

COOPER-GORDON LLP

Summer 2011 Newsletter

Frieda Gordon, Esq.*
(310) 829-7220 (T)
(310) 829-2490 (F)
friedag@cooper-gordon.com

Katherine Su, Esq.
katherines@cooper-gordon.com

Drorit Bick Raiter, Esq.
drorit@cooper-gordon.com

Erin Louria Zivic, Esq.
erin@cooper-gordon.com

Avery M. Cooper, Esq.*
(310) 829-9918 (T)
(310) 828-6371 (F)
averyc@cooper-gordon.com

Yana Rozovskaya, Paralegal
yanar@cooper-gordon.com

Christine Donald, Legal Assistant
christined@cooper-gordon.com

Alison Freebairn-Smith, Financial Assistant
alisonf@cooper-gordon.com

2530 Wilshire Blvd., Santa Monica, CA 90403, 3rd Flr.

*Certified Family Law Specialists Certified by the California State Bar Board of Legal Specialization

Welcome

to the Summer 2011 edition of our newsletter. There has been much excitement as our associate Katherine Su prepared to get married to Brian O'Connor on June 25, 2011. The wedding was held at the Long Beach Art Museum and it was an absolutely beautiful event.

The weather was just perfect and the views divine. But the most beautiful sight was that of dear Katherine shining her lovely eyes at the groom whose eyes mirrored the mutual adoration and respect which they so clearly had for each other.

Our entire firm attended and we all were so happy to

be sharing such lovely moments with the people we have come to know and love so much in our office. We have put many pictures up on our new Cooper-Gordon Facebook page and would love you to take a look and see some of our other comments as well.



There has, of course, been lots of work to do at Cooper-Gordon. Many new clients have passed through our doors and many new issues of interest to the Family Law and Probate and Estate Planning community have been discussed, researched and written about as well. Despite difficult financial times, we have been blessed with a full stable of cases and a lovely and brilliant firm to handle all the matters that have come before us and that continue to challenge us.

Our office assistant Rebecca Boulour, who is in her last year of attendance at UCLA is now in the process of studying for her law school entrance exams. She completed her Junior year with honors and started right in this summer preparing for the next phase of her education. Our paralegal Yana Rozovskaya recently received a six-week old puppy named Tyson from her family. He is so adorable and we love having him at work, but he is now getting used to being at home with his cousin Daisy. Our legal secretary Christine is planning a trip back to Scotland in the fall with her boyfriend Sean and still enjoys her weekly bike rides.

Our associate, Drorit Bick Raiter set up a Facebook page for Cooper-Gordon LLP. In addition to the many pictures posted there, the CG LLP Blog is linked there as well.

Drorit also continues to volunteer regularly at a domestic violence clinic here in Santa Monica, California. As summer sets in, Drorit has been enjoying taking hikes all around Franklin and Fryman Canyons, along with her husband and their Boston terrier, "Boston." Drorit feels very lucky to be living in Los Angeles, and she hopes to try some new trails by Malibu Creek and by Griffith Park later this summer. She has authored the following article which can be separately found on our website under the Articles tab:

Can an Old Dog Make New Gifts?: An Analysis of the *Anderson v. Hunt* Case and Determining the Standard for Mental Capacity to Execute an After Death Transfer by Trust

In the recent case of *Andersen v. Hunt* (California Court of Appeal, Second District, B221077, June 14, 2011), the California Court of Appeal articulated the applicable standard by which to evaluate an individual's capacity to make an after-death transfer by trust.

In 1992, Decedent Wayne Anderson and his wife Harriet established a family trust that named their children, Stephen and Kathleen the sole beneficiaries after their parents' deaths. Harriet died in 1993. Before Harriet died, Wayne had become involved in a close personal relationship with Pauline Hunt, and this

relationship continued until Wayne's death. In 2003, after suffering a stroke, Wayne amended his trust to leave a 60 percent portion of his estate to Pauline, with the remainder going to his children, Stephen and Kathleen, and to his grandson John. Decedent made subsequent amendments later in 2003 and in 2004, but retained the provision leaving 60 percent of his estate to Pauline.

When Wayne died in 2006, his children brought an action in Probate Court to invalidate the 2003 and 2004 trust amendments and recover funds placed in accounts held jointly by Wayne and Pauline. The Probate Court ruled that Decedent lacked capacity under *Probate Code* Sections 810 - 812 to execute an amendment to his Trust, transfer funds from the trust to joint tenancy accounts, and change the beneficiary of his life insurance policy. Additionally, the Probate Court ruled that Pauline had exerted undue influence with respect to the amendments and transfers. Pauline appealed from these rulings.

The appellate court decided that the probate court was wrong when it evaluated Wayne's capacity to execute the trust amendments by the general standard of contractual capacity set out in *Probate Code* Sections 810 - 812, instead of the standard of testamentary capacity set out in *Probate Code* Section 6100.5. *Probate Code* Sections 810 to 812 set forth the standard by which to evaluate a Decedent's capacity to enter into a contract ("contractual capacity"), while *Probate Code* Section 6100.5 sets forth the standard by which to evaluate a Decedent's capacity to draft a Will. The issue in this case was whether the standard used to determine whether an individual has the capacity to amend a Will or Trust should be the "contractual" standard or the "testamentary" standard.

Under *Probate Code* Sections 810 - 812 regarding "Contracting Capacity," the standards set forth in those sections states that there is 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." (*Probate Code* § 810(a).) In other words, the trier of fact, which, in California, would be the judge, but in other states it might be a jury, starts out believing that everyone is capable of entering into an agreement with another person. However, by creating the artificial idea of a "presumption," the trier of fact requires a higher standard of proof, meaning that the person claiming the lack of capacity must provide either slightly more proof or proof by way of "clear and convincing evidence that the person lacks the capacity to contract than the Party claiming competence has to provide.

In the *Anderson* case, the Court decided that these sections made it clear that 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. (*Probate Code* Section 810(b).) A person may only be found to lack capacity when there exists a correlation between the deficit and the decision or act in question. (*Probate Code* § 811(a).) Even if a mental deficit exists pursuant to the Code, the deficit may only be relevant if it “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.*” (*Probate Code* § 811(b).)

The Court stated that it had to evaluate the Decedent’s mental capacity to contract under *Probate Code* Sections 810 to 812. However, in examining these code sections, the Court decided that they do not set out a “single standard for contractual capacity, but rather provide 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 concluded, more complicated decisions and transactions would require greater mental function while less complicated decisions and transactions would appear to require less mental function. The standard might very well deviate with regard to such different acts as making a contract, making a will and/or making or amending a trust document.

In this case, the Court found that while the original trust documents were complex, the amendments to the Trust were not. The Court reasoned that since each trust amendment closely resembled a will or codicil in its content and complexity, it would actually be more appropriate to look to *Probate Code* Section 6100.5, the lower standard for “testamentary capacity” in order to evaluate the Decedent’s mental capacity. The Court stated, “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.” Thus, if a Trust amendment is as simple as a will or codicil, it will be treated like a will or codicil and held to the same standard for evaluating mental capacity as a will or codicil.

Thus, for a simple trust or simple trust amendment, the standard that would be applied under *Probate Code* Sections 810-813 is the “testamentary capacity” standard applied under *Probate Code* Section 6100.5 to make a will or codicil. Under *Probate Code* Section 6100.5, an individual is deemed not mentally competent to make a will if at the time of making the will “[t]he individual does not have sufficient mental capacity to be able to...understand the nature of the testamentary act.” Using this standard, the Court found that there was no

substantial evidence that Decedent lacked testamentary capacity to execute the 2003 and 2004 trust amendments, which the Court deemed quite simple.

Under the holding in *Andersen v. Hunt*, it is clear that a court would first need to determine whether the trust or trust amendment was simple or more complex in nature, and presumably apply a higher standard than that articulated under *Probate Code* Section 6100.5 when the trust or amendment is determined to be more complex. Likewise, it is also evident that capacity to execute an after-death transfer by Will or Trust will continue to be a question of fact to be determined on a case-by-case basis.

Frieda was again busy both chairing and working with the Long Range Planning Committee of the California Association of Certified Family Law Specialists to completely update and revise the Bylaws of the organization. In addition, she found time



to help organize as well as appear as a presenter during the latest Spring Seminar in April of 2011 where the topic was “An Advanced Course in Evidence - How to Find It, Get It and Admit It.” It was a wonderful event held for the second year in a row at the Hyatt Grand Champions in Indian Wells, California, near Palm Springs. Next year, the event will be at the Rancho Las Palmas in Rancho Mirage, CA over the weekend of March 23, 2012.

Avery, in balancing his extensive workload, has made sure to allot time for his favorite summer time activities including playing basketball, bike riding, and spending time with his dog, Mickey.



The Importance of Retaining Qualified Counsel

A recent case in our office has taken an interesting journey, revealing twists and turns created by lawyers throughout the country which we believe to be of interest to our readers.

A client contacted our firm to represent him in an action to establish a conservatorship of his father’s person and estate. The client lived on the West Coast, but his father, a widower in his 80s, lived on the East Coast. During the

course of our representation we learned that, after the father's wife passed away, another woman moved into the father's home to provide him with day-to-day care. Eventually, this much younger woman married our client's father. The client then discovered that this woman was using his father's money and believed that she was attempting to isolate his father from him.

When the son discovered the alleged acts, he took immediate action to have his father moved to the West Coast. He was not comfortable with a stranger caring for, and possibly taking advantage of, his father. In order to ensure an end to the abuse, the client hired an attorney in his father's home state and commenced a proceeding to nullify the father's marriage to his caretaker. In the proceeding, the son alleged that the father did not have the mental capacity to enter into the marital relationship. The proceeding later changed from a nullity proceeding (which renders the marriage to have never existed) to a dissolution proceeding.

Prior to the resolution of the dissolution proceeding, the father passed away. The significance between a nullity proceeding and a dissolution proceeding soon became apparent. If a party dies before a judgment is entered in a dissolution of marriage proceeding, the parties are considered married until the death of one of the parties. In a nullity proceeding, if a Party dies before a judgment is entered, the case may still proceed towards a determination of nullity. If the marriage is nullified, there are significant consequences related to the decedent's property. For example, the surviving Party will no longer be entitled to any of the marital property. Because our client decided to change the matter in the other state to a divorce proceeding, once the father passed away, his divorce case ended and it was determined that, at the time of his death, he was still married to his caretaker.

Approximately one month after the father passed away, the son, as the result of an unexpected illness, also passed away. The son was never married and he had no children. The son left his entire estate to a dear friend. This friend was then tasked with winding up the father's conservatorship and estate, as well as that of his son's estate. Upon hiring our firm, she learned that, in their home state, the father and his first wife originally executed separate trusts naming an out-of-state bank as Trustee. Later, they hired a different attorney who, she alleges, improperly attempted to revoke the trust, improperly attempted to reconvey a real property deed from the trust to the father and wife as individuals, and never had the deed delivered and recorded. Several attempts to contact this new out-of-state proved fruitless, as, unfortunately, the out-of-state attorney is in the late stages of an illness and is unavailable to assist in the matter.

While, the father's second "wife" created multiple obstacles to winding up the estate and conservatorship proceedings, thus causing everyone to unnecessarily

incur attorney's fees and headaches, the father and his first wife also created problems, as the validity of the earlier trust will now have to be litigated. There is the likelihood that both the father and his first wife's estate will have to be probated out of state and the father's estate probated in California. Thus, the multiplicity of actions will result in statutory as well as extraordinary attorney's fees for the probate of *three* estates.



If the son and father had each retained qualified and experienced counsel, this whole matter could have turned out quite differently. The father would likely have had the nullity granted. The caretaker could have been found lacking in standing to block the legal proceedings. The father's property could have been administered through his trust without any legal proceedings. There would have been no probate. And, lastly, there would have been reduced legal fees, reduced headaches, quicker disposition of

the estates and increased peace of mind. In an effort to ensure avoiding experiences such as this one, be sure to hire legal counsel that is trained in the relevant area of law.

Avery and Frieda have been working on many estate plans and administering numbers of complicated probate, trust and conservatorship estates. In addition, several highly complex divorce matters have come to conclusion either by means of a negotiated settlement or as the result of successful trials. Frieda has been creating numerous prenuptial agreements and working on a couple of high-conflict custody cases.

They are not planning on another long trip until a year from now. Having loved Spain so much, Avery and Frieda are planning to return to Madrid for a few days before moving on into Northern Italy. This Spring, they took some time to attend a family graduation in the Washington D.C. area and visit the Outer Banks of North Carolina. It was an amazing trip.



The firm took some time to celebrate Christine's Birthday at À Votre Sante Restaurant and had a wonderful time.



Erin Zivic has been of enormous help in the administration and formation of trust estates at Cooper-Gordon LLP. She still finds the time to volunteer her services to various legal clinics several times a month. She is planning on giving talks for the California Highway Patrol as to why they should all have estate plans and is prepared to offer a special price for a Simple Will and Advance Health Care Directive. She wrote an article on undue influence in estate planning, which has been published to our website and is set forth here for convenience.

Smart, Sweet and Susceptible: Treading a Fine Line Between Mental Capacity and Undue Influence in the Preparation of Estate Plans for Elderly Clients

In order to execute a Will or other testamentary document, an individual must have sufficient mental capacity to do so. The standard for sufficient mental capacity is relatively basic and seeks to determine whether the Testator understands the “why, what and who” of the testamentary document. *Probate Code* Section 6100 sets forth the formal standard for determining the requisite mental capacity and specifies that an individual must “(A) understand the nature of the testamentary act, (B) understand and recollect the nature and situation of the individual's property, [and] (C) remember and understand the individual's relations to living descendants, spouse, and parents, and those whose interests are affected by the will.”



Even if an individual has the mental capacity to execute an estate plan, the individual's Will or Trust may still be found invalid if the execution was tainted by “Undue Influence.” Undue influence occurs when a person's will becomes susceptible to the control of another, as if he or she is a

puppet with someone else pulling the strings. The possibility of undue influence opens an estate to extensive and costly litigation if the testamentary document was executed when the Testator was dependent on others, i.e., most often with elderly clients whom, as a result of their age and vulnerability, are likely more susceptible to undue influence by those around him or her, especially those who regularly provide him or her with care.

By way of explanation, consider the following hypothetical situation. “Jane” is a woman in her late eighties and has always had a fulfilling and close relationship with her children and grandchildren. Jane has also had a trust in place for several years, leaving all of her property to her children and grandchildren. A new young couple has moved in next door to Jane. They are a kind couple and always offer to help Jane with going through her mail, picking up her prescriptions, and buying her groceries. Jane becomes increasingly unwell and bedridden. She does not want to bother her children for help especially when they are so busy. Jane’s neighbors continue to help her and Jane is immensely grateful; Jane does not know what she would do without their help. Jane is compelled to thank her neighbors and as a result, she decides to change her trust. She explains her desire and reasoning to her neighbors and in turn, Jane’s neighbors arrange for an attorney to come to her home. Jane explains to her attorneys the property she wishes to distribute and to whom, and also verifies the names of her nuclear family. Jane then executes an amendment to her trust, leaving her home, bank accounts and all of her personal property to her neighbors. Three days later, she dies. Jane’s family suspects that Jane was not capable of revising her estate plan and that her neighbors threatened to refuse to assist Jane unless she amended her Trust documents for their benefit. Working with the given facts, in fact, Jane does have the mental capacity to execute the Trust document. She understands the nature of the act, that it is a way to distribute her property after death. She understands the nature of her property, i.e. that she owns a home and several bank accounts. And lastly, she understands her relations, as she names her nuclear family. Determining whether the document was tainted by undue influence is not quite as clear an analysis. Even though Jane has the mental capacity to execute a Will or Trust, she is still in a vulnerable position and thus susceptible to undue influence, even if it was unintentional. In general as a society, we are still wary of drastic changes to testamentary documents, such as the ones in this example and thus the legal process of estate planning aims to protect individuals and their families at this vulnerable time.

Some indicators that suggest that a person may be susceptible to undue influence include the following:

1. The individual is isolated from most friends and family;
2. The individual has a mental or physical condition which renders her dependent on others;
3. The relationship between the individual and main beneficiary enabled the beneficiary to control the testamentary act;
4. The main beneficiary did in fact control the act; and
5. The dispositions of the will were vastly different from the previously expressed intentions of the decedent.

As a result of this susceptibility, *Probate Code* Section 21350 sets forth certain donative transfers (i.e. gifts through a Will or Trust) which are *presumptively* invalid (i.e. the Court operates with the belief that the gift is invalid and the burden of proof shifts to the beneficiary to prove otherwise), which include but are not limited to the following:

1. The person who drafted the Will and/or Trust and possibly other members of the firm;
2. Transfers to any person who has a fiduciary relationship with the transferor such as a conservator or trustee;
3. Care custodians, i.e. those who provide care for the individual; and
4. All those who are related by blood or marriage to, the domestic partners of, cohabitants with, and employees of, the specifically excluded individuals as described above.



In order to protect a dependent adult's true intentions in her estate plan, the attorney should require a capacity certification for the client. Such a certification is given by a doctor and verifies that the client has the mental capacity to complete the testamentary act. Secondly, the attorney must complete a Certificate of Independent Review. This certificate requires the attorney to interview the client to make sure that the donative transfer is not the result of fraud or undue influence. This certification process must be done outside the presence of the beneficiary of the gift in question.

Due to the delicate nature of estate planning for dependant adults, attorneys drafting testamentary instruments for dependent adults must tread a fine line in determining 1) whether the client has the requisite capacity to complete the testamentary act and 2) whether the client has succumbed to undue influence in making a gift or has a genuine relationship with a care custodian and is making such gift freely and voluntarily. Likewise, the current laws and case law attempt

to prohibit gifts that are the result of undue influence, yet still try to enable dependent adults to make gift as they truly desire.

As a result of the inherent difficulties in drafting estate plans for dependent adults, it is important to consult an attorney experienced in this particular facet of the law. Such legal counsel will be able to advise clients on the necessity of (1) capacity certifications by doctors and/or mental health professionals, (2) certifications of independent review, and (3) various other fact-specific issues pertaining to the client.

Katherine, before leaving for her honeymoon in Turks and Caicos, also wrote a brilliant article analyzing the case of Marriage of Valli. The text of her article follows.

Big Girls Don't Cry, But Frankie Valli Does: An Analysis of *In re the Marriage of Valli* and the Effect of the Title Presumption on Community Assets

Pursuant to *Family Code* section 760, all property acquired by a person during marriage is *presumptively* community property, with some exceptions. For example, pursuant to *Family Code* section 770, property acquired during marriage by gift, bequest, devise or descent (i.e. through an inheritance) is separate property. There are also additional exceptions which involve the concept of “tracing,” which is the process of characterizing property as either separate property or community property based on the original source of funds. However, these are the most *basic* rules in Family Law which apply to characterize property acquired during the marriage as community property or separate property.

Typically, these basic rules of Family Law are all that are needed in order to make a determination as to the characterization of property acquired during a marriage. However, in a recent case involving legendary lead singer of the Four Seasons, Frankie Valli, the characterization of a simple life insurance policy was anything but simple.

Frankie Valli and his wife, Randy Valli, married in 1984. Considering the Vallis' Hollywood lifestyle, they had an unusually long marriage which lasted approximately 20 years before they separated in 2004. Approximately a year and a half before they separated, in March of 2003, the Vallis acquired a \$3.75 million life insurance policy on



Frankie's life, naming Randy the owner and beneficiary of the policy. Up until the Vallis separated a year-and-a-half later, all the life insurance premiums were paid from community property funds.

At trial, the Vallis provided evidence demonstrating that the cash value of the life insurance policy was more than \$365,000. Applying the basic rules of family law, the Trial Court found the life insurance policy to be a community property asset, due to the fact the life insurance policy was acquired during marriage with community property funds. The Trial Court then awarded the *entire* \$365,000 asset to Frankie, ordering him to pay Randy one-half the value of the policy from some other source of funds to compensate or "equalize" her for his receipt of the entire community property asset.

Randy appealed the Trial Court's Order, arguing that the life insurance policy was her *separate property*, despite the fact that it had been both acquired during the marriage and acquired with community property funds. Randy argued that because she was named owner of the life insurance policy, the life insurance policy was *presumptively* her separate property, and that this "form of title" presumption trumped the default presumption that all property acquired during marriage is community property.

In law, the word "presumption" is a term of art which means that the Court operates with a certain belief in accordance with the presumption and the burden shifts to the opposing party to offer evidence to rebut the presumption. The form of title presumption states that all property is held according to the title of the property. There is also a community property presumption which states that all property acquired during marriage is community property (save for the separate property exceptions mentioned in the beginning of this article). Litigation often ensues, as in cases like this one, where there are two legal presumptions that conflict with one another. In this case, according to the title presumption, if the title to the insurance policy states that Randy is the sole owner, Randy is the sole owner. However, under the community property presumption, since the insurance policy was purchased during the marriage with community property funds, the insurance policy is community property and both Parties are owners. There is a split of authority among the courts as to which presumption controls.

Ultimately, the Court of Appeals *agreed* with Randy that, despite the fact that the life insurance policy was acquired during the marriage and all premiums paid during the marriage were paid with community funds, the life insurance policy was Randy's separate property. The Court based its ruling *solely* upon the evidence presented at trial that Randy was named owner of the policy. Further, the Court found, Frankie did not present evidence of an agreement or

understanding with Randy that when the policy was placed solely in Randy's name as owner, that they intended the policy to be anything other than Randy's separate property. *Consequently, the Court ruled the life insurance policy was Randy's separate property.*

This case is a perfect example of how one innocent transaction by spouses can have far-reaching, dramatic results in the context of a divorce. Specifically, by merely titling an asset in one spouse's name, even without a specific intention to make such property the spouse's separate property, the other spouse may effectively make a gift of such property, even if the community pays for it.

In retrospect, Frankie could have done a number of things differently in order to avoid the end result in his case. For example, he could have taken title to the insurance policy in both their names or *his* name only, while still naming Randy the beneficiary of the policy. In this manner, Randy still would have been afforded the security which the Parties had intended for her in the event that Frankie passed away, without making the policy Randy's separate property in the event of a divorce. Similarly, if the Parties had a Revocable Trust (or Living Trust) in place, they could have titled the policy in the name of their Trustee(s), naming Randy as beneficiary. In this situation, the life insurance policy would still be community property. In the alternative, the Parties could have named Randy both the owner and beneficiary of the life insurance policy, but entered into a written agreement, perhaps a Post-Nuptial agreement, reflecting their intent that the life insurance policy be community property, despite titling the policy in Randy's name alone.

As in this case, attorneys often see legal problems arise when those who have assets refuse to spend money on legal advice for the protection of such assets. In the hopes of protecting yourself from such a mistake, when considering how to take title to significant assets acquired during marriage, be sure to consult an experienced attorney to help you navigate the multitude of laws governing the subject. Doing so will assist in ensuring you and your partner's intentions in the event of dissolution or death of a partner.

We wish everyone a wonderful summer season filled with lazy days, lovely nights, good company, good wine and peace in the world. If you have questions or comments about any of the news written here or about anything related to family law and/or probate and estates, please send us an email, call or blog us and we will respond right back. As always, it is a pleasure to serve our community.

