Session 303 | Girls Just Wanna have FUNds

In a world where women are often financially independent and build their own wealth, it is essential for women to "plan for the best but prepare for the worst," when it comes to protecting their assets. This program will provide guidance and tips geared towards a female audience on how to best protect their assets and finances in situations relating to marriage, divorce, family disputes and estate planning. Learn from family law and estate planning attorneys, CPAs and financial advisors on how to prevent financial disputes over division of family assets, address potential family disputes upon divorce or death to reduce risks of litigation, prepare for and defend litigation relating to family financial disputes, and ways to manage and preserve your assets. You will hear from attorneys and other advisors based on their experiences dealing with high profile cases and clients, and learn what to and not to do. Whether you want to learn how to address these issues for your own good or to advise your clients, this program is truly essential for women at all stages of life -- single, married, divorced, re-married, retired -- you name it!

Although this program is geared towards a female audience, the topics are pertinent and applicable to everyone, and all are welcome!

**Moderator:**
**Stephanie Louie,** Attorney, Bloomquist Law, PLLC

**Speakers:**
**Stacie Chau,** Attorney, Holland & Knight LLP
**Linh H. Ly,** Attorney, Pesner Altmiller Melnick DeMers & Steele PLC
**Eric M. Tokuyama,** Attorney, Hoffman Sabban & Watenmaker, APC
**Theresa White,** Financial Planner and Advisor, First Financial Group
Girls Just Wanna Have FUNds

Speakers

• Stacie L. Chau, Attorney - Private Wealth Services, Holland & Knight LLP
• Linh H. Ly, Partner - Family Law, Pesner Altmiller Melnick DeMers & Steele PLC
• Eric Tokuyama, Attorney - Estate Planner, Hoffman Sabban & Watenmaker, APC
• Theresa W. White, Financial Advisor, First Financial Group

Moderator

• Stephanie Louie, Attorney - Estate Planning and Probate, Bloomquist Law, PLLC

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Topics Covered

- I am engaged! #BRIDETRIBE
- “Happily Married”
- #Divorced
- Marriage Take#2!

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Basic Terms

- **Premarital Agreement** (or Prenuptial Agreement): An agreement between prospective spouses made in contemplation of marriage and to be effective upon marriage.

- **Postnuptial Agreement**: a marital agreement between spouses for the purpose of settling rights and obligations of either or both of them, to the same extent, with the same effect, and subject to the same conditions as premarital agreements, except that postnuptial agreements shall become effective immediately upon their execution.

Premarital Agreements

- Generally in order to be valid, a prenuptial agreement:
  - Must be in writing
  - Signed by both parties
  - Becomes effective upon marriage

- Generally in order to be enforceable, a prenuptial agreement:
  - Must be voluntarily executed
  - Must not be unconscionable when executed
  - Each party must make a fair and reasonable disclosure of his or her property and financial obligations, or the party who does not receive disclosure must waive the right to disclosure voluntarily and in writing.

Notes:
When to Consider a Premarital or Postnuptial Agreement

- A significant income disparity between the parties
- A large discrepancy in net worth between the parties
- A party owns a business or businesses
- A party anticipates a considerable inheritance or gift
- A party has children from a prior relationship
- A party has been divorced in the past
- A couple wants to limit legal fees and stress of litigation in the event of divorce

Issues to Consider

- Both parties should have independent counsel
- If one party is unable to afford counsel, the other party should consider paying the fees
- If one party refuses to obtain counsel, the agreement should clearly state that both parties are entering into the agreement freely and voluntarily and that party one party had the opportunity to seek independent counsel and after consideration, has declined to retain counsel
- Full disclosure of assets and liabilities is essential
- Timing – negotiation and execution should be as far in advance of the wedding as possible

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Limitations of Premarital Agreements

- Custody and/or Child Support:
  - Parties cannot agree to any terms regarding child custody or child support because such matters are always subject to the jurisdiction of the court and subject to modification
  - Contracting terms for non-existing children may also be against public policy
Jurisdiction Specific

- Texas
- California
- Virginia

**Texas**
- Texas Family Code section 4.102 and 4.103 allow parties to partition community property not yet in existence.

**California**
- General Provisions
  - Governed by the California Premarital Agreement Act
  - Agreement must be in writing and signed by both parties. (Cal. Fam. Code § 1611)
  - No consideration is required. (Cal. Fam. Code § 1611)
- Proper matters for prenups
  - May contract for any matter “not in violation of public policy or a statute imposing a criminal penalty.” (Cal. Fam. Code §1612(a)(7))
  - May affect rights and obligations regarding property “wherever acquired or located.” (Cal. Fam. Code §1612(a)(1))
  - May agree in advance on the disposition of property upon separation, divorce or death. (Cal. Fam. Code §1612(a)(3))
  - May affect the right to buy, sell, transfer, assign, encumber, manage, or dispose of any property. (Cal. Fam. Code §1612(a)(2))
  - May include a provision for the making of a will, trust, or other arrangement to carry out the agreement. (Cal. Fam. Code §1612(a)(4))
  - May affect the "ownership rights in and disposition of the death benefit from a life insurance policy." (Cal. Fam. Code §1612(a)5))
  - May specify the choice of law governing the agreement. (Cal. Fam. Code §1612(a)(6))
Virginia

- **General provisions:**
  - Governed by Virginia Premarital Agreement Act (Va. Code §20-147 to §20-155)
  - Must be in writing, signed by both parties, and effective upon marriage (Va. Code §20-149)

- **Content of agreement (Va. Code §20-150):**
  - The rights and obligations of each of the parties in any of the property of either or both of them whenever and wherever acquired or located;
  - The right to buy, sell, use, transfer, exchange, abandon, lease, consume, expend, assign, create a security interest in, mortgage, encumber, dispose of, or otherwise manage and control property;
  - The disposition of property upon separation, marital dissolution, death, or the occurrence or nonoccurrence of any other event;
  - Spousal support;
  - The making of a will, trust, or other arrangement to carry out the provisions of the agreement;
  - The ownership rights in and disposition of the death benefit from a life insurance policy;
  - The choice of law governing the construction of the agreement; and
  - Any other matter, including their personal rights and obligations, not in violation of public policy or a statute imposing a criminal penalty.

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Estate Planning

- Leaving estate to spouse—Good or Bad Idea?
- Potential problems with leaving estate to spouse?
- Estate planning options
- Inheritance as separate property
- Potential issues to keep in mind
  - Pretermitted Heirs
  - Omitted Spouse Rule

Pretermitted Heirs

- Children born or adopted after execution of testamentary instrument receive intestate share. (Cal. Prob. Code § 21620)
  - Testamentary instrument includes wills and revocable trusts. (Cal. Prob. Code § 21601)
  - Exceptions—intentional omission, disposition to other parent and other instruments. (Cal. Prob. Code § 21621)

Omitted Spouse Rule

- Spouse receives intestate share, but not more than 50% of the value of the separate property.
- Exceptions:
  - Decedent intentionally omitted spouse from testamentary instrument or decedent provided for omitted spouse with transfers other than via testamentary instruments and that intention is shown by evidence. (Cal. Prob. Code § 21611)
- Order of recourse:
  - First from decedent’s estate not disposed by will or trust and then proportionately from each beneficiary of a decedent’s testamentary instruments.
  - Children (Cal. Prob. Code § 21623)
  - Spouse (Cal. Prob. Code § 21612)

Elective Share

- A surviving spouse may claim an elective share regardless of whether (i) any provision for the surviving spouse is made in the decedent's will or (ii) the decedent dies intestate (Va. Code § 64.2-302)
Have the tough conversations before you #gethitched

- Wedding
- Family – having kids? How many?
- Education – private v. public? Funding of college?
- Finances
- Parents – caring for parents/in-laws?
- Death – estate plans

Notes:
“HAPPILY MARRIED”

“Happily Married”

- Post-Nup
  - Not too late if there was no pre-nup!
- Transmuting Community Property
- Planning for the worst
  - What happens if spouse dies?
- Knowing your spouse
- Other Considerations
  - General power of attorney
  - Living Will
  - Medical Directives
  - HIPPA

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A transmutation must:
1. Be in writing:
   a. See Cal. Fam. Code § 852(a) (transmutations)
   b. See Cal. Evid. Code § 250 for definition of "writing"
2. The writing must be an "express declaration" (must contain language which "expressly states that
   the characterization or ownership of the property is being changed"). Estate of MacDonald, 51
   Cal.3rd 262, 272 (1990); and
3. The writing must be "made, joined in, consented to, or accepted" by the spouse whose interest in
   the property is adversely affected. (Extrinsic evidence is not admissible to prove a transmutation,
   so the joinder, consent, or acceptance must also be in writing. See In re Marriage of Campbell, 74

Tax Considerations
- Income Tax Advantage with Community Property
  o Parties will often want to have property characterized as community property so that, at
    one spouse's death, the surviving spouse will receive a basis adjustment in his or her share
    of the property.
- Waiver of Survivor Rights
  o The waiver of a right to a joint and survivor annuity under ERISA is not a
    transmutation of the community property rights of the person executing the waiver.
    (Cal. Fam. Code § 853(b))

Notes:
Example 1

- The Lenis signed written escrow instructions for the sale of a house, stating: "proceeds to be split 50/50." The court held that the statement in the escrow instructions was not an express declaration to change the character of the property from separate property to community property. *In re Marriage of Leni*, 144 Cal.App.4th 1087 (2006).
- Mr. Barneson signs written brokerage instructions to "transfer" his stock to his wife. The court held that the written instructions was not an express declaration to change the ownership of the stock from husband to wife. *In re Marriage of Barneson*, 69 Cal.App.4th 583 (1999).

Example 2

- Mr. Bibb registers his Rolls Royce owned before marriage in the names of "H or W." The change in registration to include either spouse was not an express declaration to change the character of the Rolls Royce from H’s separate property to community property. *Estate of Bibb*, 87 Cal.App.4th 461 (2001).
- Mr. Bibb also signs a deed to his SP apartment building: "For a valuable consideration, [Mr. Bibb] hereby grants to [himself and Mrs. Bibb], his wife as joint tenants." The language in the deed was determined to be an express declaration to transmute the real property from separate property to community property. *Id.*

Notes:
Example 3 - Estate Plan

- Mr. Holtemann signed a "Spousal Property Transmutation Agreement" stating that several items were "hereby transmuted from his separate property to the community property of both parties."
- The agreement was made "solely for the purpose of interpreting how property shall be disposed of at death."
- The court held that the transmutation agreement was effective to change the character of the property from H’s separate property to community property. *In re Marriage of Holtemann*, 166 Cal.App.4th 1166 (2008).
- Mr. Holtemann was entitled to reimbursement for the value of the property on the date of the transmutation. (Cal. Fam. Code §2640 (b))

Notes:
Estoppel Argument

- Ms. Campbell spent $66,000 of her separate property funds to improve her husband's separate residence, based on his alleged oral agreement to place her on title.
- The court refused to consider the payments by wife as extrinsic evidence that the residence was orally transmuted from separate property to community property. *In re Marriage of Campbell*, 74 Cal.App.4th 1058 (1999); *In re Marriage of Benson*, 36 Cal.4th 1096, 1110 n.6 (2005).

No Oral Testimony as to Content

- Extrinsic evidence is not admissible to establish the requirements of California Family Code section 852. See *Estate of MacDonald*, 51 Cal.3rd 262, 272 (1990); Cal. Fam. Code § 1523.

- The court must look to the writing itself, without resort to oral testimony or other extrinsic evidence, to see if it is a transmutation as defined by California Family Code section 852.
Is Testimony Ever Allowed?

- The Holtemanns' trust attorney sent them a letter advising the agreement has "clear and potentially irreversible consequences."

- The letter is admissible to rebut husband's claim that he made the writing unknowingly or inadvertently. Holtemann, 166 Cal.App.4th at 1173 n.4.

- Extrinsic evidence is also allowed to show duress or breach of fiduciary duty.
**Gifts Exception**

- General transmutation rule does not apply to a gift of clothing, wearing apparel, jewelry or other articles of a personal nature used solely or principally by the spouse to whom the gift is made and that is not substantial in value, taking into account the circumstances of the marriage.

“This section does not apply to a gift between the spouses of clothing, wearing apparel, jewelry, or other tangible articles of a personal nature that is used solely or principally by the spouse to whom the gift is made and that is not substantial in value taking into account the circumstances of the marriage.”

(Cal. Fam. Code § 852(c))

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Breach of Fiduciary Duty and Transmutation

- A transmutation is subject to attack as a breach of fiduciary duty. If a spouse receives an unfair advantage as a result of an interspousal transaction, a presumption of undue influence arises. In re Marriage of Burkle, 139 Cal.App.4th 712 (2006); Cal. Fam. Code §721(b).

California – Fiduciary Duties Owed to Spouse

- **Duties Owed - Cal. Fam. Code § 721**
  - Husband and wife are subject to the general rules governing fiduciary relationships which control the actions of persons occupying confidential relations with each other.
  - If a party obtains an asset or other advantage in violation of the fiduciary duty, the court will set aside the transaction.

- **Breach - Cal. Fam. Code § 1101**
  - Remedies for breach of the fiduciary duty by one spouse shall include, but not be limited to, an award to the other spouse of 50 percent, or an amount equal to 50 percent, of any asset undisclosed or transferred in breach of the fiduciary duty plus attorney’s fees and court costs.

- **What's Unfair?**
  - An unfair advantage is "not merely a gain or benefit obtained in a mutual exchange." Burkle, 139 Cal.App.4th at 731.
  - A transaction "for no consideration or for clearly inadequate consideration" results in an unfair advantage. Id.
  - One spouse must obtain a benefit at the expense of the other, who receives nothing in return. Id.

- **Contract Law Applies**
  - Agreements must be in writing. (See Cal. Fam. Code § 852(a) (transmutations); Cal. Prob. Code § 142(a) (probate waivers))
  - Consideration is not required to have a transmutation (Cal. Fam. Code § 850), but a lack of consideration creates an “unfair advantage” and the undue influence presumption will arise.
Overcoming the Presumption

- "When a presumption of undue influence applies to a transaction, the spouse who was advantaged by the transaction must establish that the disadvantaged spouse's action 'was freely and voluntarily made,' with full knowledge of all the facts, and with a complete understanding of the effect of the transaction." Burkle, 139 Cal.App.4th at 738.

- Just like any other waiver, there must be proof of a voluntary relinquishment of a known right.
  - The transaction was made "freely and voluntarily"
  - The spouse had "full knowledge of all the facts"
  - The spouse had a "complete understanding of the effect of the transaction"

Notes:
Right of Reimbursement

- A spouse who transmutes separate property to community property has a right of reimbursement, upon divorce, for his or her "contributions to the acquisition of property," which include the down payments, improvements, principal payments on a loan used to finance the purchase or improvement of the property – but do not include interest payments, maintenance, insurance, or property taxes.

- The right exists unless there is a written waiver of right to reimbursement.

- Compare probate proceedings

Reimbursement

- A spouse who transmutes separate property to community property has a right of reimbursement, upon divorce, for his or her "contributions to the acquisition of property," which include the down payments, improvements, principal payments on a loan used to finance the purchase or improvement of the property – but do not include interest payments, maintenance, insurance, or property taxes. (Cal. Fam. Code § 2640(b))

- The right exists unless there is a written waiver of right to reimbursement. (Cal. Fam. Code § 2640(b))

- There is no right to interest or appreciation on the capital contribution. (Cal. Fam. Code § 2640(b))

- Reimbursement is made prior to the division of community property. *In re Marriage of Walrath*, 17 Cal.4th 907(1998).

Compare Probate Proceedings

- With the exception of California Probate Code section 5305, which is limited to bank accounts, there is no statutory authority granting a right of reimbursement to the separate estate that is similar to California Family Code section 2640 at death. *Estate of Blair*, 199 Cal.App.3d 161 (1988).
No Reimbursement for Gifts

- A party shall be reimbursed for the party's separate property contributions to the acquisition of property of the other spouse's separate property estate during the marriage, unless there has been a transmutation in writing . . . or a written waiver of the right to reimbursement. (Cal. Fam. Code §2640(c))

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Post-marital Agreements

- Fiduciary duty applies
- Different types of agreements:
  - Agreement between couple remaining married
  - Reconciliation agreement
  - Marital settlement agreement (MSA) between couple separating or divorcing
Planning for the Worst

- Planning for the worst
  - What happens if spouse dies?
  - Know where your spouse’s original estate planning documents are located
  - Have a list of your spouse’s assets
    - Cryptocurrency key
  - Find out which bills your spouse pays for and make sure they get paid
  - Have access to passwords for online accounts – use a password manager for assistance if needed

Planning for the Worst

- Estate Planning
  - Community Property States
  - Separate Property States
- Living Will
- Medical Directives
  - Appoint an agent and alternate agents for medical decisions
  - Execute these documents and keep them updated
- HIPPA
- Life insurance
- Other Considerations
  - Kids
  - Planning for their future

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Separation

• Dealing with community property
  o “Date of separation” = date that a complete and final break in the marital relationship has occurred, as evidenced by: (1) express intent to end the marriage; and (2) the conduct of the spouse is consistent with intent to end the marriage.
  o Income earned from the efforts of a separated spouse after separation is that spouse’s separate property.

• Update estate plans
  o Each party remains the spouse of the other until their marriage is terminated by the court; separation or filing of divorce does not terminate their marital status.
  o Possible solutions:
    • Execute a temporary will and revoke trust.
    • Sever joint tenancy interests and hold property as tenants in common.
    • Update beneficiary designations

California – Definition of Separation

• Pursuant to California Family Code section 70, the “date of separation” is the date that a complete and final break in the marital relationship has occurred, as evidenced by: (1) the spouse has expressed to the other spouse his or her intent to end the marriage; and (2) the conduct of the spouse is consistent with his or her intent to end the marriage.
• Income earned from the efforts of a spouse during marriage is community property, regardless of when the income is actually received, whereas income earned from the efforts of a separated spouse after separation is that spouse’s separate property.

California – Effect of Separation on Estate Plan

• Each party remains the spouse of the other until their marriage is terminated by the court; separation or filing of divorce does not terminate their marital status. (Cal Prob. Code §§ 78, 6122)
• Possible solutions:
  o Execute a temporary will and revoke trust.
  o Sever joint tenancy interests and hold property as tenants in common.

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Separation

- Separate assets
  - Open new bank account
- Change passwords for all financial accounts, email, social media, etc.
  - You never know what will be used against you in litigation!
- Consider physical custody arrangements, child support, financial support, etc.
- Life insurance policy considerations

Separation

- Hiring Attorneys
  - Ask for referrals
  - Do paid consultations
- Settlement v. Litigation Costs
  - A contested divorce case will cost at least $30,000 if a trial is needed, but becomes more costly if there are more assets and issues about minor children
  - Settlement is always encouraged to save on legal fees
  - An uncontested divorce is much cheaper and allows parties to negotiate their own terms instead of getting a decision from a judge
- Marital Settlement Agreements

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Restraining Orders

- California Automatic Temporary Restraining Order (Cal. Fam. Code § 2040)
  - ATROs apply to all family law actions.
  - ATROs are binding on petitioner upon filing of the action, and are binding on respondent upon receipt of service.
  - ATROs remain in effect until final judgment.

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Restraining Orders

- Prohibited Activities
  - Transferring, assigning, selling, or encumbering property, except in the usual course of business or for necessities of life.

- Permitted Activities
  - Creation, modification or revocation of a will
  - Revocation of a non-probate transfer if notice is filed and served before revocation takes effect
  - Severing joint tenancy (with notice)
  - Creation of an unfunded revocable or irrevocable trust
  - Execution and filing of a disclaimer
  - Payment of attorney's fees

Prohibited Activities – Cal. Fam. Code § 2040

- Transferring, assigning, selling, or encumbering property, except in the usual course of business or for necessities of life.
- "[T]he reallocation of assets to obtain a better return on capital is most assuredly in the 'usual' course of business for a company whose business it is to hold and manage property." Gale v. Super. Ct., 122 Cal.App.4th 1388, 1393 (2004).
  - Cancelling, transferring, borrowing against, or changing beneficiaries of any insurance.
  - Creating or modifying a non-probate transfer in a manner that affects the disposition of property, without written consent or court order.
    - Non-probate transfer is defined as any instrument, other than a will, which transfers property on death, including revocable living trusts, pay on death accounts, Totten trusts, and similar items. (Cal. Fam. Code § 2040(d)(1))

Permitted Activities

- Creation, modification or revocation of a will
- Revocation of a non-probate transfer if notice is filed and served before revocation takes effect
- Severing joint tenancy (with notice)
- Creation of an unfunded revocable or irrevocable trust
- Execution and filing of a disclaimer
- Payment of attorney’s fees

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MARRIAGE TAKE#2!

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Post-Divorce, Remarriage and Blended Families

- Legal issues that may arise after divorce
  - Child custody and child support
  - Spousal support
  - Spousal rights in probate

- Other areas of dispute
  - Introducing children to a new partner
  - Sandwich Generation

- Areas of Financial Planning
  - College Funding
  - Retirement Funds

California – Post-Divorce

- A dissolution judgment revokes a will as to the former spouse's rights (Cal. Prob. Code § 6122)
- Trust and non-probate provisions for a spouse are also revoked by dissolution or nullity (Cal. Prob. Code § 5600)
  - Exception. A dissolution revokes all non-probate transfers in favor of former spouse, unless:
    1. There is clear and convincing evidence that decedent intended the contrary,
    2. The court ordered that the non-probate transfer be maintained for the former spouse, or
    3. The non-probate transfer is not subject to revocation by transferor at time of death. (Cal. Prob. Code § 5600)

Child Support After Payor’s Death

- Child support obligation continues after death, but may be satisfied by insurance proceeds. Taylor v. George, 34 Cal.2d 55 (1949).
- Child support is a charge against the decedent’s estate, requiring the filing of a creditor’s claim. In re Marriage of O’Connell, 8 Cal.App.4th 565 (1992).
- Child support may be modified after death

Spousal Support After Payor’s Death

- Terminates on death of either party unless otherwise agreed. (Cal. Fam. Code § 4337)
- Nevertheless, the family court may require a party to purchase an annuity or maintain a life insurance policy for the benefit of the supported spouse, or establish a trust for the supported spouse to provide the spouse with support following the payor’s death. (Cal. Fam. Code § 4360)
Scenario 1

- Wife and husband gets married, each bringing their children from prior marriage.
  - Avoiding litigation
  - Common Litigation Areas
    - Inheritance
    - Disputes over family business
Scenario 2

- Older couple, husband dies leaving a fortune to wife. The “pool boy” starts taking wife on dates. Children get worried that mom will get taken advantage of. What can be done?
- Conservatorship – of person or estate
  - Litigation
    - Lack of capacity
    - Undue influence


- The proposed conservatee.
- The spouse or domestic partner of the proposed conservatee.
- A relative of the proposed conservatee.
- Any interested state or local entity or agency of this state
- Any other interested person or friend of the proposed conservatee

Summary of Standards for Conservatorship:

- A conservator of the person may be appointed for a person who is unable to properly provide for his or her personal needs for physical health, food, clothing, or shelter. (Cal. Prob. Code § 1801(a))
- A conservator of the estate may be appointed for a person who is substantially unable to manage his or her own financial resources or resist fraud or undue influence. (Cal. Prob. Code § 1801(b))
- No conservatorship may be granted unless the court makes an express finding that the granting of the conservatorship is the least restrictive alternative needed for the protection of the conservatee. (Cal. Prob. Code § 1800.3(b))
- The requisite showing for the appointment of a conservator must be made by clear and convincing evidence. (Cal. Prob. Code § 1801(e))

Presumption of Capacity - Cal. Prob. Code § 810

- "[T]here 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." (i.e. capacity is presumed.)
- Gomez v. Smith, 54 Cal. App. 5th 1016, 1040 (2020): Wife of deceased husband who died before he could establish living trust to provide for wife during her life brought action against husband's adult children from prior marriage alleging intentional interference with expected inheritance.
Among the issues discussed, the court found that the adult daughter had burden of proving husband’s mental capacity or incapacity at trial, and she ultimately failed to meet this burden.

**Capacity - Cal. Prob. Code § 811**
- The general standard for contractual capacity requires evidence of a deficit in mental function that is correlated to the decision or act in question. If the act in question is analogous to making a will or codicil, the more specific statutory standard of California Probate Code section 6100.5 governing testamentary capacity is applicable.

**Undue Influence - Cal. Welf. & Inst. Code § 15610.70.**
- “Undue influence” means excessive persuasion that causes another person to act or refrain from acting by overcoming that person’s free will and results in inequity.
- In determining whether a result was produced by undue influence, courts will consider (1) the victim’s vulnerability; (2) the influencer’s apparent authority; (3) the tactics used by the influencer, and (4) the inequity of the result. *Keading v. Keading*, 60 Cal. App. 5th 1115, 112 (2021)
Scenario 3

- Scenario 3 – Child defrauds mom, asking her to sign documents effectively giving him the family home
  - Claims of financial elder abuse
  - Could result in double damages plus attorneys' fees


- Financial abuse occurs when a person or entity does any of the following:
  - Takes, secretes, appropriates, obtains or retains, any interest in real or personal property, for a wrongful use, or with intent to defraud or both; OR assists in doing any of the above described acts; OR does any of the above described acts through “undue influence” as defined.

Dependent Adult - Cal. Welf. & Inst. Code § 15610.23

- “Dependent adult” means a person, regardless of whether the person lives independently, between the ages of 18 and 64 years who resides in this state and who has physical or mental limitations that restrict his or her ability to carry out normal activities or to protect his or her rights, including, but not limited to, persons who have physical or developmental disabilities, or whose physical or mental abilities have diminished because of age.
  - Includes any person between the ages of 18 and 64 years who is admitted as an inpatient to a 24-hour health facility, as defined in Sections 1250, 1250.2, and 1250.3 of the Health and Safety Code.

Undue Influence - Cal. Welf. & Inst. Code § 15610.70

- “Undue influence” means excessive persuasion that causes another person to act or refrain from acting by overcoming that person’s free will and results in inequity.
- In determining whether a result was produced by undue influence courts consider of (1) the victim’s vulnerability; (2) the influencer’s apparent authority; (3) the tactics used by the influencer, and (4) the inequity of the result. *Keading v. Keading*, 60 Cal. App. 5th 1115, 1125 (2021).

Civil Actions for Abuse of Elderly/Dependent Adults - Cal. Welf. & Inst. Code § 15657.6

- In cases of taking property of an elder or dependent adult when the elder or dependent adult
lacks capacity under or is of unsound mind, but not entirely without understanding, the person who took the property must, upon demand made on behalf of the elder or dependent adult, return the property or be subject to the remedies provided by California Welfare and Institutions Code section 15657.5, specifically including attorney fees and costs.

Available Damages
- If found liable for elder financial abuse, the person shall be liable for twice the value of the property recovered by an action under this part. In addition, except as otherwise required by law, including Section 15657.5 of the Welfare and Institutions Code, the person may, in the court’s discretion, be liable for reasonable attorney’s fees and costs. The remedies provided in this section shall be in addition to any other remedies available in law to a person authorized to bring an action pursuant to this part. (Cal. Prob. Code § 859)
- Double damages are authorized for commission of elder financial abuse, without a separate finding of bad faith. *Keading v. Keading*, 60 Cal. App. 5th 1115 (2021)
- Treble Damages may be available under California Civil Code § 3345

*Keading v. Keading, 60 Cal. App. 5th 1115 (2021)*
- Acting under the recently conferred power of attorney, son executed a grant deed transferring property out of the trust and to himself and dad/decedent in joint tenancy with right of survivorship.
- Decedent then transferred to son nearly 99,678 shares of stock in Freedom Motors, which had been purchased years earlier for $1 per share. Decedent’s signature on the transfer document was barely legible.
- Son executed another trust amendment that removed his sister as successor trustee.
- Court found:
  - Although son “did not have substantial authority over [Decedent]” and did not isolate him or make him solely dependent on him, son exerted “substantial undue influence over [Decedent]”
  - The power of attorney, the grant deed transferring the property out of the trust, and the stock transfer—all done in the month before Decedent died—all resulted from elder abuse
  - Son ordered to pay damages in the amount of $1,548,830.

Notes:

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