RESOLUTION 05-04-2013

DIGEST
Wills and Trusts: Capacity Standard to Execute a Will
Amends Probate Code section 6100.5 to clarify that this section applies only to wills.

RESOLUTIONS COMMITTEE RECOMMENDATION
APPROVE IN PRINCIPLE

History:
Similar to 04-04-2012 and 04-05-2012, both of which were withdrawn.

Reasons:
This resolution amends Probate Code section 6100.5 to clarify that this section applies only to wills. This resolution should be approved in principle as it is a simple solution to the legal confusion created by *Andersen v. Hunt* (2011) 196 Cal.App.4th 722.

This resolution addressed the same subject matter as resolution 05-01-2013, namely the appropriate standard to apply in determining capacity to make testamentary instruments. The need to address this issue stems from the decision in *Andersen,* where the court evaluated a trustor's mental capacity as was necessary to make a will even though the document at issue was an amendment to a trust. *Andersen* concluded that if the act in question (making or amending a trust) is analogous in content and complexity to that of making a will, then that act is properly evaluated under standard of testamentary capacity set forth in section 6100.5. This holding could open the door to additional litigation to determine the complexity of the document at issue – i.e., whether it is more like a will or a trust – before determining which standard should be used. By limiting section 6100.5 to apply only to wills, the potential confusion, and further litigation, created by *Andersen* will be prevented.

TEXT OF RESOLUTION

RESOLVED that the Conference of California Bar Association recommends that legislation be sponsored to amend Probate Code §6100.5, to read as follows:

1 §6100.5.
2 (a) An individual is not mentally competent to make a will if at the time of making the
3 will either of the following is true:
4 (1) The individual does not have sufficient mental capacity to be able to (A) understand
5 the nature of the testamentary act, (B) understand and recollect the nature and situation of the
6 individual's property, or (C) remember and understand the individual's relations to living
7 descendants, spouse, and parents, and those whose interests are affected by the will.
8 (2) The individual suffers from a mental disorder with symptoms including delusions or
9 hallucinations, which delusions or hallucinations result in the individual's devising property in a
10 way which, except for the existence of the delusions or hallucinations, the individual would not
11 have done.

12 (b) Nothing in this section supersedes existing law relating to the admissibility of
13 evidence to prove the existence of mental incompetence or mental disorders.
14 (c) Notwithstanding subdivision (a), a conservator may make a will on behalf of a
15 conservatee if the conservator has been so authorized by a court order pursuant to Section 2580.
16 <u>(d) This section shall apply only to wills.</u>

(Proposed new language underlined; language to be deleted stricken.)

PROPONENT: San Bernardino County Bar Association

STATEMENT OF REASONS

<u>The Problem</u>: Until 2011, the capacity standard applicable to trust instruments was generally "contract capacity," while the standard applicable to wills was a relatively lower testamentary capacity. However, a recent decision by the Court of Appeals disregarded the statutory distinction and applied the lower standard for testamentary capacity to trust amendments that in content or complexity closely resemble a will or codicil. *Anderson v. Hunt* (2011) 196 Cal.App.4th 722.731.

The Anderson decision has added confusion over the capacity standard applicable to trusts. In creating a new standard for execution of some trust amendments, the Anderson court failed to consider that many amendments modify both the disposition and the administrative provisions. Under the Anderson ruling, it will be difficult, expensive, and unpredictable to determine what portions of trust amendments will be subject to which mental capacity standard.

<u>This Solution</u> : This law will restore the law applying the lower standard for testamentary capacity to apply only to wills and codicils. The long-standing common law codified in 1985 by the California legislature in Probate Code Section 6100.5 established a relatively lower standard for determining the capacity to make a will. Essentially the testator simply must understand who his/her relatives are, what the testator owns, and and who will take under the will.

In contrast, Probate Code 812 establishes a higher standard of capacity for contracts, marriage, medical decisions, and trusts. Probate Code section 812 includes the sensible requirement that a person is no competent to make these decisions if the person cannot understand the consequences, risks, benefits and alternatives to the action. Since trusts are used as an alternative to durable powers of attorney (to avoid conservatorship), there is much greater potential for harm to a person who executes or modifies a trust. Also, wills have an added protection, because they must be witnessed by two non-beneficiaries, or must be written completely in the handwriting of the testator, while a trust or trust amendment requires only the trustor's signature. The Anderson decision shows no consideration for how much easier it will be under that ruling for those who prey on the elderly to get a "simple" unwitnessed amendment signed by a mentally impaired elder so the predator becomes the sole beneficiary of the elder's estate.

The proposed resolution will add clarity by requiring that the lower standard of capacity outlined in Probate code 6100.5 is applicable only to wills (and codicils). In contract, the more

comprehensive standard of capacity outlined in Probate code section 812 will continue to be applied to trusts and trust amendments.

LEGISLATIVE HISTORY
Not known

IMPACT STATEMENT
The proposed resolution does not affect any other law, statute or rule.

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