

THE LAST DANCE: FORENSIC PSYCHIATRIC EXPERTISE IN TESTAMENTARY CAPACITY, UNDUE INFLUENCE AND WILL CONTESTS

Presented By The Bar Association of San Francisco

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12 noon – 1:30 p.m.

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INTRODUCTIONS

- Probate and Trust Litigator, **Charles P. Wolff, Esq.**
Evans, Latham and Campisi, A Profession Law Corporation
- Forensic Psychiatrists **Mark Levy MD** and
Charles Saldanha MD, and
- Forensic Neuropsychologist **Ronald Roberts PhD**

Forensic Psychiatric Associates Medical Corporation

Who Is fpamed?

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Forensic Psychiatric Associates Medical Corporation

- The Depth and Breadth of our Forensic Psychiatric & Neuro-Psychological Practice
- Types of Forensic Psychiatric & Psychological Issues Addressed in Probate Law Consultation:
 - Testamentary Capacity
 - *Undue* Influence?
 - Will Contest Litigation

KEY ISSUES TO BE DISCUSSED:

- Who is (and who is not) a *Forensic Psychiatrist & Psychologist*?
- How do forensic psychiatric and psychological experts assess Testamentary Capacity?
- What are the medical & psychological hallmarks of “Undue Influence?”
- What is the role of psychiatric and psychological testimony in Will Contests?

WHO IS (AND WHO IS NOT) A FORENSIC PSYCHIATRIC & PSYCHOLOGICAL EXPERT?

- CREDENTIALS:

- BASIC PROFESSIONAL TRAINING AND CERTIFICATION
- SPECIALTY BOARD TRAINING & CERTIFICATION
- MEDICAL-LEGAL KNOWLEDGE
- MEDICAL-LEGAL EXPERIENCE
- PROFESSIONAL HONORS
- PROFESSIONAL SOCIETY MEMBERSHIP
- THE PROBLEM OF “VANITY” (i.e., “PSEUDO”) BOARDS

“VANITY BOARDS”



QUALIFICATIONS OF A FORENSIC PSYCHIATRIC EXPERT

- American Board of Psychiatry and Neurology (ABPN) Certification in Forensic Psychiatry Requirements:
 - MD + Internship + 3 year full time residency in Psychiatry
 - Diplomate ABPN (General Psychiatry)
 - Completion of 1 year Fellowship in Forensic Psychiatry at Approved Medical Institution
 - Passing ABPN's Comprehensive, ½ day, Examination in Forensic Psychiatry

ADVANCED CREDENTIALS IN PSYCHIATRY

- ABPN Diplomates (Board Certification) in General Psychiatry and/or Child Psychiatry *With Added Qualifications in Forensic Psychiatry*
- Fellows (FAPA) and Distinguished Fellows (DFAPA) of The American Psychiatric Association – recognized for special contributions to the field
- Membership in Professional Organizations:
 - American Psychiatric Association
 - American Academy of Psychiatry and the Law
- Faculty Appointments

FORENSIC PSYCHIATRISTS & PSYCHOLOGISTS DIFFER FROM TREATERS

- Different Ethical Obligations
- Different Missions
- Different Methods
- Different Perspectives

FORENSIC PSYCHIATRISTS & PSYCHOLOGISTS DIFFER FROM TREATERS

- Different Ethical Obligations:
 - Expert’s ethical obligation is to provide to the fact finder objective opinion based upon evidence
 - The Treating Clinician’s ethical obligation is to his patient: *Primum Non Nocere* (“First do no harm”)

FORENSIC PSYCHIATRISTS & PSYCHOLOGISTS DIFFER FROM TREATERS

- Different Missions:
 - The mission of the Independent Expert is *to seek objective evidence.*
 - The mission of the Treater is *to relieve suffering.*

FORENSIC PSYCHIATRISTS & PSYCHOLOGISTS DIFFER FROM TREATERS

- Different Methods:
 - Forensic Experts strive to review all available data (All Medical Records, Legal Documents, Test Data and to conduct a Diagnostic Interview Examination of the Plaintiff)
 - Treeters rely almost exclusively upon their patient's subjective self report of "fact."

FORENSIC PSYCHIATRISTS & PSYCHOLOGISTS DIFFER FROM TREATERS

- Different Perspectives:
 - Forensic Experts seeks an *objective* perspective based upon a careful and detailed assessment of all the clinical evidence, *including psych testing whenever possible*.
 - In legal contexts Treaters inevitably and appropriately *advocate* for their patient's own subjectively defined self interest

ADVOCACY

Often Physicians Confuse Their Roles as *Treating Clinicians* with Their Roles As *Independent Experts*, Causing...

THE PROBLEM OF WEARING TWO HATS



THE PROBLEM OF WEARING 2 HATS IS “DUAL AGENCY” ...



... And Role Confusion

FORENSIC PSYCHIATRISTS & PSYCHOLOGISTS *COLLABORATE - WE DON'T DUPLICATE*

- DIFFERENT PROFESSIONAL EDUCATION
- DIFFERENT POST-GRADUATE TRAINING
- DIFFERING AREAS OF SPECIAL EXPERTISE & SKILLS

QUALIFICATIONS FOR A FORENSIC PSYCHOLOGICAL EXPERT?

- Education, Training & Experience
- Board Certification by the American Board of Professional Psychology (ABPP) and the American College of Law and Psychology
- To be eligible to apply for board certification in Forensic Psychology:
 - 100 hours in formal education, direct supervision or continuing education
 - 1000 hours of experience
 - Post-Doctoral Training Program
 - Post-Doctoral Experience
 - Work Sample Submission (written test)
 - Oral Examination

ADVANCED CREDENTIALS: PSYCHOLOGY

- Diplomates (ABPP & Other Psych Board Certification)
- Fellows (special contribution to the field)
- Membership in Professional Organizations
 - Society for Personality Assessment (SPA)
 - National Academy of Neuropsychology (NAN)
 - American Academy of Law and Psychology
 - American Board of Professional Psychology (ABPP)
 - National Register of Health Providers in Psychology

TYPES OF FORENSIC PSYCHIATRIC & PSYCHOLOGICAL ISSUES FREQUENTLY SEEN IN WILL CONTESTS

• **Testamentary Capacity –**

- Presumption of Capacity
- Did the Testator have Testamentary Capacity *at the time of making the will?*
- What was the Testator's Mental & Neuro-Cognitive Status at the time?

• **Questions of “Undue” Influence –**

- At the time the will was made, were there any *“Undue” Influences* exerted upon the Testator?

ASSESSING MENTAL CAPACITY & “*UNDUE*” INFLUENCE

- Mental Capacity – objective, relatively neutral principles, standard assessment tools
- “*Undue*” Influence? – more difficult to come up with objective and relatively neutral principles, no assessment tools

WILL CONTESTS

- Typical litigants in a will contest: disgruntled heirs who believe they should have received a larger share of the estate than what they received under the Will.
- The Petitioners who challenge a validly executed will bear the *burden of proof* that the Testator lacked capacity as well as the burden of proving *undue influence*.

WAYS TO SHIFT THE BURDEN OF PROOF REGARDING ALLEGATIONS OF “*UNDUE*” INFLUENCE

- Show the existence of...
 - A confidential relationship with the Testator
 - Active participation in the testamentary act
 - Receipt of an undue benefit;
- Transfer to disqualified person under Prob.C 21350

TESTAMENTARY CAPACITY

(The requisite mental capacity to make a valid Will)

- Was the Testator of “Sound Mind?”



EVALUATION OF CAPACITY

- Is based on an understanding the Testator's basic character structure including his or her history, intelligence, and emotional condition.
- Begins with a complete historical interview and review of information from all available sources including medical, legal and financial records as well as collateral interviews.
- When possible, utilizes scientific tools (psychological and neuro-psychological testing) for greater objectivity.

MENTAL INCOMPETENCY IN WILL CONTESTS

- Petitioner has the burden of proof.
- Petitioners must prove that the Testator suffered from some sort of “*mental incompetency.*”

MENTAL INCOMPETENCY IN WILL CONTESTS

PROB.C 6100.5. Persons not mentally competent to make a will

(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.

MENTAL INCOMPETENCY IN WILL CONTESTS

PROB.C 6100.5. Persons not mentally competent to make a will

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

(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.

Probate Code 810 – 812

The Due Process In Competence Determination Act

- Competency determination is relative to the task at hand, e.g.
 - Testamentary Capacity is present even at a relatively low cognitive bar, in part, because the tasks are relative simple
 - Contractual or Testimonial Capacity may require more sophisticated cognitive abilities.
- There is a rebuttable presumption that all persons possess competency
- A person with a mental disorder may still be competent
- A Judicial determination that a person lacks capacity 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.
- A determination that an individual lacks capacity requires specific evidence from a detailed list in one or more areas of mental functioning.

Probate Code 810 – 812

Due Process In Competency Determination Act

•810. The Legislature finds and declares the following: (a) For purposes of this part, there shall exist a rebuttable presumption affecting the burden of proof that all persons have the **capacity** to make decisions and to be responsible for their acts or decisions. (b) A person who has a mental or physical disorder may still be capable of contracting, conveying, marrying, making medical decisions, executing wills or trusts, and performing other actions. (c) A judicial determination that a person is totally without understanding, or is of unsound mind, or suffers from one or more mental deficits so substantial that, under the circumstances, the person should be deemed to lack 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.

Probate Code 810 – 812

Due Process In Competency Determination Act

811.(a) A determination that a person is of unsound mind or lacks the **capacity** to make a decision or do a certain act, including, but not limited to, the incapacity to contract, to make a conveyance, to marry, to make medical decisions, to execute wills, or to execute trusts, shall be supported by evidence of a deficit in at least one of the following mental functions, subject to subdivision (b), and evidence of a correlation between the deficit or deficits and the decision or acts in question:

(1) Alertness and attention, including, but not limited to, the following:

(A) Level of arousal or consciousness.

(B) Orientation to time, place, person, and situation.

(C) Ability to attend and concentrate.

(2) Information processing, including, but not limited to, the following:

(A) Short- and long-term memory, including immediate recall.

(B) Ability to understand or communicate with others, either verbally or otherwise.

(C) Recognition of familiar objects and familiar persons.

(D) Ability to understand and appreciate quantities.

(E) Ability to reason using abstract concepts.

(F) Ability to plan, organize, and carry out actions in one's own rational self-interest.

(G) Ability to reason logically.

Probate Code 810 – 812

Due Process In Competency Determination Act

811.(a) A determination that a person is of unsound mind or lacks the **capacity** to make a decision or do a certain act, including, but not limited to, the incapacity to contract, to make a conveyance, to marry, to make medical decisions, to execute wills, or to execute trusts, shall be supported by evidence of a deficit in at least one of the following mental functions, subject to subdivision (b), and evidence of a correlation between the deficit or deficits and the decision or acts in question:

(3) Thought processes. Deficits in these functions may be demonstrated by the presence of the following: (A) Severely disorganized thinking. (B) Hallucinations. (C) Delusions. (D) Uncontrollable, repetitive, or intrusive thoughts. (4) Ability to modulate mood and affect. Deficits in this ability may be demonstrated by the presence of a pervasive and persistent or recurrent state of euphoria, anger, anxiety, fear, panic, depression, hopelessness or despair, helplessness, apathy or indifference, that is inappropriate in degree to the individual's circumstances.

Probate Code 810 – 812

Due Process In Competency Determination Act

811.(b) A deficit in the mental functions listed above may be considered only if the deficit, by itself or in combination with one or more other mental function deficits, 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.

(c) In determining whether a person suffers from a deficit in mental function so substantial that the person lacks the **capacity** to do a certain act, the court may take into consideration the frequency, severity, and duration of periods of impairment.

(d) The mere diagnosis of a mental or physical disorder shall not be sufficient in and of itself to support a determination that a person is of unsound mind or lacks the **capacity** to do a certain act.

(e) This part applies only to the evidence that is presented to, and the findings that are made by, a court determining the **capacity** of a person to do a certain act or make a decision, including, but not limited to, making medical decisions. Nothing in this part shall affect the decision making process set forth in Section 1418.8 of the Health and Safety **Code**, nor increase or decrease the burdens of documentation on, or potential liability of, health care providers who, outside the judicial context, determine the **capacity** of patients to make a medical decision.

Probate Code 810 – 812

Due Process In Competency Determination Act

812. Except where otherwise provided by law, including, but not limited to, Section 813 and the statutory and decisional law of testamentary **capacity**, a person lacks the **capacity** to make a decision unless the person has the ability to communicate verbally, or by any other means, the decision, and to understand and appreciate, to the extent relevant, all of the following: (a) The rights, duties, and responsibilities created by, or affected by the decision. (b) The probable consequences for the decision maker and, where appropriate, the persons affected by the decision.

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

“RED FLAGS” FOR CONCERN ABOUT TESTAMENTARY CAPACITY

- Diagnostic
 - Dementia with progressive cognitive decline over time.
 - History of serious medical illness profoundly affecting mental status (e.g., delirium)
 - Psychosis specifically affecting testamentary capacity

NEUROPSYCHOLOGY

- The Science of the relationship between the brain and one's cognitive, emotional and behavioral functioning.
- Uses Tests to obtain objective evidence of someone's:
 - Knowledge
 - Understanding
 - Ability to Plan
 - Emotional Condition

NEUROPSYCHOLOGICAL TESTS

- Neurocognitive Tests:
 - Intelligence Tests: (Wechsler Adult Intelligence Scale-III or WAIS-III)
 - Memory Tests: (Wechsler Memory Scale-III or WMS-III)
 - Planning and Problem Solving Tests.
 - Also know as Executive Functioning Tests: (TMT, WCST, STROOP)

PERSONALITY TESTS

- Tests of one's emotional condition
- Minnesota Multiphasic Personality Inventory-2 (MMPI-2)
- Personality Assessment Inventory (PAI)
- Rorschach (Inkblot Test)
- Thematic Apperception Test (TAT)

NEUROPSYCHOLOGY OF TESTAMENTARY EVIDENCE

- Basic Intellectual Capacity and extent of decline or preservation.
- Has one suffered a decline in the intelligence or not?
- Is one able to attend, concentrate and remember what is going on or do their abilities wax and wane?
- Prob.C 810-812 sets forth evidence that can serve as the basis of an expert opinion of capacity.

COGNITION & PLANNING & SUSCEPTIBILITY TO “UNDUE” INFLUENCE

- How likely is it that someone may form an opinion that is consistent or are they prone to vacillate?
- Do they possess the basic cognitive capacity to form and shift their cognition in response to changing demands in the environment?
- Are they fixated on one thing and cannot see the forest for the trees?

EMOTIONAL FACTORS & SUSCEPTIBILITY TO “UNDUE” INFLUENCE

- Are they emotionally sound and secure?
- Do they have a stable sense of self-esteem?
- Are they overly dependent and needy for attention?
- Are they in control of their impulses?
- Do they have good impulse control?
- Have they become depressed and given up?

GOOD NEWS

- When someone's cognition is intact the tests will provide objective evidence.
- Age is taken into account when giving scores.
- A person who is 65 does not have to remember as much as a 45 year old to demonstrate average memory skills.
- There may be decline that is age appropriate but not indicative of impairment.

BAD NEWS

- When someone is demented they remain impaired. In fact, their cognition usually continues to decline.
- They may have “good and bad” days, but they are not always reliable. (However, presumption of capacity is that the Will was executed on a “good day.”)
- When they become fixated it is unlikely that they will change. Can lead to trouble in court.

“UNDUE” INFLUENCE?

- Determining whether or not influence is “undue” is an *ultimate issue* for the *trier of fact*.
- On the other hand, it is an appropriate task for the forensic psychiatric expert to inform the fact finder what the expert believes were the conditions influencing the Testator and the characteristics the expert believes the Testator had, at the time he made his Will.
- Determining and explaining the emotional, cognitive and medical susceptibility of the Testator to being *influenced* is also an appropriate task for the forensic psychiatrist and forensic neuro-psychologist.

“UNDUE” INFLUENCE?



*...Someday, and that day may never come,
I'll call upon you to perform a service for me....*

- Don Corleone

“UNDUE” INFLUENCE?



*...after you're gone, wouldn't you
want me to be well taken care of...?*

DESCRIPTION OF “*UNDUE* INFLUENCE”

- An equitable doctrine.
- Involves one person taking advantage of a position of power over another person.
- The key element is that the influence was so great that the Testator had lost the ability to exercise his/her judgment and could not refuse to give in to the pressure.

DESCRIPTION OF “*UNDUE* *INFLUENCE*”

- In probate law, defined as a testator's loss of free agency regarding property disposition through contemporaneous psychological domination by an adviser or caregiver resulting in excessive benefit to the advisor.
- Burden of proof is with the Petitioner.
- Open Issue: Whether “*Undue*” Influence is only an issue when the advisor is benefiting but not when advisor is obtaining a benefit for someone else in which case it may be considered *fraud*.

FACTORS THAT MAY INCREASE SUSCEPTIBILITY TO &/OR SUGGEST “UNDUE” INFLUENCE

- Unequal relationship
- Isolation
- Dependency
- Sense of powerlessness
- Sense of fear and vulnerability
- Being kept unaware
- Creating a siege mentality
- Markedly changed testamentary decisions
- Unnatural disposition of assets
- Beneficiary actively participating in obtaining the testamentary instrument

INCOMPATIBILITY BETWEEN THE LAW & CONTEMPORARY MEDICAL SCIENCE REGARDING THE UNDERSTANDING OF INFLUENCES UPON DECISION MAKING

- The law's inability to appreciate how more subtle psychological factors can increase susceptibility and vulnerability to third party influences -
- For example:
 - Identification with the aggressor** (e.g., so-called "Stockholm Syndrome," or a battered person "syndrome," in which abducted hostages or victims of battery identify with and show loyalty to their hostage-takers and batterers, etc.).
 - Susceptibility to suggestion, identification and influence** among people suffering from declining cognition.
 - The absence of any psychological screening & assessment requirement** for Court appointed & approved caregivers and conservators.

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