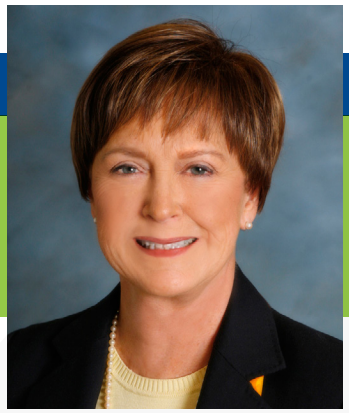

Recent Changes in Testamentary Capacity Rules

By Hon. Elaine Rushing, (Ret.)

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Estate planners and litigators face new challenges in light of recent developments in case law and statutory changes affecting the law of testamentary capacity. Gone are the simple rules that estate planners have used for their entire careers. Now, new rules challenge even the most experienced lawyers. And the rules keep evolving.

What standard would you apply in assessing a person's mental capacity to perform the following acts?

1. – Make a simple will
2. – Make a complex will
3. – Make a simple trust
4. – Make a complex trust
5. – Make simple amendments to a complex trust
6. – Make complex amendments to a complex trust
7. – Open a joint tenancy bank account
8. – Change beneficiary designations on a life insurance policy

Would you apply the low, fixed, straight-forward, traditional test in Probate Code section 6100.5? Or would you apply the higher, sliding-scale, complicated and fairly new test in Probate Code sections 810-812? The answers are: Actions 1, 2, 3 and 5 are governed by 6100.5 and 4, 6, 7 and 8 by sections 810-812. How did this happen?

The capacity standard for wills took shape about a century ago. When reviewing will contests on appeal, courts focused on whether the testator understood the nature of the testamentary act, the nature of the property at issue, and his relationship to those affected by the will, including parents, spouse and children. Hence, the ability to transact even ordinary business was cast aside as a standard for testamentary capacity. In *Estate of Sexton* (1926) 199 Cal. 759, 768, the court stated: "as every lawyer knows, a man may be capable of making a good will after he is so far gone in imbecility and mental darkness as to be no longer capable of making a valid deed or of transacting business generally."

While the courts routinely used the low capacity standard for all wills to find that a testator had capacity, courts interpreting contractual capacity--the capacity to contract, make trusts, make gifts, enter into joint tenancy accounts--instead examined cognitive capacity in the context of the particular transaction at issue. The standards for testamentary capacity and contractual capacity thus diverged. With regard to wills, the focus was on the testator's understanding of the nature of the testamentary act in the abstract, as well

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as his ability to understand what he owned and who he was related to, not on the complexity of the will. With regard to contracts and other conveyances, the inquiry revolved around the complexity of the document in question.

The common-law test for testamentary capacity was codified in 1985 as Probate Code section 6100.5, which requires that a testator (1) demonstrate an understanding of the nature and extent of his or her property, the identity of those persons society expects to benefit on the death of the testator (the "natural objects" of one's bounty), and the nature of the plan being put into place by the will; and (2) not suffer from delusions or hallucinations.

As the disciplines of psychiatry and psychology developed, the traditional rules for capacity had to be updated. Thus, in 1995, the legislature enacted the Due Process in Competence Determinations Act (Prob.Code, § 810-812). Section 810 begins by declaring that for the purposes of making the financial decisions enumerated in the statute, "There shall exist a presumption affecting the burden of proof that all persons have the capacity to make decisions and to be responsible for their acts and decisions." Further, "[a] judicial determination that a person lacks the legal capacity to perform a specific act should be based on evidence of a deficit in one or more of the person's mental functions rather than on a diagnosis of a person's mental or physical disorder."

Section 811 provides that courts shall base incapacity determinations on evidence of a deficit in at least one of four mental functions: (1) alertness and attention, (2) information processing, (3) thought processes, and (4) ability to modulate mood and affect. It elaborates on the categories that are pertinent to each of these functions. For example, a deficit in thought processes may be shown by severely disorganized thinking, hallucinations, delusions, or uncontrollable, repetitive or intrusive thoughts. The statute further mandates evidence of a correlation between the deficit and the decision or acts in question.

The DPCDA also creates a standard for capacity determinations, set forth in section 812, that is applicable "[e]xcept where otherwise provided by law, including, but not limited to… the statutory and decisional law of testamentary capacity." The operative part of the section states "… 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 decision maker and, where appropriate, the persons affected by the decision.

(c) The significant risks, benefits, and reasonable alternatives involved in the decision."

The two standards of capacity are not easily reconciled. Any document entitled "Will" is not analyzed, no matter how simple or complex. Instead, we ask testators what they know about their families, their assets and their plans. 6100.5 is lawyer-friendly and has a century of case law defining it. By contrast, 810-812 are observation and analysis-based. First, we carefully examine the nature of the document for its complexity. The more complex, the higher the level of capacity required. Then we make specific observations about the

contracting party, looking for signs of the section 811 mental functions. The code sections are complex and not lawyer-friendly. Some commentators have opined they virtually necessitate the use of expert witnesses.

How have the courts interpreted these statutory schemes?

In *Andersen v. Hunt* (2011) 196 Cal.App.4th 722 [126 Cal.Rptr.3d 736] the trial court held that section 6100.5 only applied to wills, and while decedent might have satisfied the 6100.5 test, he lacked the higher contractual capacity required under sections 810-812 for his trust amendments, bank accounts and beneficiary designations. On appeal, the court reversed in part. While acknowledging that 6100.5 does not expressly refer to trusts, the appellate court found that since decedent's particular trust amendments were simple and will-like, the court would look to 6100.5 to provide a convenient test for evaluating them. Not entitled to the same standard, joint tenancy accounts and beneficiary designations were declared invalid, since the decedent lacked the higher level of capacity required by Sections 810-812.

In Re *Marriage of Greenway* (2013) 217 Cal.App.4th 628, 639 [158 Cal.Rptr.3d 364], a family law case, did an excellent job interpreting the Act: "[T]he determination of a person's mental capacity is fact specific, and the level of required mental capacity changes depending on the issue at hand. Complicating matters are the multiple, and overlapping, statutes regarding the "capacity" of elders (anyone over the age of 65) found in the Probate Code, the Welfare and Institutions Code, the Civil Code, and the Family Code. After reviewing the relevant case law, we conclude mental capacity can be measured on a sliding scale, with marital capacity requiring the least amount of capacity, followed by testamentary capacity, and on the high end of the scale is the mental capacity required to enter contracts."

In *Lintz v. Lintz* (2014) 222 Cal.App.4th 1346 [167 Cal.Rptr.3d 50], the court found that the sliding-scale contractual scale of 810-812 should have been applied to the trusts and trust amendments at issue: they were unquestionably more complex than a will or codicil. They addressed community property concerns, provided for income distribution during the life of the surviving spouse, and provided for the creation of multiple trusts, one contemplating estate tax consequences, upon the death of the surviving spouse.

It is the attorney's responsibility to stay current on changes in the law in this area, once so simple and now ever-evolving and more complex. ●

Hon. Elaine Rushing (Ret.) served on the Sonoma County Superior Court bench for nearly two decades, including five years as Supervising Judge of the Civil Division. She has handled hundreds of settlement conferences in a variety of civil cases, including business litigation, construction, personal injury, employment, real estate, family law, and trusts, estates and probate matters. She can be reached at erushing@jamsadr.com.

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