

Dual Perspectives on Capacity and Undue Influence

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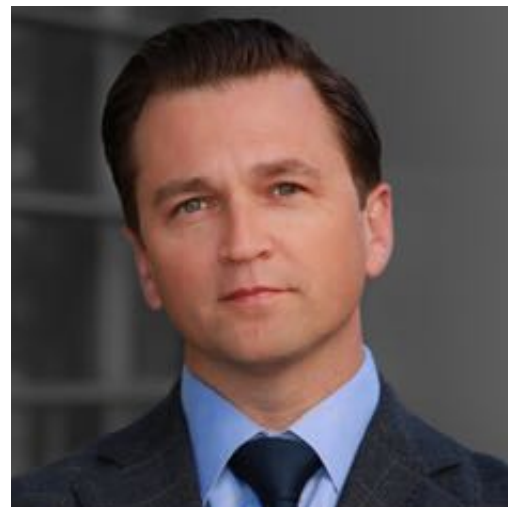
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About Us



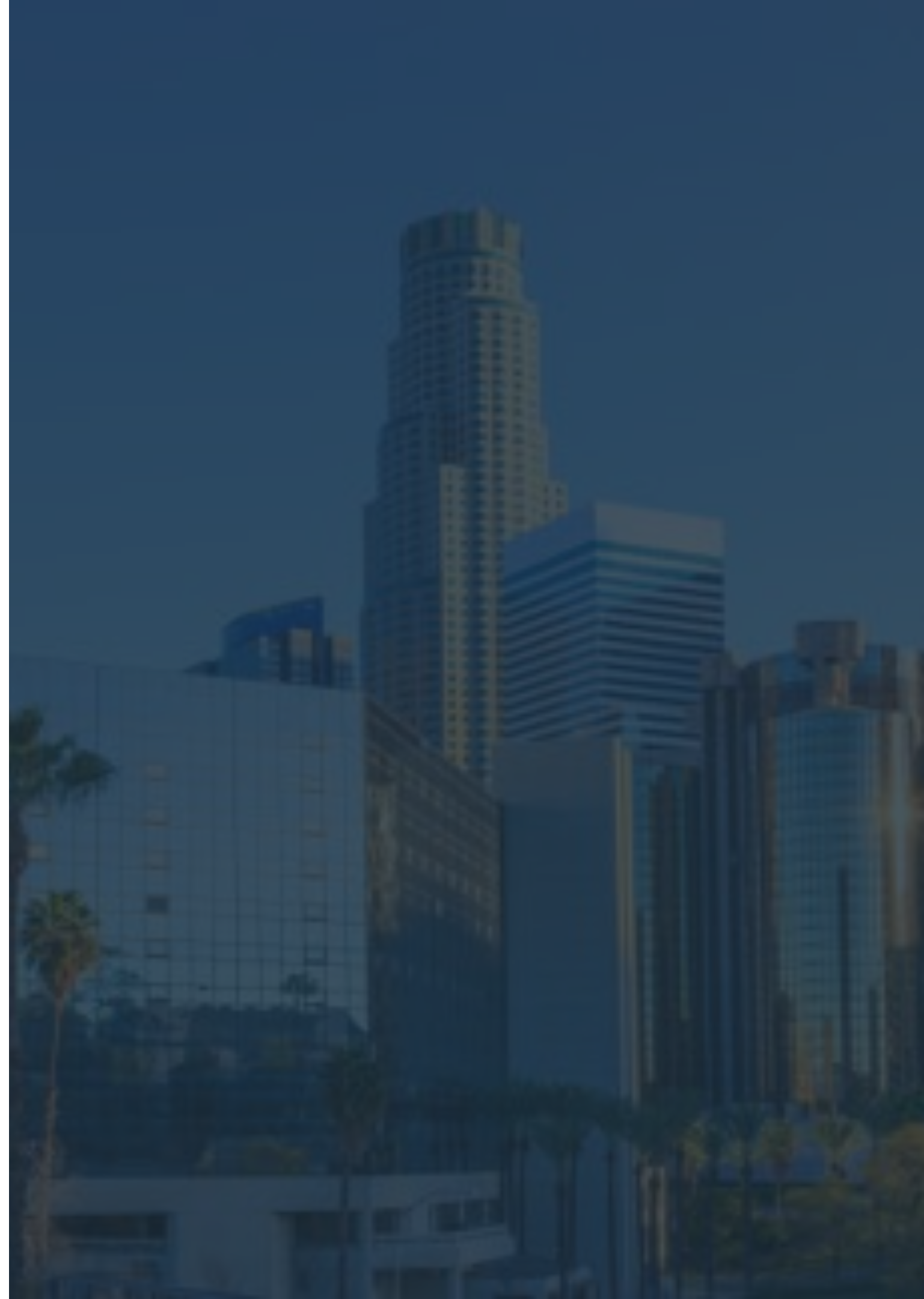
Dr. Dana Chidekel

A clinical and forensic neuropsychologist providing comprehensive assessments to children and adults referred for cognitive, developmental, academic, psychiatric, and behavioral problems.



Scott Rahn

Founding Partner of RMO LLP, a national trust and probate estate litigation law firm focused on representing trustees, executors, beneficiaries, heirs, conservators, guardians, and creditors in contentious probate and civil court matters.



Analyzing Capacity & Undue Influence: Issues of Legal Interpretation and Neuropsychology Expert Opinion

Q1: Did the decedent have the requisite **capacity** to execute documents?

- Decedent's cognition and orientation

Q2: Were the decedent's actions free of **undue influence**?

- Decedent's vulnerability
- Authority of the influencer
- Influencer's actions/tactics
- Equity of the result

Capacity [kəˈpæʊ



Incapacity

Incapacity

What does it mean?

☐ A Neuropsychologist's Definition

Refers to the ability to act or make decisions adaptively.

- Assess a given situation
- Understand the options
- Appreciate the outcomes of decisions

Clients may have capacity in one or more domains, while they lack capacity of others.

Capacity is not fixed or linear: clients may fluctuate in and out of capacity.

☐ California Probate Code § 810-13

“a judicial determination that a person is totally without understanding, 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...**”

Incapacity

A Clinical Neuropsychologist's View

- Differentiate
 - Normal age-related changes
 - Pathology that significantly (and potentially legally) affects a client's decision-making
- Differentiate cognitive changes due to
 - Progressive disorders
 - Transient treatable conditions

Incapacity

Causes of Diminished Capacity

☐ Progressive Conditions

- Dementia
- Medical conditions
 - Some cancers
 - Effects of long-term alcohol use
 - Brain tumors
 - Renal failure/dialysis
 - Stroke

☐ Transient (Treatable) Conditions

- Psychiatric conditions
- Delirium
- Urinary tract infections
- Medication effects
- Intoxication
- Dehydration
- B-12 deficiency

Incapacity

Signs of Loss of Capacity

☐ Changes in behavior (often without insight)

- Forgetfulness
 - Asks the same questions repeatedly
 - Misses appointments/Forgets important events
- Forgetting how to do routine things
 - Opening a box
 - Using a pen
- Actions contradict intentions
- Changes in personality
 - Expansive person becomes more withdrawn or vice-versa
- Disorientation to Person, Place or Situation

Incapacity

Complicating Factors

- Paranoia - People without insight into their deficits accuse/alienate others
- Confabulate “right” answers (“I paid that bill”)
- Loved ones may be aware OR in denial
- “Empty speech” may mask problems
 - “It is what it is” “You know” “That thing”
- Vision/hearing may mimic (or exacerbate) cognitive problems
 - Seniors may resist acknowledging/treating these

- What looks like “dementia” may be depression

MORE LIKE DEPRESSION	MORE LIKE DEMENTIA
Oriented	Disoriented
Concentration problems (that they notice and comment on)	Short-term memory problems (about which they are indifferent)
Writing, speaking, motor skills are generally intact	Writing, speaking, motor skills diminish.
Symptoms improve with treatment for depression	Symptoms don't improve
Can recognize what they “forget” when prompted.	Prompting doesn't improve recall.



Incapacity

A Probate Litigator's View

☐ **Banks v. Goodfellow, (1870) LR 5 AB 549**

Lord Cochran wrote this case from the Queen's Bench in 1870. Cochran created the rule that form the baseline every state utilizes for capacity to create a will

- If you know:
 - the nature of your property
 - you are making a will, and
 - who your heirs are
 - Probate Code section 6100.5
- You are good to go.
- Further codified in the 1990's - Probate Code sections 810-813

Incapacity

A Probate Litigator's View

- General presumption that everyone has the capacity to make decisions, unless sufficiently rebutted.
Probate Code section 810.
- Specific deficits to consider, which must have a nexus to the ability to make the decision at issue.
Probate Code section 811.
- Except as to “statutory and decisional law of testamentary capacity” (Lord Cochran’s rule), a person lacks capacity unless they can understand, appreciate and communicate the following:
 - The rights, duties and responsibility created by or affected by the decision;
 - The probable consequences for the decision maker and, where appropriate, the persons affected by the decision; and
 - The significant risks, benefits and reasonable alternatives involved in the decision.Probate Code section 812.
- Commonly referred to as “contractual capacity” (e.g. trusts, beneficiary designations, etc.)

Incapacity

A Probate Litigator's View

- “Testamentary Capacity” only refers to a will.
 - Lord Cochran’s rule
- All other documents evaluated for contractual capacity.
- What’s the difference?
 - Many people have the capacity to know their children, their property, and they’re making a will.
 - But they may not have capacity to do a trust, change beneficiaries, etc.
 - A savvy estate planner might do a will for someone who cannot do a trust.

Incapacity

Key Capacity Cases in California

☐ ***In re Marriage of Greenway 217 Cal PP. 4th 628 (2013)***

Determination of mental capacity is fact-specific and changes depending on the issue at hand. Married capacity is the lowest level, followed by testamentary capacity (Lord Cochran's rule), and then the PC 810-812 level.

☐ ***Anderson v. Hunt 2011, 196 Cal App 4th 722 (2011)***

If you have a trust amendment that looks like a Will, does that mean that a complicated Will would use the capacity standards for creating a Trust??? We don't know.

Incapacity

What Professionals Can Do

- Know your clients. PAY ATTENTION.
- Maintain boundaries (so you can see when your clients don't)
- Identify collateral sources who know your clients well
 - Children, Spouse, Neighbors/Close friends
- Get releases so you can access information
 - Update these annually
- Be alert for changes in intent/providers



Undue Influence

Undue Influence

A Clinical Neuropsychologist's View

- The four prongs of influence
 - Decedent's VULNERABILITY
 - Age, education, illness/disability, isolation, dependency, emotional distress
 - Influencer's knowledge of this
 - Influencer's AUTHORITY
 - Family member, caregiver, professional/legal authority, close friend with access to
 - Influencer's ACTIONS/TACTICS
 - Manipulates access to information food, sleep,
 - Isolates the client
 - Changes providers
 - Uses affection, intimidation, coercion. Poisons relationships
 - Rushes the client to make decisions secretly
 - INEQUITY of the result
 - Changes in prior intent that benefit the influencer

Undue Influence

What does it mean?

☐ **California Welfare and Institutions Code - WIC §15610.70**

Undue Influence is defined as:

“**Excessive** persuasion that causes another person to act or refrain from acting by overcoming that person's free will and results in inequity.”

☐ **In re Will of Dunn, 129 N.C. App. 321, 328, 500 S.E.2d 99, 104 (1998)**

“There are four general elements of undue influence:

- (1) a person who is subject to influence;
- (2) an opportunity to exert influence;
- (3) a disposition to exert influence; and
- (4) a result indicating undue influence.”

Undue Influence

A Probate Litigator's View

□ Proving Undue Influence

- "It is impossible to set forth all the various combinations of facts and circumstances that are sufficient to make out a case of undue influence because the possibilities are as limitless as the imagination of the adroit and the cunning. The very nature of undue influence makes it impossible for the law to lay down tests to determine its existence with mathematical certainty." *In re Will of Sechrest*, 140 N.C. App. 464, 469, 537 S.E.2d 511, 515 (2000)
- Undue influence is generally proved by a number of factors taken collectively, even where each standing alone would be of little weight. *In re Will of McNeil*, 230 N.C. App. 241, 245-46, 749 S.E.2d 499, 503 (2013)
- Mere persuasion, without more, is not undue influence. A person may use fair argument and persuasion to induce another to execute a will in his favor." *In re Will of Turnage*, 208 N.C. 130, 132, 179 S.E. 332, 333.9 (1935)
- (Influence gained by kindness and affection, without more, is not undue, even if it induces a person to make an unequal or unjust disposition of his property. *In re Frank's Will*, 231 N.C. 252, 260, 56 S.E.2d 668, 675 (1949)
- Proving undue influence is fact intensive, making these cases difficult and expensive.

Undue Influence

A Probate Litigator's View

☐ **Flipping the Script: Rebuttable Presumption of Undue influence (CA Probate Code 21380)**

- Donative transfers to the following are presumed to be the product of fraud or undue influence
 - The person who drafted the instrument.
 - A person who transcribed the instrument if in a fiduciary relationship with the testator when transcribed.
 - A care custodian of a transferor who is a dependent adult, but only if the instrument was executed during the period in which the care custodian provided services to the transferor, or within 90 days before or after that period.
 - A care custodian who commenced a marriage, cohabitation, or domestic partnership with a transferor who is a dependent adult while providing services to that dependent adult, or within 90 days after those services were last provided to the dependent adult, if the donative transfer occurred, or the instrument was executed, less than six months after the marriage, cohabitation, or domestic partnership commenced.
- The presumption created by this section is a presumption affecting the burden of proof. The presumption may be rebutted by proving, by clear and convincing evidence, that the donative transfer was not the product of fraud or undue influence. If a beneficiary is unsuccessful in rebutting the presumption, the beneficiary shall bear all costs of the proceeding, including reasonable attorney's fees.
- Does not apply to heirs or cohabitants (CA Probate Code Section 21382)

Undue Influence

A Probate Litigator's View

☐ **Flipping the Script: Rebuttable Presumption of Undue Influence - Common Law**

- A confidential relationship;
- Influencer actively participated in procuring the instrument's preparation or execution (more than just driving them to the lawyer's office); (found the lawyer, made the appointment, sit in on the meeting, etc.)
- The influencer would benefit unduly by the testamentary instrument.
 - Evidence of an inequitable result without more is insufficient.

- Victim vulnerability
- Abuser's authority or apparent authority
- Controlling necessities of life, mediation, the victims interactions with others, access to information, or sleep;
- Use of affect, intimidation, or coercion; and
- Changes in personal or property rights (creating joint bank accounts, etc.), use of haste or secrecy in affecting those changes, effecting changes at inappropriate times and places, and claims of expertise in effecting changes.

☐ ***Lintz v. Lintz 222 Cal App 4th 1346 (2014)***

Detailed analysis of what undue influence looks like.

Case Study

The Estate of Mrs. X



The Estate of Mrs. X

- Mr. and Mrs. X had three children: Andy, Michelle & Mark.
 - Your Clients: Andy and Michelle: responsible citizens
 - Mark: troublemaker and addict. **Mrs. X is an enabler**
- 2005: Mr. and Mrs. X execute a trust
 - Andy and Michelle: successor trustees. Equal distributions to all children
- 2011: Mr. X diagnosed with Alzheimer's
- 2012: Mr. and Mrs. X amend and restate the Trust, adjusting each child's inheritance based on gifts/help received during life

The Estate of Mrs. X

- Michelle lives near the X's, provides regular support.
 - designated agent for healthcare decisions (Andy is first alternate).
- 2015: Mr. X to memory care
 - Michelle is facility go-to person when Mrs. X undermines rules
- **2016: Mrs. X briefly removes Michelle as POA in a fit of pique because of this role**

The Estate of Mrs. X

- Mid-2016: Mr. X. dies. Mrs. X starts having moments of confusion.
- July 2018: Mrs. X executes trust amendment and restatement. Each child's inheritance is apportioned based on gifts received.
- September 2018: Mrs. X Diagnosed with Mild Cognitive impairment moves to assisted living. Michelle is the contact person on all documents.
- January 2019: Mrs. X is diagnosed with Severe Major Depression, Generalized Anxiety, and Parkinson's (MoCA score 18/30).
 - DMV is alerted.
 - She starts multiple medications, which are adjusted in the ensuing months

The Estate of Mrs. X

- Mid-2019: Mark's addiction spirals. His wife, Val, asks Sibs for help
 - Val and sibs find a rehab and interventionist
 - Mrs. X agrees to fund and participate
 - All write letters stating he's cut off should he refuse or leave rehab
- **September 10, 2019: Mrs. X Amends the Trust, equalizes division of trust estate**
- September 23, 2019: Mark to rehab. Siblings help Val untangle the mess
- **November 7, 2019: Mrs. X has a neuropsychological assessment with Dr. F.**
 - **Findings: No signs of dementia**

The Estate of Mrs. X

- December 27, 2019: Mark leaves rehab after a dirty drug test
 - Mrs. X refuses to say if she's been in contact
- January 2, 2020: bank account changes initiated
- **January 8, 2020: Andy and Michelle's letter to Mrs. X: they have to cut ties with her if she doesn't keep boundaries with Mark**
- January - April 2020:
 - Sibs exchange cordial texts with Mrs. X. No visits
 - Mrs. X sustains falls and hospitalizations. Parkinson's, Chronic UTI's

The Estate of Mrs. X

- April 28, 2020: Mrs. X executes a trust amendment and new POA.
 - Andy & Michelle specifically excluded
 - Jan, Mrs. X's best friend, & a distant niece named 1st & 2nd successor trustees
 - Mark is POA
- May 15, 2020: Mrs. X moved to Memory Care.
- May-August 2020: More falls and hospitalizations.
- August 19, 2020: Mark moves Mrs. X. Doesn't tell Andy or Michelle
- September 19, 2020: Location revealed & sibs visit 1 week before Mrs. X's death

The Estate of Mrs. X

A Clinical Neuropsychologist's View

WHAT ARE THE ISSUES?

- Mrs. X's capacity proximal to April 28, 2020
- Mrs. X's vulnerability to undue influence by Mark (so far.....)

The Estate of Mrs. X

A Clinical Neuropsychologist's View

MRS. X's CAPACITY PROXIMAL TO April 28, 2020

- Before 2019: confusion, MCI, move to assisted living, driving concerns
- January 2019: Depression/Anxiety/Parkinson's, medications, MoCA 18/30
- **December 2019: Neuropsychologist finds no dementia**
- January-April 2020: falls, hospitalizations, Chronic UTI's
- May 15, 2020: Move to Memory Care. Dr. says she can't function on her own

The Estate of Mrs. X

A Clinical Neuropsychologist's View

December 19, 2019 Neuropsychological Evaluation Report

- No mental status exam
- No collateral information (Violate APA Guidelines for Dementia assessment)
- Statistical underestimate of premorbid IQ
- Scores verbal fluency test wrong
- Attributes error on attention testing to Mrs. X being “flustered”
 - Mischaracterizes Alzheimer’s-level verbal memory score as “Adequate”
- Contradictory information about clock-drawing performance
- Misinterprets a figure copy task as a visual memory test
- Reaches conclusions about executive functioning without testing it

The Estate of Mrs. X

A Clinical Neuropsychologist's View

MRS. X's CAPACITY PROXIMAL TO April 28, 2020

January-April 2020: falls, hospitalizations, Chronic UTI's

- Parkinson's is a progressive subcortical dementia
- Falls increase as Parkinson's progresses and can cause T.B.I.
- Cognitive side effects of Gapapentin, Xanax, Remeron
- Increasing doses to manage worsening symptoms
- UTIs are a common source of confusion in older people

WE FINALLY GOT THE RECORDS FROM THE APRIL 2020 HOSPITALIZATION!!!

The Estate of Mrs. X

A Clinical Neuropsychologist's View

MRS. X's CAPACITY PROXIMAL TO April 28, 2020

January-April 2020: falls, hospitalizations, Chronic UTI's

.... And they were not definitive about cognition.

(Grrrrr....)



The Estate of Mrs. X

A Clinical Neuropsychologist's View

MRS. X's CAPACITY PROXIMAL TO April 28, 2020

May 15, 2020 Move to Memory Care. "She can't function on her own."

- May 15 is 17 days after the document is executed
- In the May 15 document, the doctor refers to "the recent period of illness" but is not specific

Ultimate opinion about Mrs. X's capacity

Capacity likely fluctuated around the relevant period, but evidence was insufficient to opine Mrs. X lacked capacity.

The Estate of Mrs. X

A Clinical Neuropsychologist's View

UNDUE INFLUENCE AND MRS. X

- Prong 1 - Mrs. X's Vulnerability
 - Factors include illness, disability, age, impaired cognitive function, emotional distress, isolation, dependency, and influencer's awareness of same
 - Note: These are the factors relevant to capacity.
- Findings
 - Mrs. X was vulnerable to influence given her declining health and physical disability; dependence on others for care; problems with memory; emotional distress; and isolation from others.
 - Mark and Jan knew, or should have known, about her vulnerability.

The Estate of Mrs. X

A Clinical Neuropsychologist's View

UNDUE INFLUENCE AND MRS. X

- Prong 2 - Influencer's authority
 - Mark is a family member
 - Mark has extra authority given Mrs. X's "codependence"

FYI Throughout this process, the attorney has continued to advocate for missing records. The new drafting attorney's file arrives, revealing

- Potentially actionable breaches of conduct
- Jan, Mrs. X's best friend's role as a bad actor
- Very interesting billing and chain of custody information
 - Jan, emerges as new source of undue influence.

The Estate of Mrs. X

A Clinical Neuropsychologist's View

UNDUE INFLUENCE AND MRS. X

- Prong 2 - Influencer's authority
- Findings
 - Mark and Jan had apparent authority as a function of the nature of their relationships with Mrs. X.
 - They had access to her documents.

The Estate of Mrs. X

A Clinical Neuropsychologist's View

UNDUE INFLUENCE AND MRS. X

- Prong 3 - ACTIONS/TACTICS of influencers
- Findings
 - Mark and Jan employed tactics to lead Mrs. X to make changes in her estate plan, including poisoning Mrs. X's relationships with Michelle and Andy; moving her residence; changing her usual providers; making requests that benefited them; pressuring her during periods of distress, illness and transition; using intimidation or coercion; using haste and secrecy in effecting changes; and soliciting gifts, bequests or cash.
 - Both participated in procuring the new estate documents.

The Estate of Mrs. X

A Clinical Neuropsychologist's View

UNDUE INFLUENCE AND MRS. X

- Prong 4 - EQUITY of the Result
- Findings
 - Inequities resulted from the actions of Mark and Jan – one or both – including diversions from Mrs. X's prior intent and course of conduct and dealing.

The Estate of Mrs. X - Opinions

A Probate Litigator's View

- Can we prove incapacity?
 - What standard applies?
- Can we prove undue influence?
 - Can we flip the burden onto Mark?
 - Statute?
 - Common law?
 - Can we flip the burden onto Jan?
- Where should we focus our attention?
 - Collaboration



Thank You

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