservatee or the estate. (2) Minimizing current or prospective taxes or expenses of administration of the conservatorship estate or of the estate upon the death of the conservatee. (3) Providing gifts for any purposes, and to any charities, relatives (including the other spouse or domestic partner), friends, or other objects of bounty, as would be likely beneficiaries of gifts from the conservatee. (b) The action proposed in the petition may include, but is not limited to, the following: (1) Making gifts of principal or income, or both, of the estate, outright or in trust…. (5) Creating for the benefit of the conservatee or others, revocable or irrevocable trusts of the property of the estate, which trusts may extend beyond the conservatee's disability or life…. (11) Exercising the right of the conservatee (A) to revoke or modify a revocable trust or (B) to surrender the right to revoke or modify a revocable trust, but the court shall not authorize or require the conservator to exercise the right to revoke or modify a revocable trust if the instrument governing the trust (A) evidences an intent to reserve the right of revocation or modification exclusively to the conservatee, (B) provides expressly that a conservator may not revoke or modify the trust, or (C) otherwise evidences an intent that would be inconsistent with authorizing or requiring the conservator to exercise the right to revoke or modify the trust…. (13) Making a will. (14) Making or revoking a revocable transfer on death deed.

H. *Conservatorship of McDowell* (2004) 125 Cal.App.4th 659. Conservator petitioned under Probate Code section 2580 to make a new will on grounds that conservatee lacked capacity to make existing will and beneficiary was a "care custodian" under Probate Code section 21350 and could not rebut presumption of undue influence by clear and convincing evidence. Trial court granted in part and denied in part, holding conservatee had capacity, but beneficiary was care custodian and could not rebut presumption of undue influence. Court of Appeal

reversed and remanded on grounds that beneficiary did not fit statutory definition of care custodian and thus burden of proof on undue influence was on petitioner. Notably, neither trial court nor Court of Appeal questioned ability to contest will during conservatee's life utilizing substituted judgment procedure.

I. *Drake v. Pinkham* (2013) 217 Cal.App.4th 400.

1. Facts. Ted and Josephine had two children, Janice and Gina. Ted and Josephine settled a trust. On first death, trust divided into credit shelter and survivor's trusts. Upon survivor's death, equal division between Janice and Gina. Ted died. Josephine amended survivor's to eliminate Gina as a beneficiary and as a successor co-trustee, making Janice sole beneficiary and sole successor trustee. Gina petitioned for appointment as co-trustee without knowing about amendments, and claimed Janice was unduly influencing their mother. Josephine objected and attached amendments showing that Gina had no right to appointment as trustee. Gina did not contest amendments. Gina and her mother entered settlement such that Josephine remained sole trustee and agreed not to dispose of certain property in the trust. Josephine died.

2. Procedural Posture. Gina filed a contest asserting lack of capacity and undue influence. Janice objected asserting statutes of limitations, res judicata and laches. Court granted Janice's summary judgment on res judicata and statutes of limitations without reaching issue of laches. Gina appealed. Janice claimed Gina had been aware of amendments, Josephine's alleged incapacity and Janice's alleged undue influence prior to Josephine's death. Gina responded that there had been no determination by court of incapacity and trust remained revocable; hence, Gina had no standing to contest.

3. Holding. Under section 15800, beneficiary lacks standing while trust is revocable and person holding power to revoke is competent. Because Gina alleged in her petition for appointment as co-trustee that Josephine lacked capacity, she had standing to assert incompetence, and thus could have brought the action to invalidate the amendments. Her failure to do so constituted laches.

4. Comment. What if Gina knew of facts but never filed anything? Does it make sense that standing should exist only if the settlor were incompetent? What if the beneficiary knew settlor was being unduly influenced? What is the standard of "incompetence"?

J. *Murphy v. Murphy* (2008) 164 Cal.App.4th 376

1. Estate Plan. William's wife died in 1999. In 2000, William executed a holographic will in which he devised the family home and another real property in San Francisco and two thirds of the residue to William's daughter, and devised a vacation home and a third of the residue to his son. In April 2001, William suffered a debilitating stroke. In June 2001, William executed a new holographic will leaving his entire estate to daughter. In July 2001, William executed a pour over will and a trust leaving his entire estate to daughter. In 2003, William's conservator re-executed the trust and pour over will as of July 2001, pursuant to the court's substituted judgment order.

2. Petition for Conservatorship. At son's request and nomination, Dolch, a private professional conservator, petitioned to establish a conservatorship of person and estate. Petition explained son believed daughter was isolating William and unduly influencing him while he suffered impairment from his stroke. Petition alleged facts in support. Court appointed Dolch as temporary.

3. Probate Investigator Report. Investigator interviewed William. Investigator found home and care adequate, but William unable to manage finances or resist undue influence. William said he opposed conservatorship and Dolch becoming conservator, and if conservatorship were necessary he would want his daughter. Investigator told William there were concerns that daughter was isolating and unduly influencing William. He strongly denied. Report indicated son and some of William's law firm employees accused daughter of interfering in the law firm business after William's stroke, and William's secretary alleged daughter abused drugs and prescription narcotics. Daughter accused her brother of physically abusing William. Daughter also said her brother had a drinking problem and would come home drunk and "rough people up." Investigator found William could identify general nature of his assets and debts. He denied daughter was interfering in William's social relationships and

he still saw friends. Dolch indicated she had concerns about daughter's motives and believed given the family discord and William's vulnerability that an independent conservator was appropriate. A neuropsychological evaluation found William suffered significant impairments and lacked insight into his condition. He found daughter's actions consistent with undue influence but believed her motive was to help her father maintain the image that he was functioning fine rather than an attempt to take advantage. Court appointed Dolch as general conservator of person and estate.

4. Petition to Terminate Conservatorship. William's attorney petitioned to terminate, asserting Dolch had accomplished necessary tasks, and William could carry out his financial affairs with daughter's help pursuant to a power of attorney. Probate Investigator reported that when initial referral was made, William was facing complex professional and financial issues that he could not manage and which had been resolved by Dolch. Investigator noted neuropsychologist's concerns about daughter's conduct, but since daughter would be trustee of William's trust, if court supervised trust administration and provided daughter a fixed fee, Investigator could recommend termination.

5. Amended Petition to Terminate. William filed an amendment to the petition to terminate in which he asked the court to ratify the trust, on grounds that he began process of creating trust, as evidenced by handwritten notes, as early as September 2000, before William's stroke or the petition for conservatorship, the trust reflect his intent, and was consistent with his holographic wills.

6. Objections to Amended Petition to Terminate. Son objected asserting no evidence other than William's statement to rebut evidence in support of conservatorship, that a conservatee cannot request substituted judgment and the requested order does nothing to serve William's interests, as it simply leaves his estate at death to daughter, making the whole business suspicious.

7. Amended Petition for Substituted Judgment. Pursuant to Probate Code section 2580(b)(5) and (13), William petitioned to ratify trust and pour over will he had previously executed, to

transfer all assets to the trust and appoint daughter as successor trustee with the trust to be administered under court supervision. Notice was provided to son. No objections were filed. Court granted. No appeal was filed. Trust and will were re-executed by Dolch *nunc pro tunc* as of July 2001.

8. Termination of Conservatorship. William died in May 2004. Subsequently, the court entered an order terminating the conservatorship and allowing fees.

9. Civil Complaint. In August 2004, son filed a civil complaint, and then an amended complaint, against daughter. Son asserted (1) William breached an oral agreement with his wife that William would leave estate equally and induced wife to leave her estate to William based on the promise on which wife detrimentally relied; (2) daughter unduly influenced William's holographic instruments and the 2001 will and trust; (3) daughter intentionally interfered with oral agreement between her parents; (4) daughter made false statements of fact to William to induce him by fraud into executing the offending instruments. Daughter argued that the probate court had exclusive jurisdiction and that collateral estoppel barred son's claims, in addition to denying the allegations.

10. Statement of Decision. Court found for son on all causes of action. Court rejected argument that probate court had exclusive jurisdiction. Court found no collateral estoppel because undue influence was not tried and did not involve identity of parties and issues, and capacity was not asserted. Court also stated that trial court on substituted judgment did not have access to the opinions of the neuropsychologist or Probate Investigator.

11. Appeal. The Court of Appeal reversed holding that res judicata barred all causes of action in the complaint. The Court explained that the substituted judgment procedure required son to assert these claims as reasons that it should deny the petition, and that each of these claims, including that there was an inconsistent oral agreement, could have been considered by the court in the proceedings for substituted judgment as to why it should deny. Since all of these issues could have been litigated, son was barred from seeking to litigate them in a subsequent proceeding.

VII. Privilege

A. Evid. Code § 953: As used in this article, "holder of the privilege" means: (a) The client, if the client has no guardian or conservator. (b) *(1)* A guardian or conservator of the client, if the client has a guardian or conservator*, except as provided in paragraph (2). (2) If the guardian or conservator has an actual or apparent conflict of interest with the client, then the guardian or conservator does not hold the privilege.* (c) The personal representative of the client if the client is dead, including a personal representative appointed pursuant to Section 12252 of the Probate Code. (d) A successor, assign, trustee in dissolution, or any similar representative of a firm, association, organization, partnership, business trust, corporation, or public entity that is no longer in existence. [Italicized text added by 9/18/18 legislative amendment—Ch. 475, Statutes of 2018.]

B. Prob. Code § 4235: If the principal becomes wholly or partially incapacitated, or if there is a question concerning the capacity of the principal to give instructions to and supervise the attorney-in-fact, the attorney-in-fact may consult with a person previously designated by the principal for this purpose, and may also consult with and obtain information needed to carry out the attorney-in-fact's duties from the principal's spouse, physician, attorney, accountant, a member of the principal's family, or other person, business entity, or government agency with respect to matters to be undertaken on the principal's behalf and affecting the principal's personal affairs, welfare, family, property, and business interests. A person from whom information is requested shall disclose relevant information to the attorney-in-fact. Disclosure under this section is not a waiver of any privilege that may apply to the information disclosed.

VIII. Elder Abuse Restraining Orders

A. Welf. & Inst. Code § 15657.03

(a) (1) An elder or dependent adult who has suffered abuse, as defined in Section 15610.07, may seek protective orders as provided in this section.

(2) A petition may be brought on behalf of an abused elder or dependent adult by a conservator or a trustee of the elder or dependent adult, an attorney-in-fact of an elder or dependent adult who acts

within the authority of a power of attorney, a person appointed as a guardian ad litem for the elder or dependent adult, or other person legally authorized to seek the relief.

(3) (A) A petition under this section may be brought on behalf of an elder or dependent adult by a county adult protective services agency in either of the following circumstances:

(i) If the elder or dependent adult has suffered abuse as defined in subdivision (b) and has an impaired ability to appreciate and understand the circumstances that place him or her at risk of harm.

(ii) If the elder or dependent adult has provided written authorization to a county adult protective services agency to act on his or her behalf.

(B) In the case of a petition filed pursuant to clause (i) of subparagraph (A) by a county adult protective services agency, a referral shall be made to the public guardian consistent with Section 2920 of the Probate Code prior to or concurrent with the filing of the petition, unless a petition for appointment of a conservator has already been filed with the probate court by the public guardian or another party.

(C) A county adult protective services agency shall be subject to any confidentiality restrictions that otherwise apply to its activities under law and shall disclose only those facts as necessary to establish reasonable cause for the filing of the petition, including, in the case of a petition filed pursuant to clause (i) of subparagraph (A), to establish the agency's belief that the elder or dependent adult has suffered abuse and has an impaired ability to appreciate and understand the circumstances that place him or her at risk, and as may be requested by the court in determining whether to issue an order under this section.

(b) For purposes of this section:

(1) "Abuse" has the meaning set forth in Section 15610.07.

(2) "Conservator" means the legally appointed conservator of the person or estate of the petitioner, or both.

(3) “Petitioner” means the elder or dependent adult to be protected by the protective orders and, if the court grants the petition, the protected person.

(4) “Protective order” means an order that includes any of the following restraining orders, whether issued ex parte, after notice and hearing, or in a judgment:

(A) An order enjoining a party from abusing, intimidating, molesting, attacking, striking, stalking, threatening, sexually assaulting, battering, harassing, telephoning, including, but not limited to, making annoying telephone calls as described in Section 653m of the Penal Code, destroying personal property, contacting, either directly or indirectly, by mail or otherwise, or coming within a specified distance of, or disturbing the peace of, the petitioner, and, in the discretion of the court, on a showing of good cause, of other named family or household members or a conservator, if any, of the petitioner.

IX. Financial Elder Abuse

A. Welf. & Inst. Code § 15610.30 (a) “Financial abuse” of an elder or dependent adult occurs when a person or entity does any of the following: (1) Takes, secretes, appropriates, obtains, or retains real or personal property of an elder or dependent adult for a wrongful use or with intent to defraud, or both. (2) Assists in taking, secreting, appropriating, obtaining, or retaining real or personal property of an elder or dependent adult for a wrongful use or with intent to defraud, or both. (3) Takes, secretes, appropriates, obtains, or retains, or assists in taking, secreting, appropriating, obtaining, or retaining, real or personal property of an elder or dependent adult by undue influence, as defined in Section 15610.70.

(b) A person or entity shall be deemed to have taken, secreted, appropriated, obtained, or retained property for a wrongful use if, among other things, the person or entity takes, secretes, appropriates, obtains, or retains the property and the person or entity knew or should have known that this conduct is likely to be harmful to the elder or dependent adult.

(c) For purposes of this section, a person or entity takes, secretes, appropriates, obtains, or retains real or personal property when an elder or dependent adult is deprived of any property right, including by

means of an agreement, donative transfer, or testamentary bequest, regardless of whether the property is held directly or by a representative of an elder or dependent adult.

(d) For purposes of this section, "representative" means a person or entity that is either of the following: (1) A conservator, trustee, or other representative of the estate of an elder or dependent adult. (2) An attorney-in-fact of an elder or dependent adult who acts within the authority of the power of attorney.

B. Who has standing to bring financial elder abuse claim?

1. If the victim is still alive:

a. Elder victim (if competent)

b. GAL or conservator. CCP § 372.

c. "Next friend" only if an appointed conservator or GAL refuses to act. *Golin v. Allenby* (2010) 190 Cal.App.4th 616, 624.

d. Note: Agent under DPOA may not serve as plaintiff (but may be appointed as GAL or conservator, and then serve as plaintiff in that capacity); agent must appear in action through an attorney because right to appear in *propria persona* does not extend to real party's agent. CCP § 369(a); *In re Marriage of Caballero* (1994) 27 CA4th 1139, 1151.

2. If the victim is deceased (Welf. & Inst. Code § 15657.3):

a. Personal representative (exclusive standing, unless refuses to act)

b. Successor in interest (only if PR not appointed or refuses to act, includes heirs and beneficiaries and any "interested person" under Prob. Code § 48)Remedies for Financial Elder Abuse

3. Welf. & Inst. Code §15657.5

a. If financial elder abuse proven by preponderance of the evidence:

(1) "compensatory damages and all other remedies otherwise provided by law"

(2) C.C.P. § 377.34 Cap on Damages after Death: If action brought after victim's death, damages limited to the harm decedent sustained before death, including any penalties or punitive or exemplary damages, but excluding damages for pain, suffering, or disfigurement

(3) Mandatory attorney's fees and costs ("the court shall award to the plaintiff reasonable attorney's fees and costs")

(4) Mandatory statement re elder abuse in judgment: Any money judgment in an action under this section shall include a statement that the damages are awarded based on a claim for financial abuse of an elder or dependent adult

b. If additionally proven by clear and convincing evidence that the defendant has been guilty of recklessness, oppression, fraud, or malice in the commission of the abuse, the C.C.P. § 377.34 Cap on Damages after Death "shall not apply," meaning additional available damages include:

(1) Compensatory, punitive, or exemplary damages for time period after decedent's death

(2) Damages for pain, suffering, or disfigurement

4. Double Damages

a. Prob. Code § 859: If a court finds that a person has in bad faith wrongfully taken, concealed, or disposed of property belonging to a conservatee, a minor, an elder, a dependent adult, a trust, or the estate of a decedent, or has taken, concealed, or disposed of the property by the use of undue influence in bad faith or through the commission of elder or dependent adult financial abuse, as defined in Section 15610.30 of the Welfare and Institutions Code, the person shall be liable for twice the value of the property recovered by an action under this part. In addition, except as otherwise required by law, including Section 15657.5 of

the Welfare and Institutions Code, the person may, in the court's discretion, be liable for reasonable attorney's fees and costs. The remedies provided in this section shall be in addition to any other remedies available in law to a person authorized to bring an action pursuant to this part.

X. Settlements with DC Litigants

A. The risks of settling with a person who lacks capacity.

1. You have already been driven mad by litigating with a person who no longer has capacity to make reasoned decisions.

B. Should a guardian ad litem be appointed?

C. Should a conservatorship be established for the purpose of obtaining an order of substituted judgment?

D. Will court approval be sufficient?

XI. Estate Planning Solutions

A. Limiting revocability of instruments by requiring consents of trusted persons to avoid potential of undue influence.

B. Trustee removal provisions.