Conflicted Families:

Ethics and the Omnibus Waiver

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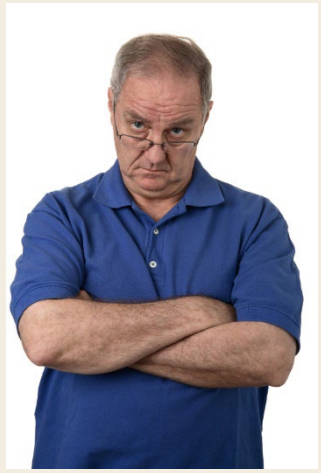
The Hypo #1

Divorce

New Marriage

Divorce



Issues in planning:

CHARACTERIZATION OF PROPERTY

- Community Property

- Separate Property
  - Pre-marital property
  - Gifted, bequeathed or inherited property
  - “Rents, issues and profits” of such property

- QCP

CHARACTERIZATION OF PROPERTY

- Community Property ← Each can bequeath 1/2

- Separate Property
  - Pre-marital property
  - Gifted, bequeathed or inherited property
  - "Rents, issues and profits" of such property

  ← Owner/powerholder spouse can bequeath 100%

- QCP ← Each can bequeath ½ (except out of state real estate acquired while out of state)

Conflicts

- If the attorney decides to represent multiple parties in which the interests of the clients potentially conflict:
  - must have an informed written waiver executed by both clients. Cal Rules of Prof Cond 1.7.
  - If the potential conflict becomes an actual conflict, the attorney must obtain further informed written consent. Cal Rules of Prof Cond 1.7.
  - Attorney representing a client in one matter may not undertake the representation of a client who in that matter has an interest adverse to the first client without the informed written consent of both clients, **even if the matter involved in the proposed representation is completely unrelated**. Cal Rules of Prof Cond 1.7.

What do we disclose?

- There is no bright line test for an acceptable written waiver of a conflict of interest
- “the relevant circumstances and … any actual and reasonably foreseeable adverse consequences of the proposed course of conduct." G
- Should it include a formal statement of general problems handled by standard clauses in a form letter or ***a specific analysis applying general principles to the unique facts of the clients' situation***?
  - Who should bear the cost of such a thorough and expensive effort?

Content of Disclosure

- “Of course, should either of you feel for any reason that you need the advice of another attorney regarding any aspect of the services I/we provide for you, each of you should feel free to obtain an independent attorney to provide advice and counsel on this matter and to assure you that my/our representation of one of you is not adversely influenced by my representation of the other.”

- Anything that either of you communicates to me will be fully and freely disclosed to the other, and no information will be kept confidential as between the two/three/more of you. Should the two/three/more of you ever become involved in any lawsuit against one another, neither/none of you will be able to invoke the attorney-client privilege concerning any communication made by or to me/this firm in the case of my/our joint representation of you, and either or any of you may compel me to testify in court concerning any communication made in the course of that representation.

BRAINSTORM – PROS AND CONS OF JOINT REPRESENTATION

- [Go to flip chart]

Drafting Considerations

- Client and spouse have different beneficiaries they ultimately want to benefit
- Surviving spouse and children of first marriage are in possible conflict
- Surviving spouse and children of first marriage are close to the same age
- Look to intent of parties - who do they want to benefit?
- Plan for adult and minor children as well as grandchildren - is a pot trust appropriate?

Using Three Trusts & CP SubTrusts at Death of First Spouse – SP Direct

Wife's SP Trust

Smith 2016 Trust

Husband's SP Trust

Survivor's Trust

"QTIP"

"Bypass"

Surviving Spouse

Children of first marriage

How does the plan protect deceased spouse's property?

For whose benefit?

Using Three Trusts & CP SubTrusts at Death of First Spouse – Pass CP Through SP

Smith 2016 Trust

Survivor's ½ CP

Wife's SP Trust
(Revocable B4 Her Death)

Husband's SP Trust –
Irrevocable at His Death

"QTIP"

"Bypass"

How does the plan protect deceased spouse's property?

For whose benefit?

Surviving Spouse

Children of first marriage

Watch For

- Incapacity – ordering the payment of expenses
- Incapacity – disclosures to agents and others
- Simultaneous death
- Class gifts – especially “child/children” and “grandchild/grandchildren” Any class where kinship is necessary to define it – e.g., “my nieces”
  - Foster children and stepchildren may be included
  - Raised while a minor (started as a minor and continued throughout lifetimes)
  - Barrier to adoption – clear and convincing evidence that decedent would have adopted but for barrier
- “Descendants”
- Use disinheritance language?

Dimishing Capacity of a Current Client

The Ethics of Representing Those Whose Capacity is Diminishing

Three Scenarios

- You are asked to represent a party *during* suspected elder abuse, undue influence, incapacity, etc.
  - How do you mitigate the risk?
- You have represented Client X for 25 years. You notice Client X is beginning to show signs of incapacity
  - What ethics rules govern your conduct?
- Client X (same as above hypo) “invests” in the Canadian Lottery, a “hot new business” that purports to “grow onions on Mars” and befriended a new art dealer who is selling Client X expensive art
  - Client X’s child asks for your opinion and advice

California Rules of Professional Conduct

(Effective November 1, 2018)

TABLE OF CONTENTS

Ethics – ABA Rule 1.14 CLIENT WITH DIMINISHED CAPACITY

(a) When a client's capacity to make adequately considered decisions in connection with a representation is diminished, whether because of minority, mental impairment or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.

(b) When the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial or other harm unless action is taken and cannot adequately act in the client's own interest, the lawyer **may take reasonably necessary protective action, including consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian ad litem, conservator or guardian.**

(c) Information relating to the representation of a client with diminished capacity is protected by Rule 1.6. When taking protective action pursuant to paragraph (b), **the lawyer is impliedly authorized under Rule 1.6(a) to reveal information about the client**, but only to the extent reasonably necessary to protect the client's interests.

Cf. another State, e.g., Nevada Rule 1.14

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Nevada Rules of Professional Conduct

Rule 1.6. Confidentiality of Information.

(a) A lawyer shall not reveal information relating to representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation, or the disclosure is permitted by paragraphs (b) and (d).

(b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:

(1) To prevent reasonably certain death or substantial bodily harm;

(2) To prevent the client from committing a criminal or fraudulent act in furtherance of which the client has used or is using the lawyer's services, but the lawyer shall, where practicable, first make reasonable effort to persuade the client to take suitable action;

(3) To prevent, mitigate, or rectify the consequences of a client's criminal or fraudulent act in the commission of which the lawyer's services have been or are being used, but the lawyer shall, where practicable, first make reasonable effort to persuade the client to take corrective action;

(4) To secure legal advice about the lawyer's compliance with these Rules;

(5) To establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client; or

(6) To comply with other law or a court order.

(7) To detect and resolve conflicts of interest arising from the lawyer's change of employment or from changes in the composition or ownership of a firm, but only if the revealed information would not compromise the attorney-client privilege or otherwise prejudice the client.

(c) A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.

(d) A lawyer shall reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary to prevent a criminal act that the lawyer believes is likely to result in reasonably certain death or substantial bodily harm

Bus. and Prof. C 6068(e)

"It is the duty of an attorney to do all of the following: . . . (e) To maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client. <= ***Memorize***

Note to audience: The California Supreme Court takes this **very** seriously.

CA Trusts and Estates Section:

"This bill will enable an attorney to notify the proper individuals or entities of limited facts necessary to protect the attorney's client where the attorney reasonably believes that the client is at risk of substantial physical, financial or other harm due to the client's impairment"

The California Supreme Court ***rejected*** the T&E Section proposal without comment.

First Code

- “I accept that I will some day be wrongfully accused of elder abuse.”

[and you will generally have a tough time defending yourself because of the privilege]

[Now breathe]

Bar Association Options

- San Diego
- Los Angeles
- Orange County
- San Francisco
- California State Bar
- Guide to California Rules of Professional Conduct for Estate Planning, Trust and Probate Counsel (1997)

Bar Association Options

- San Diego Ethics Opinion 1978-1

"QUESTION PRESENTED

A. May an attorney pursue aspects of a litigation which in his judgment would be advantageous to his client notwithstanding that the client has expressly directed that he *not* pursue those aspects.

B. May an attorney initiate, or cause to be initiated, conservatorship proceedings for his own client when, in his judgment, the client is no longer competent.

SUMMARY

A. The attorney should not ignore, nor overrule, the express directions of his client regarding the management of the client's suit. Should the client insist upon a course of conduct **contrary to the judgment of the attorney, the attorney may withdraw** from the client's employment.

B. Since the attorney could **not** either initiate the conservatorship proceedings, nor cause them to be initiated by other individuals, without revealing the confidences of the client, the attorney could not initiate conservatorship proceedings. Moreover, were such proceedings initiated, ***the attorney could represent only the client in such proceedings*** and thus would be in a position of possibly arguing against a conservatorship which he had initiated."

Bar Association Options

- Los Angeles Op. 450

"ACTION AGAINST PRESENT OR FORMER CLIENT. It is **improper** for an attorney to bring an action for appointment of a conservator for a present or former client, within the scope of the representation of the client, **even where the attorney believes that a conservatorship is in the client's *best interest***"

-involved a substance abuse victim/child of attorney's original clients (parents), who is now representing the siblings of the addict. "It appears from the facts presented to the Committee that the attorney would be disqualified from bringing such an action, because it would be based on confidential information acquired during the attorney's former representation of "A."

Bar Association Options – Orange (Peter's Favorite)

- Orange County FORMAL OPINION NO. 95-002

Facts: Involved court-appointed counsel: an 88-year old demands hearing in conservatorship. After interviewing client, attorney believes Cship is "in the best interest of her client." The expense of a hearing, particularly if a jury is demanded, would exhaust the conservatee's limited estate

Orange County gives us 3 possibilities:

1. Probate C 1470(a): "discretionary by the court for the purpose of providing help in resolving the issues before the court (i.e. *In re Drabick*, supra)" or to protect the interests of the conservatee. ***The conservatee has not contested the hearing*** and there is no "opposing" viewpoint which needs to be presented. Under these circumstances the attorney may inform the court as to her own opinions regarding the best interest of the client."

2. Probate C 1471(b) "conservatee has not requested the appointment of counsel. The court has been compelled, due to information in the investigator's report or some other source, to appoint counsel to help resolve the issues and/or protect the interests of the client. Although the appointment of counsel is not discretionary in this instance, the role of counsel is still the same as under Probate Code section 1470(a) where ***there is no "opposing" viewpoint***."

3. Probate C 1471(a): "The facts in this case, however, are that the proposed conservatee has demanded a hearing to oppose her family's request to appoint a conservatorship. Counsel has been appointed under Probate Code section 1471(a) "to represent the interest" of the proposed conservatee. The ***client*** has expressed her wishes to oppose the conservatorship and any opinion with respect to the "best interests of the client" which the court-appointed attorney offers to the court must not violate the strict duty of loyalty and confidentiality. Under these circumstances, it would ***be improper for the court-appointed attorney to divulge any "secrets" (i.e. any information which may be embarrassing or detrimental to the client), including the attorney's own observations and opinions***, to the court without the client's consent."

Accordingly, here "it is the responsibility of court-appointed counsel to maintain the duty of loyalty and confidentiality in her representation of the proposed conservatee and to not provide any information to the court which may be ***contrary to the interests expressed by her client***. If the court insists court-appointed counsel provide information to the court which would force counsel to violate her duty of loyalty or confidentiality under the Rules of Professional Conduct, ***then counsel must withdraw from employment with permission from the court***."

Bar Association Options

- San Francisco OPINION 1999-2

"An attorney who reasonably believes that a client is substantially unable to manage their own financial resources or resist fraud or undue influence, ***may***, but is not required to, take ***protective action*** with respect to the client's person and property."

"California case law states that when there is no California Rule on a subject, the courts can look to the ABA Rules and published California ethics opinions for guidance, *People v Ballard* (1980), 104 Cal App 3rd 757,761. See also COPRAC (State Bar Standing Committee on Professional Responsibility and Conduct) Formal Opinion 1983 70. Unfortunately, those authorities disagree. There is some California civil case law dealing with these issues that appears to have been ignored by most of the discussion in the California Ethics Opinions."

Bar Association Options – San Francisco

- San Francisco OPINION 1999-2 – cont'd.

"*Sullivan v. Dunne* (1926) 198 Cal 183, appears to be the earliest case addressing this issue. It holds that ***the client must have capacity to contract in order to give the attorney authority to represent the client in a civil proceeding***. In dicta, it states that if the client had contract capacity when hiring the attorney, then lost it, the contract would necessarily end, as the authority of an agent ends when the principal becomes incompetent.

Bar Association Options

- San Francisco OPINION 1999-2 – cont'd.

"In *Conservatorship of Chilton* (1970) 8 Cal. App. 3rd 34, the attorney was introduced to the client by the client's boyfriend, and proceeded to act for the client. The appellate court upheld the trial court's finding that the boyfriend was a "designing" person seeking to take advantage of the client and denied the attorney's petition for fees. One of the facts used against the attorney was his opposition to the conservatorship, when the existence of the conservatorship was clearly needed to protect the client. Another finding was that ***he advocated positions taken by a clearly incompetent client***. Another was that ***the client lacked the capacity to enter into an attorney client relationship*** with the attorney.

Bar Association Options

- San Francisco OPINION 1999-2 – cont'd.

In *Caldwell v. State Bar* (1975)13 Cal. 3rd 488, one of the facts used to discipline the attorney was that he ***continued to expend client funds*** under a power of attorney after the client had been adjudicated incompetent. The *Caldwell* Court cited *Sullivan* for support.

Bar Association Options

- San Francisco OPINION 1999-2 – cont'd.

CONCLUSION

As a general rule, an attorney recommends actions to clients and the clients decide what course to take. An impaired client presents challenges that are not easily resolved under customary rules, because the rules assume a rational, sober client. An attorney who ***reasonably believes*** that a client is substantially unable to manage his or her own financial resources or resist fraud or undue influence, ***may, but is not required to, take protective action*** with respect to the client's person and property. Such action ***may include recommending appointment of a trustee, conservator, or guardian ad litem***. The attorney has the ***implied authority*** to make limited disclosures necessary to achieve the best interests of the client.

Bar Association Options – the State Bar

- California State Bar Eth. Op. 1989-112

It is the opinion of the Committee that instituting a conservatorship on these facts is barred by Business and Professions Code section 6068, subdivision (e), and furthermore creates a conflict that may not be waivable. The attorney must maintain the client's confidence and trust, even though the attorney will be torn between a duty to pursue the client's desires (including protecting his secrets) and a duty to represent his interest, which may best be served by instituting a conservatorship. While the attorney will not fall below the level of competence required by simply continuing the representation for which he or she was retained and avoiding filing a conservatorship for the client, withdrawal may be appropriate or even mandatory if the client's conduct impedes the attorney's ability to effectively carry out the duties for which he or she was retained.

Bar Association Options – the State Bar

California State Bar Eth. Op. Interim No. 13-00002 (2021) .

A lawyer for a client with diminished capacity should attempt, insofar as reasonably possible, to preserve a normal attorney-client relationship with the client, that is, a relationship in which the client makes those decisions normally reserved to the client. The lawyer's ethical obligations to such a client do not change, but the client's diminished capacity may require the lawyer to change how the lawyer goes about fulfilling them. In particular, the duties of competence, communication, loyalty, and nondiscrimination may require additional measures to ensure that the client's decision-making authority is preserved and respected. In representing such a client, a lawyer must sometimes make difficult judgments relating to the client's capacity. Provided that such judgments are informed and disinterested, they should not lead to professional discipline. In some situations, the client's lack of capacity may require that the lawyer decline to effectuate the client's expressed wishes. When the lawyer reasonably believes that the client's diminished capacity exposes the client to harm, the lawyer may seek the client's informed consent to take protective measures. If the client cannot or does not give informed consent, the lawyer may be unable to protect the client against harm. A lawyer representing a competent client who may later become incapacitated may propose to the client that the client give advanced consent to protective disclosure in the event that such incapacity occurs. If appropriately limited and informed, such a consent is ethically proper.

Bar Association Options – the State Bar

California State Bar Formal Opinion 2021-207 .

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What is capacity?

To make a decision other than those concerning testamentary matters and consent to health care, a person must have “the ability to communicate verbally, or by another 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.” (Probate Code section 812.)

A person’s capacity is presumed; the presumption goes to the burden of proof, and thus must be overcome by affirmative evidence showing lack of capacity. Probate Code section 810(a). The presumption of competence is not overcome by evidence of a mental or physical disorder. Instead, there must be evidence of a deficit in one or more of the person’s mental functions, which, by itself or in combination with others, “significantly impairs the person’s ability to understand and appreciate the consequences of his or her actions with regard to the type of act or decision in question.” Id., subsections (b)-(c). In determining whether a person suffers from a deficit that is substantial enough to warrant a finding of lack of capacity to do a particular act, the court may take into consideration, the “frequency, severity and duration of periods of impairment.” Probate Code section 810(c).6 Moreover, “the required level of understanding depends entirely on the complexity of the decision being made.” In re Marriage of Greenway (2013) 217 Cal.App.4th 628, 641 [158 Cal.Rptr.3d 364].

Contractual vs. Marital vs. Testamentary Capacity

Contractual: a presumption affecting the burden of proof arises that a person is of unsound mind "if the person is substantially unable to manage his or her own financial resources or resist undue influence." (Cal. Civ. Code § 39(b).) See, *In re Marriage of Greenway* (2013) 217 Cal.App.4th 628, 642-42.

Marital: Different, and lower, standards govern: "Marriage arises under a civil contract, but courts recognize this is a special kind of contract that does not require the same level of mental capacity of the parties as other kinds of contracts." *In re Marriage of Greenway*, supra, 217 Cal.App.4th at 641.

Testamentary: "Similarly, the standard for testamentary capacity is exceptionally low." Id. at 242. Under Probate Code section 6100.5, a person lacks the capacity to make a will if at the time of making either: (1) The individual does not have sufficient mental capacity to be able to (A) understand the nature of the testamentary act, (B) understand and recollect the nature and
situation of the individual's property, or (C) remember and understand the individual's relations to living descendants, spouse, and parents, and those whose interests are affected by the will.

(2) The individual suffers from a mental disorder with symptoms including delusions or hallucinations, which delusions or hallucinations result in the individual's devising property in a way which, except for the existence of the delusions or hallucinations, the individual would not have done.

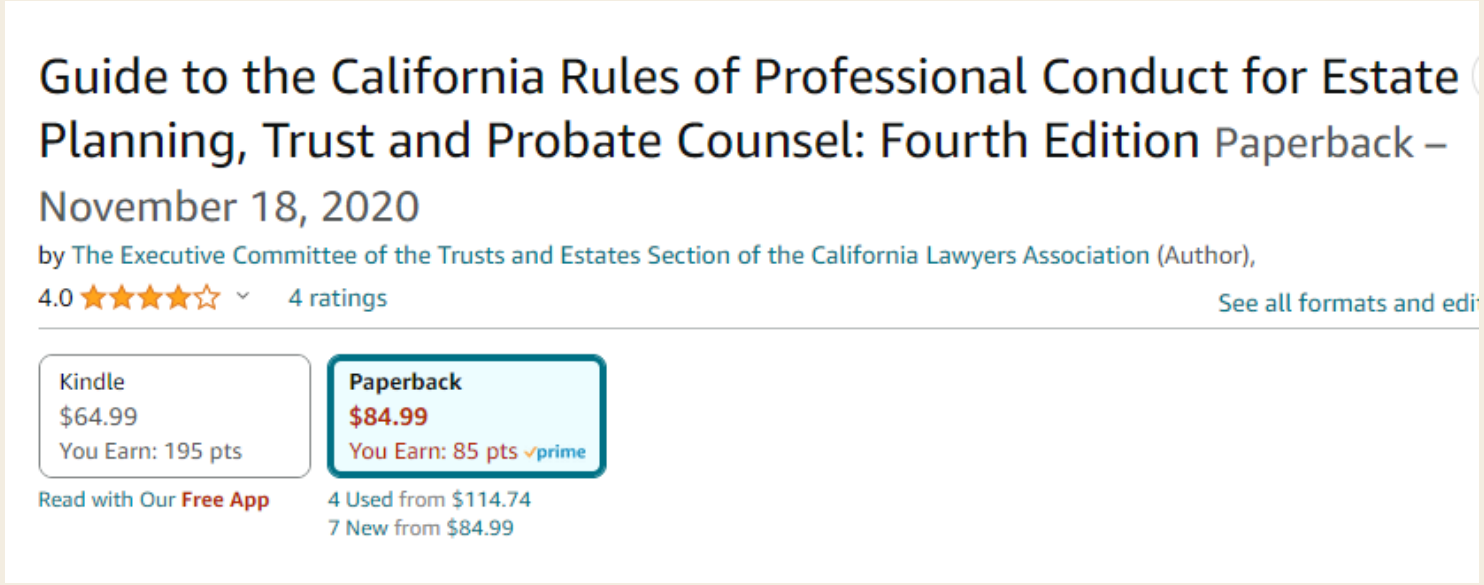
Like the more general standard of capacity, capacity to make a will is presumed, and must be rebutted by evidence that the testator's lack of mental capacity or mental disorder existed at the time of making the will. See, *Anderson v. Hunt* (2011) 196 Cal.App.4th 722, 726-28

Second Code

- “Become a Better Elder Law Professional”

Bar Association Options

- Guide to California Rules of Professional Conduct for Estate Planning, Trust and Probate Counsel (1997, 2007, 2015 and 2020):



Preparing for a meeting with a client with diminished capacity

Pre-representation (no duty . . yet) considerations:

- If abuse is taking place, inform APS & District Attorney;

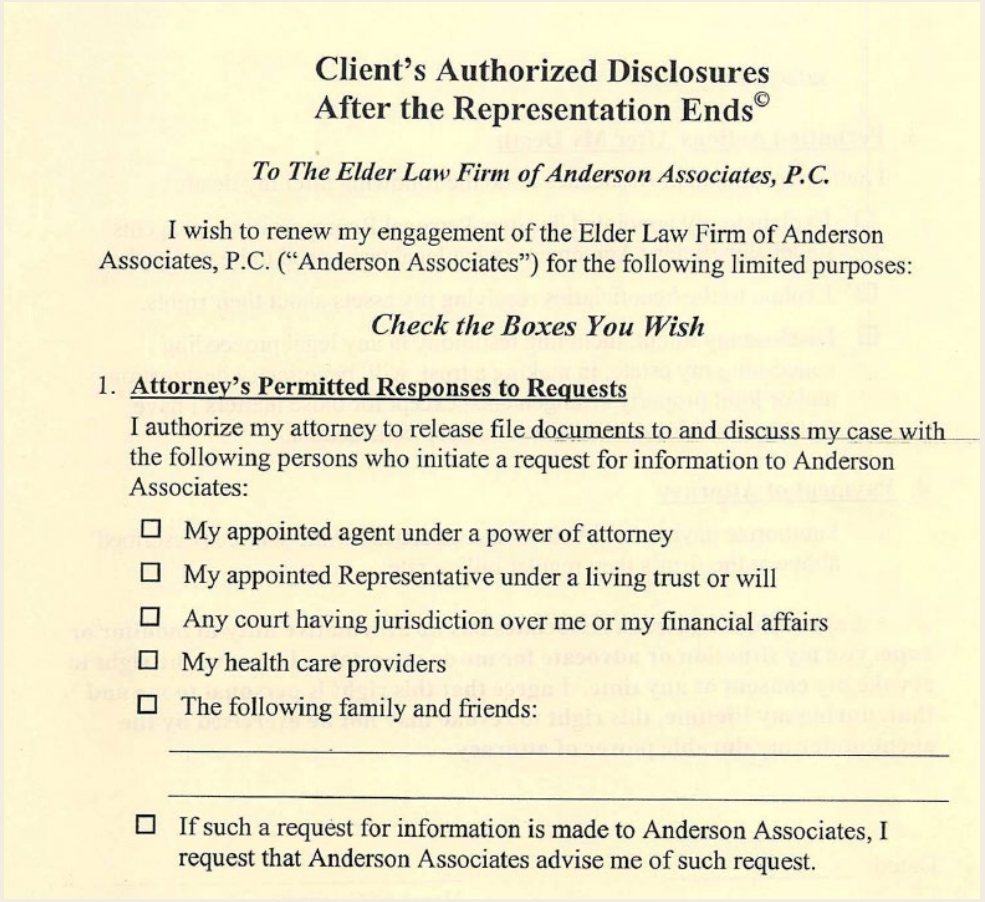
- Consider pre-representation neuropsychiatric exam

Then you decide to take the case

- Conflict Waiver – Must be in writing, signed by the client after a reasonable disclosure of the nature of the conflict. Waive confidentiality of future disclosure of A-C communications "if necessary to protect your [client's] interests."
- Written Retention Agreement – if fees anticipated to be in excess of $1,000 (unless exception – emergency or pre-existing client – applies)
- HIPAA/CMIA release to speak w/doc – Health Insurance Portability and Authorization Act; California Medical Information Act

Express Authorization for Disclosure

- Look at Anderson & Assoc. Materials



Client's Authorized Disclosures
After the Representation Ends©

To The Elder Law Firm of Anderson Associates, P.C.

I wish to renew my engagement of the Elder Law Firm of Anderson Associates, P.C. ("Anderson Associates") for the following limited purposes:

Check the Boxes You Wish

1. **Attorney's Permitted Responses to Requests**

I authorize my attorney to release file documents to and discuss my case with the following persons who initiate a request for information to Anderson Associates:

- ☐ My appointed agent under a power of attorney
- ☐ My appointed Representative under a living trust or will
- ☐ Any court having jurisdiction over me or my financial affairs
- ☐ My health care providers
- ☐ The following family and friends:

_____

_____

- ☐ If such a request for information is made to Anderson Associates, I request that Anderson Associates advise me of such request.

Dealing with a diminished potential client

- The lawyer/adviser will assume conflicts of interest are involved – assume all requests for planning for another are "dual" representation cases. *Ismael v. Millington* (1966)
- In most instances, they are potential but could evolve to actual
  - *Cf*. potential v. actual: if actual, should you report elder abuse to APS or the DA (attorneys not mandatory reporters, and may violate confidences such as AC privilege)
- Check conflicts – run report through firm process
- Consider referral to capacity doctor (neuropsychiatric eval, etc.)
- Waive future disclosures of confidential communications
- Perhaps consider some sort of recording of interviews (***generally not a good idea***, but consider this)
- Always meet with prospective client without other individual present

Dealing with a diminished potential client

- Are you liable?
- *Moore v. Anderson Ziegler*: Lawyer not liable for getting capacity wrong (drafting plan for incapacitated client)
- *Chang v. Lederman*: Lawyer not liable for not finishing plan before client became incapacitated (drafter not liable to those who "could have been named" in estate plan)
- *Hall v. Kalfayan*: distinction between:
  - Actual (or intended) beneficiaries under executed instrument (if negligent, then atty liable)
  - Potential beneficiaries under draft instrument not executed (atty not liable)

PC 810 – Presumption of Capacity

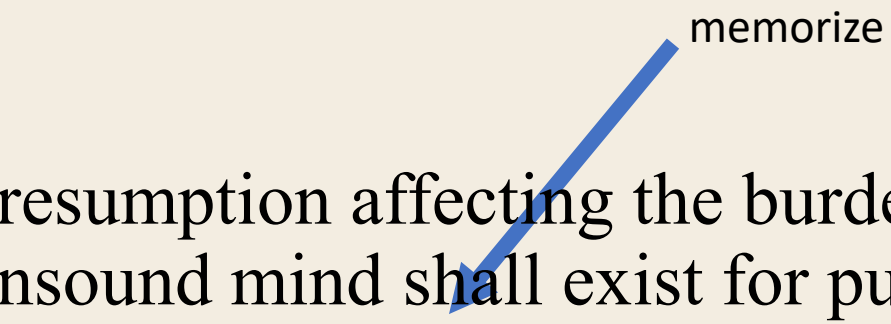
- Rebuttable presumption (affects burden of proof)
- contestants have burden of proof
- burden is clear and convincing evidence
  - *Clementi*, 166 CA4 375, 384 (2008); *Truckenmiller* (1979); *Ventura* (1963)

PC 810 – Definition of Capacity

Depends

- Medical Treatment. PC 813 – “sliding scale”

Contractual Capacity



CC 39(b):

- "A rebuttable presumption affecting the burden of proof that a person is of unsound mind shall exist for purposes of this section if the person is ***substantially unable to manage his or her own financial resources or resist fraud or undue influence***. Substantial inability may not be proved solely by isolated incidents of negligence or improvidence."

Recent Cases

Hypo: A plaintiff's attorney comes to you seeking advice on whether a skilled nursing facility ("SNF") can be sued in court for elder abuse. The family alleges:

- The SNF ignored their mother, resulting in bedsores and an infection
- The SNF overcharged her overcharged her for services they claimed were performed, but never performed or performed negligently
- The SNF failed to allow family members to visit their mother during daytime hours, claiming variously that she was asleep, was incoherent, or was being seen by a medical professional. This resulted in isolation, loneliness and depression
- Their mother died
- The SNF claims she signed an arbitration clause and has moved the Court to order the matter to arbitration
- The lawyer wonders whether the arbitration clause the mother signed is enforceable, given that she had "little capacity" to sign a contract

What is your advice?

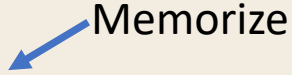
Algo-Heyres v. Oxnard Manor LP, No. B319601, 2023 Cal. App. LEXIS 141 (Ct. App. Feb. 28, 2023

Substantial evidence supported the trial court's decision finding that the defendant care facility's arbitration agreement was unenforceable against a patient's heirs because the patient, who had suffered a stroke days before signing the agreement, lacked the mental capacity to contract when he signed the form.

Although Oxnard argued that it was not its burden to prove capacity, it was Oxnard's burden to prove a valid arbitration agreement. The *presumption that all persons have capacity is rebuttable and mental capacity is a fact specific inquiry*. Substantial evidence established lack of capacity, including *failure to recognize his spouse and grandchild, inability to understand speech, and ability to respond only to simple questions or commands.* Further, *the agreement was a relatively complex five page contract that included waiving the constitutional right to trial*. Because substantial evidence supported the conclusion that Cornelio was not competent, Oxnard did not meet its burden to establish a valid arbitration agreement.

The rebuttable presumption of capacity (PC 810): what does it mean?

- Attorney is hired to create a living trust for Frank to leave money to Louise, his wife
- Lawyer prepares the documents and attempts to schedule a time to have Frank sign them
- Frank's daughter Tammy calls the Sheriff and tells him to refuse to let Attorney see Frank
- Frank died the next morning



- Louise sues for IIEI: ((1) proof of expectancy of inheritance; (2) causation; (3) intent; (4) independently tortious means of interference; (5) damages; and (6) independently tortious conduct directed at someone other than the plaintiff)
- Tammy argues Louise had the burden of proving Frank had capacity to execute the new RLT

What result?

The rebuttable presumption of capacity (PC 810): what does it mean?

- *Gomez v. Smith* (2020) 268 Cal.Rptr.3d 812:

"The only abnormality in the records was Frank's inability to recall the correct year. That, "by itself, [was] not enough for [Crawford] to believe that you would say somebody doesn't have capacity to participate in making decisions." Crawford noted the record did not contain much information relating to Frank's capacity after his discharge from the nursing home. The records showed, however, that Frank requested a suction machine on August 20, indicating he was aware of his needs and could ask for assistance. Crawford understood the record she relied upon indicated Louise made the call to hospice and told them Frank was requesting a suction machine; Frank did not make the call."

The rebuttable presumption of capacity (PC 810): what does it mean?

- *Gomez v. Smith* (2020) 268 Cal.Rptr.3d 812:
- “Tammy challenges the trial court’s mental capacity analysis on two grounds. She asserts: (1) the trial court applied an erroneous legal standard; and (2) the evidence was insufficient to support a finding of capacity. Louise responds Tammy had the burden of proving Frank did not have mental capacity on August 20, the trial court cited the correct legal standard, and the evidence supported the trial court’s determination. We conclude the trial court did not err.”

The rebuttable presumption of capacity (PC 810): what does it mean?

- *Gomez v. Smith* (2020) 268 Cal.Rptr.3d 812:
- "The trial court set forth the requirements under sections 810 through 812. More importantly, the trial court applied those standards.
- The finding that Frank "had the ability to appreciate the consequences *of the particular act he wished to undertake which was to finalize the trust plan that he had previously reviewed with Mr. Aanestad*" . . . tracks the appreciation of consequences standard pertinent to mental capacity, as outlined in section 811, subdivision (b), and section 812, subdivision (b). The trial court further expressly discussed testimony that Frank was lethargic, groggy, and drowsy, but engaged, **not disoriented, not hallucinating, and not delusional -- evidence pertinent to the enumerated mental functions of alertness and attention and thought processes set forth in section 811, subdivision (a)(1) and (3**). The trial court also discussed evidence that Frank was aware of his surroundings, capable of understanding and participating in communications, aware of his needs, and able to request assistance -- evidence pertinent to Frank's **ability to communicate under section 812 and the information processing mental functions listed in section 811, subdivision (a)(2).**
-

Eyford v. Nord – lots of commentary

What the Court said:

- A person is not competent to make a will if at the time of making the will, she has a "mental health disorder with symptoms including delusions or hallucinations." Although Pearson had several demonstrably false beliefs about her granddaughters, and those false beliefs motivated her in disinheriting them, those beliefs were tethered to facts, and therefore not delusions. Three experts testified that Pearson did not have a mental disorder, or delusional disorder. Pearson's treating physicians testified that she did not have dementia, and that they did not notice signs of cognitive impairment. Even appellant's expert testified that the second best explanation as to why Pearson changed her estate plan was that it was possible that she was upset that her granddaughters "swept" into her life after her husband's death, and she did not want to give her money to them.

What the commentators say:

- "The bottom line: the delusions or lack of testamentary capacity must be demonstrated to have existed at the time the trust or will was executed to invalidate a will or trust under California law. Testamentary capacity under California law is a very low standard, and evidence of delusions before or after the execution of the document, which were not demonstrated to have changed the disposition of the estate, will not invalidate a document. [Probate Stars]
- "So it is unnecessary to review whether she suffered from delusions–although at least one of her reasons for disinheriting the contestants–that they were interested only in her money–wasn't delusional either. [Severson & Werson]
- "For family members trying to help a struggling elder, the Eyford case is a cautionary tale. If an elder misconstrues their efforts to assist, as Kay apparently did with respect to her granddaughters, the elder may penalize them through a disinheritance that may be difficult to challenge.

"For lawyers, the takeaway is more technical. Eyford does little to clarify Andersen as to when Probate Code section 6100.5 applies to trust instruments as opposed to the contractual capacity standard under Probate Code section 812. (See my article in Trusts and Estates Quarterly for more on the nuances of Andersen.) Yet if section 6100.5 does apply, and the contestant advances a delusion/hallucination theory, Eyford requires the contestant to persuade the court that the elder suffered from a mental health disorder when executing the challenged document. [Downey Brand]

More cases

- Tom, 95, was on his second marriage to Gloria, who had 2 daughters from a prior marriage. Tom was conserved in 2014.
- Tom sought appointment of Attorney Gilstrap, who was recommended by Gloria's lawyer
- Tom's independent temporary conservator Jenkins hired Humphrey instead.
- One of Tom's 3 daughters from a prior marriage got a TRO against Gloria's daughter, Wear (a paralegal), to stop trying to get Thomas to change his estate plan to leave it all to Gloris
- Wear evaded service.
- At the hearing on the permanent conservator, the Court replaced Jenkins with Wilson

Conservatorship of Tedesco

- Wear tried to get Davis (who had gone behind everyone's back and contacted Tom directly) appointed "independent" counsel in 2016, claiming Davis was truly independent
- The Court said no and admonished Davis to stop contacting Tom.
- Wear also had a bank manager (Carpenter) contact Tom to find out the status of the conservatorship.
- Wear brought civil actions seeking to have Carpenter be Tom's GAL, had Tom sign a contract with a law firm on contingency cases. Law firm then sought termination of the conservatorship
- In 2016 Gloria (wife) moved to disqualify the probate judge, which was granted

Conservatorship of Tedesco

- More litigation ensued and Carpenter was able to get a Judge to appoint him GAL in a civil action. He nor his lawyers notified the probate Court or the conservator of this.
- Carpenter (the GAL) and his lawyers then moved to disqualify the new Probate Judge (Cahraman), who denied it, but too late – he was disqualified by operation of law
- Third judge (Evans) is assigned
- Carpenter, through Herzog et al., then goes to Orange County to remove Tom's 3 daughters as co-trustees of his living trust
- Orange County denies; Carpenter appeals and loses
- Gloria and Wear get Thomas to sign a 2020 amendment to the Trust that leaves Gloria 75% of the estate, disinheriting his 3 daughters

Conservatorship of Tedesco

- 2 months later, lawyer Davis notifies 3 daughters that Tom disinherited them in favor of Gloria
- Tom's bio Daughter files another elder abuse action (EARO) against Carpenter, Gloria, Davis, Herzog, Marshall, and Wear to prevent further abuse and changes to his estate plan
- Gloria et al. then preremptory challenge the EARO Judge under 170.6; and a fourth judge (Fernandez) is assigned
- Gloria et al then file an anti-SLAPP motion on the EARO, which is denied on the basis that "'[n]othing here involves a protected activity,'" and White has "'made a prima facie factual showing sufficient to sustain a favorable judgment as to all six [defendants].'" Gloria appeals and loses.

Conservatorship of Tedesco

- In 2021, Carpenter and Gloria file a Petition to vacate all orders of the conservatorship on the basis of “a pattern of fraud, deceit and elder abuse committed by Thomas’s daughters, their lawyers, Wilson, and Wilson’s lawyers, to prevent Thomas from having independent counsel, adjudicating the validity of the conservatorship, or securing a hearing on the merits of his civil claims.
- The 3 bio daughters demur to the Petition on the grounds the petition failed to state a cause of action, “preclusion under law of the case,” and Gloria and Carpenter lack standing.
- Wilson (the appointed conservator) moved to strike the verified petition and to disqualify nonappointed counsel from representing any party in this matter or any substantially related proceeding.

Conservatorship of Tedesco

- The Probate Court struck the Petition on the grounds it was time-barred, the parties lacked standing, and each basis in support of the petition had been litigated, determined against petitioners' favor, affirmed on appeal, and are now law of the case. Moreover, the court stated that nonappointed counsel may not represent Thomas "directly or indirectly, and specifically by representing . . . Carpenter and/or Gloria . . ." The court further sustained the demurrer to the petition, without leave to amend.
- Gloria et al appeal. The appeal is dismissed and Gloria et al move to vacate the dismissal. All other parties' (besides Gloria's) motion to vacation is denied

Conservatorship of Tedesco

- The appellate court is not happy, but they analyze the mess.
- The prior orders were raised and decided, many on appeal, and are now *res judicata*.

  "As an incapacitated person, Thomas lacks the legal ability to retain or direct counsel. (Civ. Code, §§ 40, 2356, subd. (a)(3) [an agency terminates upon the 'incapacity of the principal to contract']; Prob. Code, § 1872, subd. (a) [citations omitted] However, upon his request, the probate court must appoint independent counsel." The probate court did just that when it appointed Ofseyer on August 4, 2016, Burt on December 9, 2016, and McKenzie on January 5, 2018." . . .

  "Accordingly, if Thomas has been denied independent representation, then the evidence suggests that the denial is because Gloria has rejected each independent court-appointed counsel in favor of counsel of her or Wear's choosing."

Conservatorship of Tedesco

- “Gloria claims the order appointing Wilson, based on the parties’ oral stipulation, is void. Not so. The facts demonstrate that all parties were represented by counsel, placed their stipulation on the record before the probate court, and Thomas’s counsel prepared the order based on the stipulation.”
- “all parties stipulated on the record, and Thomas agreed, to the appointment of Wilson as conservator of Thomas’s estate. Humphrey offered to prepare, and Nunan and Humphrey prepared, the order confirming the stipulation to appoint Wilson; the order was filed on August 13, 2015. Contrary to Gloria’s claim, there was more than simply an “oral stipulation” to the appointment of Wilson.”

Conservatorship of Tedesco

- “As a conservatee, Thomas’s right to independent counsel is not absolute. Rather, counsel must be approved by the probate court. (Prob. Code, § 1872, subd. (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.”]; *Conservatorship of Chilton* (1970) 8 Cal.App.3d 34, 40 [affirming the trial court’s denial of an award of attorney fees where a conservatee signed a retainer agreement when she had no capacity to enter into a valid contract employing petitioner as her attorney].) Thomas was provided independent counsel when the court appointed Ofseyer, then Burt; however, both sought to be relieved as Thomas’s counsel based on Gloria’s or nonappointed counsel’s interference in the conservatorship and their attorney-client relationship with Thomas. (*Tedesco I*, supra, E070316.) In 2018, the court appointed McKenzie as Thomas’s independent counsel, but McKenzie lost his independence when he allowed nonappointed counsel—introduced to Thomas via Gloria or Wear—to dictate what he (McKenzie) would advocate on Thomas’s behalf. Thus, McKenzie has also been relieved as Thomas’s counsel.

Conservatorship of Tedesco

- “As the probate court and this court have repeatedly stated, nonappointed counsel have no authority to represent Thomas, and Thomas has no power to retain nonappointed counsel, absent court approval. (*Tedesco I*, supra, E070316.) If anyone has denied Thomas his right to independent counsel it is Gloria, Wear, and/or nonappointed counsel, who challenge any court-appointed attorney failing to agree with their agenda.
- Thus, we agree that Gloria, as Thomas’s spouse, has standing to petition for termination of the conservatorship.
- “As to Thomas, nonappointed counsel may not represent him unless approved and appointed by the probate court.”
- We reiterate, as an incapacitated person, Thomas lacks the legal ability to retain or direct counsel; however, upon his request, the probate court must appoint independent counsel. (*Tedesco I*, supra, E070316)

Conservatorship of Tedesco

- “Neither Wilson (as conservator), nor Thomas’s family members (including Gloria), have the power to replace a conservatee’s independent, court-appointed counsel with counsel they select because to do so would “render [Thomas’s] right to independent counsel meaningless.” (Michelle K. v. Superior Court (2013) 221 Cal.App.4th 409, 447 [the rationale and need for independent, court-appointed counsel exists when a conservator or other representative proposes acts that would significantly affect a conservatee’s fundamental rights].)”
- “Despite the court’s rejection of their request, nonappointed counsel have repeatedly stated they represent Thomas and filed pleadings on his behalf. Simultaneously, nonappointed counsel have represented Wear, Gloria, and Carpenter. (*White v. Davis*, supra, 87 Cal.App.5th at pp. 274-275; *White v. Wear*, supra, 76 Cal.App.5th at p. 27.) Given the adverse interests of Thomas (on the one hand) and Gloria, Wear, and Carpenter (on the other), nonappointed counsel are disqualified from representing Gloria based on a conflict of interest. “‘Conflicts of interest broadly embrace all situations in which an attorney’s loyalty to, or efforts on behalf of, a client are threatened by his [or her] responsibilities . . .’ to the attorney’s other interests.” [citation]; see *People ex rel. Dept of Corporations v. SpeeDee Oil Change Systems, Inc*. (1999) 20 Cal.4th 1135, 1147 [“[T]he most egregious conflict of interest is representation of clients whose interests are directly adverse in the same litigation.”]; see also Cal. Rules of Professional Conduct, rules 1.7

Conservatorship of Tedesco

- “Gloria asserts the probate court may not disqualify nonappointed counsel in other proceedings. We disagree. The probate court has exclusive concurrent jurisdiction over any issue that affects the conservatorship and Thomas, as the conservatee. Under the doctrine of exclusive concurrent jurisdiction, “when two or more courts have subject matter jurisdiction over a dispute, the court that first asserts jurisdiction assumes it to the exclusion of the others. [Citation.] The rule is based upon the public policies of avoiding conflicts that might arise between courts if they were free to make contradictory decisions . . . relating to the same controversy and preventing vexatious litigation and multiplicity of suits.” (*Shaw v. Superior Court* (2022) 78 Cal.App.5th 245, 255.) Thus, to the extent nonappointed counsel’s representation of Thomas or Gloria in other matters impacts the conservatorship, nonappointed counsel may be disqualified from such representation by the probate court.”

	INCOME	PRINCIPAL
SURVIVING SPOUSE	MANDATORY? (QTIP IT?)	HEMS*?
CHILDREN OF 1ST M	DISCRETIONARY (BYPASS ONLY)	Discretionary (Bypass only)
ADULT CHILDREN OF 2ND M	DISCRETIONARY (BYPASS ONLY)	Discretionary (Bypass only)
MINOR CHILDREN OF 2ND M	Probably not relevant? (s/s has support obligation – if needed to satisfy)	Relevant?
CHILDREN BORN OUTSIDE THE MARRIAGE	Fix C/S obligation?	????

Income and Principal Distributions

- Marital "**QTIP**"
  - All income or unitrust
  - Principal for HEMS
  - Principal for comfort, welfare and happiness
  - 5 & 5 power

- **"Bypass"** trust
  - All income or unitrust to spouse
  - Income for HEMS
  - Income for comfort, welfare and happiness
  - Principal for HEMS
  - Principal for comfort, welfare and happiness
  - 5 & 5 power

Income and Principal Distributions

- Marital "**QTIP**"
  - [All income or unitrust]
  - [mandatory]
  - **Principal for HEMS**
  - ~~Principal for comfort, welfare and happiness~~
  - ~~5 & 5 power~~

- **"Bypass"** trust
  - ~~All income or unitrust to spouse~~
  - **Income for HEMS**
  - ~~Income for comfort, welfare and happiness~~
  - **Principal for HEMS**
  - ~~Principal for comfort, welfare and happiness~~
  - ~~5 & 5 power~~

Discretionary Distributions

- “At any time or times, the trustee **SHALL** pay to or apply for the benefit of the surviving settlor so much of the net income and principal of the trust as the trustee deems proper to pay the reasonable expenses of the surviving settlor for his or her **HEALTH, EDUCATION, SUPPORT AND MAINTENANCE**. In exercising discretion, the trustee shall give the consideration that the trustee deems proper to **ALL OTHER INCOME AND RESOURCES THAT ARE THEN KNOWN TO THE TRUSTEE AND THAT ARE READILY AVAILABLE** to the surviving settlor for use for these purposes. All decisions of the trustee regarding payments under this subsection, if any, are within the trustee's discretion and shall **be FINAL AND INCONTESTABLE by anyone.** The trustee shall accumulate and add to principal any net income not distributed.”

Other typical language – discretionary distributions

"Our **Independent Trustee [in its reasonable discretion?] may distribute** as much of the principal of the QTIP Trust to the surviving Grantor as our Independent Trustee **may determine *advisable for any purpose***. If no Independent Trustee is then serving, our Trustee [in its reasonable discretion?] **shall** distribute as much principal of the QTIP Trust to the surviving Grantor as our Trustee determines necessary or advisable for the surviving Grantor's **health, education, maintenance or support.**

"Our Trustee, in its **reasonable discretion**, **may** consider the needs of the surviving Grantor and other income and resources available to the surviving Grantor.

Specific Discretionary Issues

- SHALL
- HEALTH, EDUCATION, SUPPORT AND MAINTENANCE
- ALL OTHER INCOME AND RESOURCES THAT ARE THEN KNOWN TO THE TRUSTEE AND THAT ARE READILY AVAILABLE
- FINAL AND INCONTESTABLE

Issues Related to Discretionary Distributions

- Shall v. May
- Control
- Identification of beneficiary
- Psychology of trustee
- Discretion to be used

Issues Related to Discretionary Distributions (cont.)

- HEMS definition
- Other resources
- Illiquid assets
- Exhaust marital and survivor’s trusts first
- Special trustee
- Tangible personal property

- Unitrust