



With good communications and effective education most will contests can be resolved short of a trial

Will Power

By Thomas E. Stindt

At least once in a practitioner's career, and more likely on more than one occasion, disgruntled heirs inquire if the lawyer can champion a will contest for them. Less frequent, but still common, are the inquiries from those nominated as personal representatives, who search for someone to defend against will contests. After listening over a considerable number of years to narratives of "Old Uncle Bill always was as high as a Georgia pine," or "Our aunt was so confused she thought she was a young girl back on the farm in Iowa," an attorney can begin to identify some common denominators of these inquiries. Practicing attorneys need to be aware of the key elements of a will contest in order to avoid taking costly, payment-deferred, losing cases. And informed practitioners are in a position to respond effectively and helpfully to inquiries about contesting a will.

The most common denominator among would-be contestants is a misunderstanding of the tests and the proof of testamentary capacity. This misunderstanding usually surfaces when the would-be client turns to recitals of the testator's bizarre or unusual behavior, serious illness prior to time of death, and revised estate planning disposition during this period. These incidents lead the inquirer to conclude that the decedent's will is "next to automatically" invalid. This conclusion is erroneous.

The general public seems predisposed to conclude that if a testator has a serious illness at or near time of death, displays unusual behavior or forgetfulness, and makes a revised estate planning disposition sometime during these events, then a slighted relative has a basis for a will contest. "After all," the inquiring party typically continues, "We do

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have witnesses as to his 'incompetence;' he was very ill," and "We were later informed of these new documents." Sometimes the caller continues, "On top of all that, we know that a certain Jenny-come-lately niece was hanging around Uncle Bill for the last few months of his life."

The truth of the matter, however, is that testators can have a lot of things wrong with

testator's affairs before giving rise to any serious claim of undue influence. The court in *Estate of Mann* ruled that the "mere opportunity to influence the mind of the testator, even coupled with an interest or a motive to do so, is not sufficient."⁵ To be undue, influence must be "used directly to procure the will...[and] must amount to coercion destroying free agency on the part of the testator."⁶

employees, and caregivers, conservators, guardians, and others related to the care of the testator. There are exceptions—if the testator is related to the drafter, for example, or if an independent and disinterested counsel reviews the instrument, counsels the testator, and signs to indicate independent review.

A no contest clause, which is enforceable in California, can deter contestants. Most heirs, once they understand that they risk forfeiture of a gift, will not institute an act of contest. A no contest clause, however, is not always present in the instrument and offers no protection against those with nothing to lose. Heirs in search of counsel to contest the testamentary instrument will usually find a lawyer somewhere to support their cause. The lawyer may not be a trusts and estates counsel, or a civil litigator with experience in probate. The lawyer may not know the burdens of establishing lack of testamentary capacity, or understand the relationship of prior case law to the Due Process in Competence Determinations Act (it has been held that prestatutory case law can still be useful in determining matters of testamentary capacity),⁹ or be aware of the probate statute defining mental incompetency.¹⁰ Nevertheless, the lawyer may initiate a contest. Those who defend contested testamentary instruments need to have an action plan that addresses the common misunderstandings of lay people and those lawyers who are influenced more by their clients' objectives than the realities of probate law.¹¹

Counsel and clients would be well served by a better understanding of the proof issues involved in contests as well as the role of witnesses. For experienced practitioners who are defending a contested will, the task at hand is not merely to create a winning case but also to inform and educate the opponent and the contestant family members in order to adjust their expectations to reality. The ultimate objective is an early, favorable disposition of the challenge, thus avoiding the expense of a full trial.

Statutory Parameters of Testamentary Capacity

The statute regarding when an individual is not mentally competent to make a will provides two alternative tests, and both of them apply to the time of the making of the will.¹² Testators fail the first test if they do not have sufficient mental capacity to be able to understand the nature of the testamentary act, understand and recollect the nature and situation of their property, or remember and understand their relations to living descendants, spouse, and parents, and others whose interests are affected by the will.¹³

The second test applies if testators suffer

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them and still have testamentary capacity. Testators also can have helpful family members involved in their affairs without necessarily being deemed under undue influence. A testator can even have a house guest relative who chauffeurs the testator to see a lawyer and still not be viewed as having fallen prey to the undue influence of the relative.

Episodes of bizarre behavior¹ or incidents of forgetfulness² do not equate with testamentary incapacity. Moreover, a serious illness at time of death is the norm. A pattern of frequent, heavy use of alcoholic beverages does not establish lack of capacity either, unless a contestant can establish that the testator was inebriated at the time when the testamentary instruments were signed.³ Instances of inability to carry on a normal conversation and episodes of mental confusion do not furnish grounds for holding that a testator lacked testamentary capacity.⁴

Furthermore, the prodigal grandson of whom disgruntled heirs complain has to do much more than be a belated presence who performs some acts of involvement in the ill

Certain special relationships of trust, however, can create a presumption of undue influence. If a person had a role in inducing the preparation of the instrument, and stood to gain by the instrument, the burden of proof shifts to the alleged influencing person (or to the person making a claim based upon the instrument), who needs to show that the instrument was not executed by virtue of the relationship.⁷ Special trust relationships exist, for example, between the testator or settlor and his or her attorney, accountant, caregiver, and financial adviser. The presumption of undue influence also arises if a testator's confidence or trust is reposed in a relative or good friend who is closely involved in the testator's financial affairs. Other relationships of confidence or trust may also give rise to the presumption.

Further, gifts by will to several enumerated categories of disqualified persons are invalid, with limited exceptions.⁸ Disqualified persons include the drafter, the spouse or cohabitant of the drafter, other persons related to the drafter or the drafter's law partners or

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from a mental disorder with symptoms including delusions or hallucinations that result in the testators' devising property in a way that they would not have done but for the existence of the delusions or hallucinations.¹⁴ If the conditions of either the first or second test can be established by a preponderance of the evidence to have been in existence at the time of the execution of the testamentary instrument, the contestants have met their burden of proof. In evaluating claims of incapacity based on either test, advocates may apply guidelines from the Due Process in Competency Determinations Act, which provides various indicia of unsoundness of mind or lack of decision-making capacity.¹⁵ These indicia are not intended to replace case law or the Probate Code's defining statute on the subject;¹⁶ however, they do provide factors that are useful in creating or rebutting a claim of lack of testamentary capacity. Expert testimony thus comes into play, because it can be used to support the views of either side by examining the instrument, reviewing medical records, and focusing upon indicia of mental capacity deficits (or lack thereof) in the decedent's records.

Decisional law typically distills the statutory guidelines into a search for reasoned, thoughtful testamentary acts that show understanding on the part of the testator as to his or her actions. For example, the court of appeal, in *Conservatorship of Bookasta*, stated that "testamentary capacity involves the question of whether, at the time the will is made, the testator has sufficient mental capacity to understand the nature of the act he is doing, to understand and recollect the nature and situation of his property and to remember, and understand his relations to, the persons who have claims upon his bounty and whose interests are affected by the provisions of the instrument."¹⁷

The law focuses squarely on the testator's capacity *at the time the instrument is made*. This fact often works to the advantage of a practitioner who is defending a contested instrument. For example, if the attorney defending a contested instrument is planning his or her strategy, one early step worth consideration is to seek an advance ruling under Probate Code Section 21320, which allows counsel to file a safe harbor petition. The petition requests an advance declaratory ruling in order to ensure that a proposed action is not going to trigger a forfeiture under a no contest clause. The filing presents an indirect opportunity to do some educating of the adverse party.

Under statute, no affirmative arguments for any desired result or factual presentation should be advanced in the safe harbor petition. The procedure is not designed to deter-

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1. Seeking a safe harbor determination under the declaratory relief provisions of Probate Code Section 21320 will allow the court to render findings about the substance of the underlying dispute over the testamentary instruments.
True.
False.
2. The estate planning drafter can employ conversational question-and-answer techniques during the estate planning process and at the time of execution of the instruments. If these techniques are methodically employed in a manner consistent with the cases and the literature on assessment of mental competency, they can create useful records for later use as to the competency of the testator.
True.
False.
3. Reports and anecdotes by friends and neighbors of a testator's bizarre and unusual behavior, including forgetfulness, will establish lack of testamentary capacity.
True.
False.
4. Establishing a pattern of frequent use of alcoholic beverages by the testator will establish lack of testamentary capacity.
True.
False.
5. If it can be established that the testator was periodically confused and unable to carry on a normal conversation, lack of testamentary capacity has been established.
True.
False.
6. The sudden and frequent presence near the testator of a meddling relative who assists the testator in the chores and tasks of everyday living is the basis for a determination of "undue influence" regarding how the activities of the relative affected the questioned instrument.
True.
False.
7. There are situations in which service providers who occupy positions of trust with the testator are presumptively responsible for exerting undue influence over the testator's estate planning.
True.
False.
8. There are categories of persons who are considered (with limited exceptions) "disqualified"; testamentary gifts to them will be deemed invalid.
True.
False.
9. A no contest clause can almost always be relied upon to deter any contestant from challenging the instrument at question.
True.
False.
10. The question of whether an individual has the mental capacity to make his or her will is answered as of the time the testator reviews the draft instruments with the estate planning attorney.
True.
False.



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16. A B C D
17. A B
18. A B C D
19. Yes No
20. Yes No

11. A good, concise summary of the test for testamentary capacity as applied by the courts would be that testamentary capacity involves the question of whether, at the time the will is made, the testator has sufficient mental capacity to understand the nature of the act he or she is performing, to understand and recollect the nature and situation of his or her property, and to remember (and understand his or her relations to) the persons who have claims upon his or her bounty and whose interests are affected by the provisions of the instrument.

- True.
- False.

12. The singular testimony of the attorney-drafter as to the testator's mental competence and ability to execute his or her will is more likely than not to be of higher probative value to the court than the cumulative effect of the testimony of several of the testator's neighbors who recall the testator having episodes of forgetfulness or strange behavior.

- True.
- False.

13. The good, supportive expert opinion of a prominent behavioral scientist or psychiatrist will have a conclusive effect upon the issue of the testator's testamentary capacity.

- True.
- False.

14. Testimony of the subscribing witnesses as to the testator's mental capacity at the time of execution of the instrument in question is easily rebutted.

- True.
- False.

15. The testimony of a physician, nurse, or caregiver as to the testator's mental state at about the time of the execution of the instrument in question can be highly regarded evidence on the subject of the testator's mental capacity during this general time period.

- True.
- False.

16. The standard imposed upon the contestant, in terms of meeting the burden of proof in establishing lack of testamentary capacity on the part of the testator, is:

- A. Beyond a reasonable doubt.
- B. By clear and convincing evidence.
- C. By a preponderance of the evidence.
- D. None of the above.

Hypothetical

In a contest proceeding, the proponent of the will, using the instrument and declarations of attesting witnesses, offers proof of due execution and compliance with statutory formalities for the creation and execution of wills. The contestant, using testimony of friends and relatives of the decedent, offers proof that the testator was old and feeble when the will was executed, sometimes did not recognize relatives or old friends, and was absent-minded, eccentric, ill, and sometimes forgetful. The proponent, using the drafter attorney's declaration, offers proof that the testator was lucid when instructions were given to write the instrument, and was aware of 1) the nature of the act being performed when signing the instrument, 2) the effect it would have upon the intended beneficiaries, and 3) the nature of the testator's holdings at the time.

17. Who is most likely to prevail, given only these facts?

- A. The contestant.
- B. The proponent.

18. In an estate planning assignment in which a potential contest is anticipated, and specifically at the time of execution of the instruments, which of the following techniques are helpful in terms of preparing for a future defense of a challenged instrument?

- A. Including an attorney among the attesting witnesses.
- B. Making special efforts to orient the attesting witnesses to the task at hand and ensuring that they read the attestation clause that they are signing.
- C. Making drafter attorney's summary entries for the notes file on the final questioning of the testator as to understanding and intentions at the time of signing the instruments.
- D. All of the above.

19. Should percipient witness statements regarding the testator's mental status be summarized in signed writings, if possible, in advance of preparation of declarations or other formal discovery?

- Yes.
- No.

20. Can an early settlement conference assist in the resolution of a will contest?

- Yes.
- No.

mine the merits of any particular viewpoint. Yet the act of asserting the desired remedies or proposing that the subject instrument is correct implies that supporting facts will be summarized.

In the petition, the claimants may learn about the competency assessment that the testator took at the time of the execution of the will. As a preventive act, if counsel foresees a challenge to a testator's competency, it may be useful to document, when the instrument is executed, the administration of various simple tests in addition to the estate planner's typical questions on holdings, intentions toward family members, and disposition of property. The tests may be as informal as naming presidents, making accurate comments on current events, generating lists of words (such as zoo animals and farm animals), listing the months of the year in reverse, and so forth. If the estate planning practitioner follows what has been called the Spar approach to competency assessment, it becomes difficult for a contestant to mount a successful challenge.¹⁸ These tests, left in the files of the drafter of the instrument, record that counsel researched and satisfied himself or herself regarding the testator's thought process, memory, and understanding.

Tiers of Witnesses

Another early step in defending against a challenge to the testamentary instrument is to interview the key witnesses with as little delay as possible. Not to do so risks allowing the contestant to lock a witness into a position favorable to the contest. The attesting witnesses and the attorney drafter occupy the first tier of importance. Next come the medical witnesses and care providers, followed by expert witnesses, and generally at the lowest tier are the friends and neighbors.

Friends, neighbors, and family members may have a high estimation of the evidentiary value of their observations because, after all, they knew the testator. They may also tell counsel, "We have more witnesses than they do." But witnesses are not counted; rather, the importance of their testimony is weighed in view of their legal status with the testator and the instrument. The law regards the attorney drafter's testimony as especially important, since this person has direct personal knowledge of the testator's estate planning intentions and can describe the testator's general abilities and demeanor at the time of signing.¹⁹ The testimony of subscribing witnesses is of equally high value, since they were present when the instrument was signed and presumably were cognizant of the testator's abilities and general orientation.²⁰

If counsel is involved in the will execution, and family circumstances indicate the

possibility of a contest, it is good practice to have an attorney witness and to have attesting witnesses who are not just whoever is around the office but instead persons selected for their appropriateness. Additionally, the witnesses should read with attention the attestation clause to which they are signing. Of a secondary level of importance are the recipient witness medical professionals and caregivers involved in the testator's health-care. In one contest proceeding, for example, the testator's physician and nurse testified about her mental clarity on or about the time of the signing of her will. The court ruled that their testimony rebutted claims of her incompetency a few days after signing so sufficiently that the issue did not necessarily need to be submitted to the trier of fact.²¹

The testimony of medical experts and psychiatrists occupies the next tier. Their testimony can have persuasive value, but the court decides its importance.²² At the lowest tier is the testimony of friends and neighbors, who may recount instances of abnormal or unusual conduct, memory lapses, and strange behavior.²³ This final group cannot be disregarded, because their evidence can have a cumulative effect. Authority exists to support the proposition that a large number of incidents indicative of failing mental condition (rather than a limited number of variances from what may be regarded as normal human behavior) can demonstrate senile dementia.²⁴ A contestant can initiate a claim of lack of testamentary capacity based upon senile dementia but would still need to prove that the dementia caused incapacity at the time of execution. A contestant cannot just establish that the testator had a general condition of senile dementia at periods near in time to the signing of the instrument and win the case.

Taking written witness statements in advance of formal declarations or deposition testimony is a good way to prepare notes and secure the position of the witness. The use of a private investigator to do this can be indicated, although it is suggested that counsel personally interview the attorney drafter and the attesting witnesses. While counsel is doing that, the investigator can be gathering information from the medical professionals, family members, friends, and neighbors.

The All Hands Meeting

The counsel's fact-gathering typically produces a history of the testator's capacity during the time of the signing of the instrument. The counsel defending a contested instrument often discovers that the contestants' case is based upon an illness and incidents of the testator's unusual behavior. This story of the testator's incompetence is supported by friends and neighbors, all laypersons.

The way to confront this type of challenge is to explain to the contestant family members, in an informal meeting at the counsel's office or in a voluntary settlement conference, that people can do strange things, become ill, or be forgetful, and still have testamentary capacity. Additionally, people can lose the ability to manage their affairs for a period of time and then regain enough ability to execute testamentary instruments. People can and do go in and out of incapacity.

Next, it is appropriate to remind the contestants that the decedent is presumed to have been competent to execute the will. The contestant will need to meet the preponderance standard in order to establish otherwise.²⁵ Counsel can draw upon *Estate of Mann*, in which the court, citing from earlier case law, commented, "It has been held over and over in this state that old age, feebleness, forgetfulness, filthy personal habits, personal eccentricities, failure to recognize old friends or relatives, physical disability, absent-mindedness, and mental confusion, do not furnish grounds for holding that a testator lacked testamentary capacity."²⁶

In short, the all hands meeting with the contestants and their attorney is an opportunity to give a class on testamentary capacity and the burden of proof in a will contest. It is helpful for the family members to understand that once the proponents of the instrument have proven its due execution, the burden then falls upon the contestants to make their case of lack of capacity.²⁷ This lecture, accompanied by summaries of the facts that have been gathered in support of testamentary capacity, may reveal the futility of prolonged litigation to the contestants. It is most useful to educate the other side's family members and not just their lawyer. The next step, if the case is not then resolved, is discovery, and thereafter, possibly, a summary judgment motion. Ideally a settlement conference will be scheduled to take place while the notice time is running.

If the case is still not resolved, the mandatory settlement conference (MSC) will take place, and a final effort should be made with all parties present (or on conference call), for a resolution. The MSC statement and a brief are as important to persuading the other side as they are in informing the MSC judge of the facts of the case. If counsel has properly prepared the contestants, more likely than not the case will be resolved at the MSC.

A family's opportunity for minimal economic damage lies in achieving a fast, favorable resolution of a will contest. Through education of the adverse parties at informal meetings, or through settlement conference opportunities, the facts and law may be marshaled and explained. Even in the climate of

strong family animosity, most people will at some point become rational decision makers. It is the job of the counsel who is defending the proffered instrument and its personal representative to make that point come sooner rather than later. The turning point will only be reached upon the enlightenment of the family members or heirs supporting the contest regarding the high standard required for a contest to succeed. ■

¹ Estate of Woehr, 166 Cal. App. 2d 4, 17 (1958). ("In the case at bar there is no evidence whatever of general insanity; the few isolated departures from the normal, heretofore listed, did not bear directly upon the testamentary act in question").

² Estate of Mann, 184 Cal. App. 3d 593 (1986). See also Estate of Lingenfelter, 38 Cal. 2d 571, 581 (1952).

³ Estate of Arnold, 16 Cal. 2d 573 (1959).

⁴ In re Sanderson's Estate, 171 Cal. App. 2d 651 (1959).

⁵ Mann, 184 Cal. App. 3d at 607.

⁶ Id. at 606; see also Estate of Sarabia, 221 Cal. App. 3d 599 (1990).

⁷ Estate of Auen, 30 Cal. App. 4th 300 (1994).

⁸ PROB. CODE §§21350, 21355.

⁹ PROB. CODE §§811, 812; Goodman v. Zimmerman, 25 Cal. App. 4th 1667 (1994) (holding that prestatutory case law can still be useful in determining matters of testamentary capacity).

¹⁰ PROB. CODE §6100.5.

¹¹ For example, the general perception among lawyers of the difficulty of will contests tends to allow, in some cases, instruments to be admitted as dispositive last wills when actually they should be challenged.

¹² PROB. CODE §6100.5(a).

¹³ PROB. CODE §6100.5(a)(1).

¹⁴ PROB. CODE §6100.5(a)(2).

¹⁵ PROB. CODE §§811(a), 812(a) through (c). Among the indicia listed in §811(a), which relate to alertness and attention, information processing, thought processes, and ability to modulate mood and affect, there has to be shown not only a deficit in one of the enumerated categories but also that such deficit, either alone or in concert with others, significantly impairs a person's ability to understand and appreciate the consequences of his or her actions. The deficit, however, must be linked or correlated to the decision or acts in question.

¹⁶ PROB. CODE §812 provides in part, "Except where otherwise provided by law, including...the statutory and decisional law of testamentary capacity..."

¹⁷ Conservatorship of Bookasta, 216 Cal. App. 3d 445, 450 (1989) (quoting Estate of Arnold, 16 Cal. 2d 573, 586, 107 P. 2d 25 (1940), quoting Estate of Sexton, 199 Cal. 759, 764, 251 P. 2d 25 (1926); see also Estate of Mann, 184 Cal. App. 3d 593, 602 (1986)).

¹⁸ See, e.g., J. EDWARD SPAR, AN ATTORNEY'S GUIDE TO RAPID ASSESSMENT OF MENTAL STATUS (1997).

¹⁹ Estate of Goetz, 253 Cal. App. 2d 107, 144 (1967) ("There is also the testimony of Dent Snider, the attorney who drew the will, to the effect that Mrs. Goetz gave the names and residences of her husband, son, and daughter, the occupation of her daughter's husband, the date of her own marriage, the time of acquiring the house which was her separate property, the fact that her present house was in joint tenancy...").

²⁰ Estate of McDonough, 200 Cal. 57 (1926).

²¹ In re Johanson's Estate, 62 Cal. App. 2d 41 (1944).

²² Estate of Martin, 270 Cal. App. 2d 506 (1969).

²³ Estate of Wynne, 239 Cal. App. 2d 369 (1966).

²⁴ Estate of Callahan, 67 Cal. 2d 609 (1967).

²⁵ Estate of Locknane, 209 Cal. App. 2d 505 (1962).

²⁶ Estate of Mann, 184 Cal. App. 3d 593, 603 (1986).

²⁷ PROB. CODE §8252.

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