

# **CAPACITY TO MARRY - WHICH STANDARD APPLIES?**

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## **New Developments Regarding Capacity to Execute Estate Documents**

In our last newsletter, we discussed *Andersen v. Hunt* (California Court of Appeal, Second District, B221077, June 14, 2011), the case that articulated the applicable standard by which to evaluate an individual's capacity to make an after-death transfer by trust. In *Anderson*, we learned that the standard to determine whether an individual has the capacity to amend a Will or Trust should be either the higher "contractual standard" or the lower "testamentary standard." The Court in *Anderson* compared California *Probate Code* Sections 810 - 812, which sets forth the standard by which to evaluate a Decedent's capacity to enter into a contract to California *Probate Code* Section 6100.5, which sets forth the standard by which to evaluate a Decedent's capacity to draft a Will.

The Court concluded that mental capacity "must be evaluated by a person's ability to appreciate the consequences of the particular act he or she wishes to take." Thus, the Court reasoned, more complicated decisions and transactions would require greater mental function, and be held to the higher *Probate Code* Sections 810 - 812 standards, while less complicated decisions and transactions would appear to require less mental function, and would be held to the lower Probate Code Section 6100.5 standard.

As explained in Cooper-Gordon's Summer 2011 Newsletter, following the holding in *Andersen*, a trial court must determine whether the trust or trust amendment is simple or more complex in nature in determining which standard of capacity to apply.

After *Anderson* was decided legal experts have been deeply concerned that its holding opened up a "Pandora's Box," making the issue of determining whether there was sufficient capacity to execute certain estate planning documents more complicated than ever. In a recent presentation sponsored by the Santa Monica Bar Association Probate and Trust Section, presenters Lynard C. Hinojosa, Esq., and Marc L. Sallus, Esq., both experts in this field, discussed the interesting history of this area of law as well as the new developments.

The presenters pointed out that the standard for determining capacity to draft a Will, where there is a strong presumption of lucidity, is low. *In re Ross' Estate*

(1962) 204 Cal.App.2d 82). In fact, even a person suffering from a mental disorder can have periods of lucidity and, although a testator was found to be uneducated and illiterate, it had no bearing on his testamentary capacity. (*In re Shay's Estate* (1925) 196 Cal. 355). The standard of capacity for making a Trust, on the other hand, has historically been a much higher standard, somewhat analogous to the standard for making a contract. Under current law then, there is a rebuttable presumption that a person is of unsound mind if the person is substantially unable to manage his or her financial resources or resist fraud or undue influence *California Civil Code*\_Section 39(b).

### **Which Standard Applies to Marriage?**

The development of the law with regard to standards for determining capacity has been of special interest of late to Cooper-Gordon LLP. Our firm is handling several interesting nullity cases with unique fact patterns supporting our position with regard to the capacity to enter into a marriage. Since marriage is considered to be a contract, the standard of capacity to enter into a marriage should ostensibly be high. However, the right to marry is also a constitutionally protected right not to be easily taken away. The amount of evidence required to prove the issue is unclear, especially after taking into consideration the individual's guarantee of freedom of contract. Under *Probate Code*\_Section 810(b), "A person who has a mental or physical disorder may still be capable of contracting, conveying, ***marrying***, making medical decisions, executing will or trusts, and performing other actions" (*emphasis added*).

The code section continues, "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" (*emphasis added*). Thus, the mere diagnosis of a mental disorder will not immediately bar a person from marrying. Instead, the determination must be made by weighing the evidence of the case according to the very detailed list of factors delineated in *Probate Code*\_Section 811, which lists the deficits in mental function that would give rise to a lack of capacity determination. *Probate Code* Section 810(a) provides that "...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." This rebuttable presumption creates a very high burden of proof for a Party attempting to annul a marriage based on lack of capacity.

When we compare *Probate Code* Sections 810-812 with the *Anderson* case, the holding in *Anderson* actually supports this legislation, because it highlights the fact that the standard of proof in determining capacity cannot simply be setting forth certain facts that are plugged into a routine equation. Instead, in evaluating mental capacity to marry, a Court should evaluate the person's ability to "appreciate the consequences of the particular act he or she wishes to take."

Cooper-Gordon LLP was glad to attend the informative and interesting presentation sponsored by the Santa Monica Bar Association Probate and Trust Sections, and appreciates that these issues often cross-over into the area of family law.

Cooper-Gordon LLP has over thirty years of experience in the areas of Estate Planning, challenging Wills and Trusts and Family Law, including dissolutions of marriage, paternity cases and actions for annulment of marriage. Take advantage of our expertise and call us to make an appointment today!