



## TRUSTS & ESTATES SECTION

THE STATE BAR OF CALIFORNIA

### ***CAPACITY STANDARD TO EXECUTE TESTAMENTARY INSTRUMENTS***

#### **LEGISLATIVE PROPOSAL (T&E-2013-10)**

To: Office of Governmental Affairs

From: Edward J. Corey, Chair, Trusts and Estates Section Executive Committee  
Charlotte K. Ito, Vice Chair, Trusts and Estates Section Executive Committee  
Herbert A. Stroh, Chair, Anderson Committee

Date: July 3, 2012

Re: A proposal to create new Probate Code Section 814, amend Section 812, and repeal Section 6100.5, relating to the capacity standard to execute testamentary instruments

#### **SECTION ACTION AND CONTACTS**

Date of Approval by Section Executive Committee:

Approval Vote: For: 19 Against: 11 Abstain: 0

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## **PURPOSE**

Currently the courts apply different capacity standards to wills, trusts, and nonprobate transfer documents such as life insurance and retirement account beneficiary designations. In addition, the capacity standard applicable to a trust or trust amendment varies depending upon the instrument's complexity. This proposal would establish a uniform capacity standard for determining the validity of wills, codicils, trusts, trust amendments and nonprobate transfer instruments by applying the current test applicable to wills under Probate Code Section 6100.5 to all such instruments making at-death transfers. The proposal does so by adding new Probate Code Section 814, making corresponding revisions to Probate Code Section 812, and repealing Probate Code Section 6100.5, but preserving its substance in new Probate Code section 814.

## **PROPOSAL AND REASONS FOR PROPOSAL**

The level of mental capacity required to make a will has long been less than that necessary to manage ordinary business affairs. For the purpose of a will, the question is whether the testator, i.e., the person who made the will, was able 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.” (*Estate of Sexton* (1926) 199 Cal. 759, 768-769). Probate Code section 6100.5 codified this common law standard for testamentary capacity.

On the other hand, the capacity to enter into a contract focuses on whether the party understood the particular transaction at issue. As a result, the competency necessary for a court to determine that a contract is valid depends upon its complexity. Probate Code Section 812 codifies the capacity standard applicable to contracts and legal decisions other than wills. As a general matter, under that statute a person lacks the capacity to make a decision if he or she cannot appreciate the rights, duties, consequences, risks, and benefits involved in the decision. Consequently, in applying Section 812, the level of capacity necessary to make a particular decision varies depending on the complexity of the particular decision.

With respect to a trust, trust amendment or other nonprobate transfer that is testamentary in nature, under current law it is uncertain which capacity standard a court will apply. Probate Code Section 812 does not specifically include or exclude these instruments. Moreover, the courts have not applied consistent standards in evaluating whether the settlor, i.e., the person or persons who made the trust or trust amendment, had the capacity to do so.

Until the recent case of *Andersen v. Hunt* (2011) 196 Cal.App.4<sup>th</sup> 722, there was limited and inconsistent California precedent regarding the capacity standard necessary to execute a trust or trust amendment. In determining the appropriate capacity standard to evaluate trust amendments *Andersen* concluded:

“[w]hen determining whether a trustor had capacity to execute a trust amendment that, in its content and complexity, closely resembles a will or codicil, we believe it is appropriate to look to section 6100.5 to determine when a person's mental deficits are

sufficient to allow a court to conclude that the person lacks the ability to ‘understand and appreciate the consequences of his or her actions with regard to the type of act or decision in question.’ In other words, while section 6100.5 is not directly applicable to determine competency to make or amend a trust, it is made applicable through section 811 to trusts or trust amendments that are *analogous to wills or codicils*." (Emphasis added.)

Conversely, as to trusts or trust amendments that, "in content and complexity" do not "closely resemble a will or codicil," Section 812 is applicable (*id.* at p. 730.). Consequently, the more complicated the trust or trust amendment the greater the mental capacity required for the settlor to execute the instrument.

Applying this distinction to determine the standard applicable to the instruments at issue, *Andersen* held that "[i]n view of the amendments’ simplicity and testamentary nature, we conclude that they are indistinguishable from a will or codicil and, thus, [decedent’s] capacity to execute the amendments should have been evaluated pursuant to the standard of testamentary capacity articulated in section 6100.5." (*Id.* at p. 731).

As a result of the *Andersen* opinion, whether the capacity standard under Section 812 or the capacity standard under Section 6100.5 is applicable to a trust or trust amendment will now vary from case to case. Specifically, courts are compelled to decide whether the instrument is simple and “indistinguishable from a will or codicil” before ruling on the applicable capacity standard. In addition, when Section 812 applies the degree of capacity will depend on the complexity of the particular instrument in question. This will create a patchwork of decisions focusing on the peculiar facts of each case, leaving drafters and litigators alike to speculate on the capacity standard a court might apply to any given instrument.

*Andersen* also raises concerns regarding the application of the contractual capacity standard to nonprobate at-death transfer instruments, which can lead to incongruous results. Although the *Andersen* court upheld the decedent’s trust amendments, it invalidated his insurance policy and joint tenancy account designations even though beneficiary designations, like wills and revocable trusts, are testamentary in nature. For consistency, a person’s capacity to make a beneficiary designation -- which is generally easier to understand than a will or simple trust amendment -- should be the same as that required to make or amend a will or trust.

To simplify and harmonize the capacity standards applicable to instruments that are testamentary in nature, this proposal would create a new statute: Probate Code Section 814. The proposed new statute incorporates the language of Probate Code Section 6100.5 with modifications to include revocable trusts, trust amendments, and nonprobate transfers. This preserves former Section 6100.5 to the maximum possible extent, using definitions already found in the code.

Enacting new Probate Code Section 814 will require minor harmonizing changes to Probate Code Section 812. Last, Probate Code Section 6100.5 would be repealed, since its substantive provisions are retained in new Probate Code Section 814 and more properly placed in the Due Process in Competency Determinations Act, along with the other Probate Code statutes governing the capacity to make decisions. The proposed language and amendments are attached.

The Legislation would apply retroactively to all matters pending as of its effective date, with the exception of those in which a judgment has been entered or a trial has been commenced.

**HISTORY:** The Executive Committee of the Trusts and Estates Section (TEXCOM) is not aware of any similar bill that has been introduced either in this session or during a previous session.

**IMPACT ON PENDING LITIGATION:** None known.

**LIKELY SUPPORT & OPPOSITION:**

Estate planning practitioners support the proposal as it broadens the use of trusts for clients who retain testamentary capacity but whose ability to contract may be challenged by third parties. It is anticipated that most litigators will support because it clarifies the applicable capacity standard, obviating a case-by-case judicial analysis based on the “simplicity and testamentary nature” of the instrument under question. A uniform standard of capacity reduces ambiguity for attorneys and the courts.

It is recognized that some practitioners may disfavor the proposal, believing it may make it easier to take advantage of a settlor with diminished capacity. Proponents respond that testamentary instruments obtained improperly are more effectively challenged under elder abuse and undue influence law than capacity. Proof issues to establish undue influence or elder abuse are less problematic than capacity, and allow for relief in a boarder range of fact situations. In short, there exists an effective means to challenge instruments obtained by abusers. Capacity standards do not serve as the best line of defense.

Proponents also note that it is just as likely an “abuser” will in fact be a disgruntled beneficiary who dismantles the distribution plan of the trust by unjustifiably asserting lack of capacity. In the absence of a change in the law, a settlor's intent can be thwarted by a challenge to capacity that may have otherwise failed if he/she had made the very same disposition by will. The proposal broadens the rights of a decedent to freely choose a will or trust to direct disposition of property.

Some possible opposition may be found from those arguing the capacity standard should be modified to require application of Probate Code Section 812 to all instruments, including wills. Proponents respond that such a change would overrule California common law going back to at least 1926. It would make it more difficult to establish capacity, and result in invalidating estate plans of persons impacted by age or illness who are still able to comprehend the nature of their property and know who they wish to bequeath it to at death. Retaining a basic capacity standard for testamentary instruments preserves for more persons the right to choose where their property goes at death.

Finally, some opposition may be raised by those who argue in favor of creating a dual standard—contractual during life and testamentary at death. This notion was rejected by the California Law Revision Commission when it considered the capacity standard for Transfer on Death Deeds. There, staff expressed concern “about spinning this out too finely and

complexifying the law for everyone...” (First Supplement to Memorandum 2006-16 page 5). But even more importantly, application of a dual standard will have an arbitrary effect: an executed document is invalid under contractual standards during lifetime, but could suddenly become valid on the date of the decedent's death. If a decedent is considered to have sufficient capacity to respect the instrument upon death, there is little justification for disregarding it during life.

**FISCAL IMPACT:** There is no anticipated fiscal impact.

**GERMANENESS:** The members of TEXCOM have an interest in and expertise concerning these issues in that they draft estate plans on behalf of their clients and litigate the validity of those instruments.

**DISCLAIMER:**

This position is only that of the Trusts and Estates Section of the State Bar of California. This position has not been adopted by either the State Bar's Board of Trustees or overall membership, and is not to be construed as representing the position of the State Bar of California.

Membership in the Trusts and Estates Section is voluntary and funding for section activities, including all legislative activities, is obtained entirely from voluntary sources.

**TEXT OF PROPOSAL**

SECTION 1. Section 814 is added to the Probate Code, to read:

[Inserted text begins] **§814. Persons not mentally competent to make a testamentary instrument; specified circumstances** [Inserted text ends]

[Inserted text begins] (a) An individual is not mentally competent to make a testamentary instrument if at the time of making the instrument either of the following is true:[Inserted text ends]

[Inserted text begins] (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 instrument.[Inserted text ends]

[Inserted text begins] (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.[Inserted text ends]

[Inserted text begins] (b) Nothing in this section supersedes existing law relating to the admissibility of evidence to prove the existence of mental incompetence or mental disorders.[Inserted text ends]

[Inserted text begins] (c) Notwithstanding subdivision (a), a conservator may make a testamentary instrument on behalf of a conservatee if the conservator has been so authorized by a court order pursuant to Section 2580.[Inserted text ends]

[Inserted text begins] (d) For purposes of this part, “testamentary instrument” means a will, a document that creates, amends or revokes a revocable trust, a document exercising a testamentary power of appointment, or a provision for a nonprobate transfer on death in an instrument of the type described in Section 5000, but does not include an irrevocable trust.[Inserted text ends]

[Inserted text begins] (e) Notwithstanding anything to the contrary in Probate Code section 3, this section shall apply to all matters, whenever filed, unless: (a) a judgment was entered in the matter before [the operative date]; or (b) a trial was commenced in the matter before [the operative date]. [Inserted text ends]

SEC. 2. Section 812 of the Probate Code is amended to read:

**§ 812. Capacity to make decisions**

Except where otherwise provided by law, including, but not limited to, Section 813, [Inserted text begins] Section 814[Inserted text ends] and the [Deleted text begins] statutory and [Deleted text end] 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 decision maker and, where appropriate, the persons affected by the decision.
- (c) The significant risks, benefits, and reasonable alternatives involved in the decision.

SEC. 3. Section 6100.5 of the Probate Code is repealed:

**[Deleted text begins]§ 6100.5. Persons not mentally competent to make a will; specified circumstances**

(a) An individual is not mentally competent to make a will if at the time of making the will either of the following is true:

(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.

(b) Nothing in this section supersedes existing law relating to the admissibility of evidence to prove the existence of mental incompetence or mental disorders.

(c) Notwithstanding subdivision (a), a conservator may make a will on behalf of a conservatee if the conservator has been so authorized by a court order pursuant to Section 2580. [Deleted text end]