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Unlike the standard governing the capacity to make a will, California courts have not applied a uniform standard in evaluating the capacity necessary to execute a trust instrument. In *Andersen v. Hunt*, 11 C.D.O.S. 7265, the Second District Court of Appeal acknowledged the conflicting authorities on trust capacity and concluded the requisite level of capacity depends on the complexity of the trust instrument at issue. In doing so, the court fundamentally altered how trust capacity cases will be litigated. Under *Andersen*, the applicable standard of capacity is a question of fact, rather than a question of law. Thus, the *Andersen* decision provides an opportunity for parties to build a record that will cause the court to employ a favorable standard of capacity.

The mental capacity required to make a will is relatively low. Testators do not need to be able to transact important— or even ordinary — business. Rather, as provided by Probate Code §6100.5, a testator has the capacity to make a will if, at the time the will was made, he can (1) understand the nature of the act he is undertaking, (2) understand and re- call his property, and (3) remember and understand his relations to his living descendants, spouse and parents, and those whose interests will be affected by the will. This standard of capacity is generally referred to as "testamentary capacity."

In the past, some California courts have used the testamentary capacity standard to evaluate the validity of a trust instrument. More often, however, California courts have relied on the capacity standard provided in Probate Code §§810-812 in trust capacity cases, which is commonly referred to as "contractual capacity."

Contractual capacity generally requires that the decision maker be able to communicate, understand and appreciate (1) the rights, duties and responsibilities created, or affected, by his or her decision; (2) the probable consequences of the decision; and (3) the significant risks of, benefits of and reason- able alternatives to the decision. Prob. Code §812. This contractual capacity standard was regarded by most practitioners to be both distinct from, and substantially more stringent than, the testamentary capacity standard stated in §6100.5.

In *Andersen*, the Second District addressed California's inconsistent case law and concluded that a trustor's capacity to execute a trust instrument should be evaluated under the testamentary capacity standard only if the record established the trust instrument was similar in its content and complexity to a will or codicil. In that case, the trustor had established a complex family trust that named his children the sole remainder beneficiaries. After suffering a stroke, the trustor amended his trust to leave the majority of his estate to a long-term romantic partner. Upon the trustor's death, the trustor's children sought to invalidate the trustor's post stroke trust amendments on the grounds that the trustor lacked the requisite mental capacity.

The probate court concluded that the trustor's capacity to execute the trust amendments should be evaluated using the contractual capacity standard stated in Probate Code §§810 to 812 and held that the trustor lacked capacity to amend his trust. On appeal, the trustor's long-term romantic partner contended that the testamentary capacity standard stated in Probate Code §6100.5 should have been used by the probate court. The trustor's children countered by noting that §6100.5 "defines mental competency to make a 'will,' not a testamentary transfer more generally" and that the probate court's use of a higher capacity standard was therefore proper. After noting the inconsistent standards applied in evaluating the capacity to make or amend a trust, the *Andersen* court declined to state a definitive capacity standard. According to the court, "§§810 to 812 do not set out a single standard for contractual capacity, but rather provide that capacity to do a variety of acts ... must be evaluated by a person's ability to appreciate the con- sequences of the particular act he or she wishes to take." According to the *Andersen* court's conception of these provisions, "[m]ore complicated decisions and transactions thus would appear to require greater mental function; less complicated decisions and transactions would appear to require less mental function."

Against this background, the *Andersen* court announced that "[w]hen determining whether a trustor had capacity to execute a trust amendment that, in its content and complexity, closely resembles a will or codicil, we believe it is appropriate to look to §6100.5 to determine when a person's mental deficits are sufficient to allow a court to conclude that the person lacks the ability to understand and appreciate the con- sequences of his or her actions with regard to the type of act or decision in question. ... In other words, while §6100.5 is not directly applicable to determine competency to make or amend a trust, it is made applicable through §811 to trusts or trust amendments that are analogous to wills or codicils."

Ultimately, the *Andersen* court concluded that the instruments at issue were not particularly complex in nature. Rather, the trust amendments did nothing more than alter the percentages of the trust estate that each beneficiary would receive. Because "of the amendments' simplicity and testamentary nature," the court found that the amendments were "indistinguishable from a will or codicil" and should have been evaluated pursuant to the testamentary capacity standard stated in §6100.5.

The court's holding significantly alters how trust capacity cases will be litigated. Previously, the appropriate standard for determining capacity would be decided as a matter of law, and the par- ties would present evidence

regarding whether that standard was satisfied. Under *Andersen*, parties must build a factual record to determine both what standard of capacity applies (i.e., whether the trust instrument is complex and/ or analogous to a will or codicil) and whether the applicable standard of capacity was satisfied.

Accordingly, parties in a trust capacity dispute should work to build a record that will result in the court applying the capacity standard most advantageous to their case. Parties challenging a trust instrument will obviously prefer as high a standard of capacity as possible. As such, these parties will be well-served to set the trust instrument apart from a will by emphasizing the characteristics of the instrument that go beyond the testamentary disposition of assets. For instance, parties in this position will want to stress the features of the instrument that govern the trust's administration during the trustor's lifetime because this nontestamentary characteristic weakens any analogy to a will or codicil.

Further, parties challenging a trust will want to develop a factual record showing that the considerations and process involved in the creation of the trust instrument were far more intricate and complex than would be for a will. For example, if the trust instrument was created to effectuate a complex, tax-efficient transfer of assets during the trustor's life and at death, the party challenging the trust instrument will want to gather evidence regarding the tax issues the trust instrument was intended to address and the complex and intricate planning and analysis that was required of the trustor in creating the instrument.

By contrast, parties defending the validity of a trust instrument will strongly prefer the lower "testamentary capacity" standard stated at §6100.5. Accordingly, these parties will want to emphasize the testamentary nature of the trust instrument and the provisions of the trust or trust amendment that control the disposition of assets upon the trustor's death. Further, parties in this position will want to explain how the trust instrument's provisions are analogous to provisions that can be found in a will. Finally, these parties should develop facts showing that the process of creating the trust instrument undertaken by the trustor was simple and streamlined and did not require a particularly complex analysis on the part of the trustor.

At base, the applicable standard in trust capacity cases is no longer a question of law. Rather, under *Andersen*, the facts surrounding the creation and operation of the trust instrument at issue will determine the applicable standard. As such, parties must appreciate from the outset of the litigation that the *Andersen* holding provides an opportunity to influence the capacity standard to be applied and the facts relating to the complexity of the trust instrument — rather than the facts relating to the trustor's capacity — may ultimately determine the outcome of the case. The party that best takes advantage of this shift in California law will have a substantial advantage in litigation over the validity of trust instruments.