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Mitigating Risks for Probate & Estate Lawyers In Light of *Herren v. George*

PROBATE AND ESTATE PLANNING ISSUES present inherent risks if family interests conflict between family members at odds with each other. This is true especially if an elderly family member is at the edge of their capacity and has difficulty trusting that a relative, or their attorney, is acting in their best interest.

Those risks appear to be heightened after the March 2025 *California Court of Appeal opinion in Herren v. George*. 109 Cal. App. 5th 410 (2025).

In this reported case, George S. created a trust in 1991 and restated that trust in 2022, designating his daughter, Susannah as successor attorney-in-fact. George was diagnosed with severe dementia and declared incapacitated by his doctors in 2023. Susannah then managed George's caregivers and moved George from San Francisco to Marin County after a bout with pneumonia.

George's other daughter, Gabriella, was not named as a co-trustee, however she would visit George frequently. According to Gabriella, George indicated he was not satisfied with the way his estate was managed and she believed Susannah was not providing an avenue for George to retain independent counsel.

Gabriella contacted Jamie B. Herren, a lawyer practitioner with 14-years of experience focusing on trust and estates, conservatorship, and fiduciary representation. During Herren's first meeting in person with George on May 3, 2024, Herren provided George a retainer agreement for $100,000, George signed. The same day on May 3, 2024, Herren sent a demand letter for payment to the co-trustees of George's trust, Susannah and Karie D., and to the law firm that created the 2022 restatement, Stimmel, Stimmel & Roeser, PC.

Susannah, as George's attorney-in-fact, responded five days later on May 8, 2024 by filing a petition under the Elder Abuse and Dependent Adult Civil Protection Act[1] for an elder abuse restraining order against Herren after learning of the agreement. The trial court issued a restraining order against Herren, prohibiting her from contacting George.

Between June and July of 2024, an evidentiary hearing on the restraining order was held over multiple days. After a contested hearing, the trial court issued a restraining order prohibiting Herren from abusing and contacting George.

Herren appealed, arguing that the restraining order was invalid without a prior adjudication of George's competence. On appeal, Herren raised several other arguments, including claims of due process violations and conflicts of interest.

The Court of Appeal rejected and dismissed Herren's arguments as unsupported or forfeited, stating that the Elder Abuse Act allows for protective orders *without* such prior adjudication, emphasizing the act's intent to protect elders from abuse. The appeal court ultimately affirmed the restraining order, finding substantial evidence of undue influence by Herren, noting George's vulnerability and Herren's actions to secure the retainer.[2]

In light of the Court's holding, what can attorneys do to mitigate potential post-*Herren* pitfalls inherent in representing elderly, mentally deficient clients? Here are a few suggested steps practitioners can take which may mitigate potential risks with elderly clients prior to, during, and after initial consultations throughout the representation.

During Initial Consultation:

Scrutinize the circumstances of any prospective transactions involving elderly clients for signs of exploitation and independently assess the elder's capacity:

Attorneys should make diligent inquiries into the elder's capacity, especially when presented with evidence of diminished capacity. In *Herren*, medical professionals declared George incompetent to make financial decisions. Seeking additional independent information on an elder's capacity before proceeding with a retainer agreement is an important step. A person is "deemed to have taken, secreted, appropriated, or retained property for a wrongful use" if they knew or should have known that the conduct "is likely to be harmful to the elder" *Paslay v. State Farm General Ins. Co*., 248 Cal.App.4th 639 (2016). This constructive knowledge standard means attorneys cannot simply ignore red flags in an elder's capacity.

Communicate Transparently with All Responsible Parties:

When notified that there is a trustee or attorney-in-fact empowered to act on the elder's behalf, attorneys should ensure communication and consent with such fiduciaries or attorneys-in-fact. Attorneys may also suggest that they be allowed to communicate with other family members beyond any fiduciary or attorney-in-fact, though care should be taken to ensure that client

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confidences are preserved in such communications. Although it may mean a longer window from consultation to retainer, being aware of existing trustee, power of attorney, conservatorship, and other fiduciary relationships is critical in mitigating risk. Open and honest two-way communication with an elder's fiduciaries is important. A standard outgoing trustee notification, for instance, may not yield enough information in dialogue to rule out the possibility of an elder abuse risk.

Obtain Background Information and Medical History:
Even for seemingly capable prospective clients, it is prudent for attorneys to actively seek and review all relevant health and probate documents, like trust instruments and medical declarations of incapacity, rather than risking unintentionally limiting the scope of the information provided. Proactively seeking information indicating incapacity determinations could reveal information at the outset of a consultation that may alter the nature of the attorney-client relationship.

Avoid Secret or Isolated Meetings:
While ensuring lawyer-client confidentiality, attorneys should avoid meeting with a vulnerable elder in secret or while responsible family members/caregivers are unaware, especially when the purpose is to execute significant agreements. The presence of a trusted third party, with clear communication of attorney roles, and reading all key documents to the client are critical. Especially for clients with limited sensory abilities, like blindness or deafness, ensuring the understanding and intent of a client with the safeguard of a witness or trusted interpreter may limit exposure to an attack on the validity of a retainer agreement.

Honor Express Wishes of the Elder and the Fiduciary:
If an agent or attorney-in-fact of a prospective elderly client communicates that certain types of interactions or topics (e.g., finances) cause distress or are to be avoided per doctor's instructions, attorneys should respect these boundaries. Considering there may be cases where an agent or attorney-in-fact may not honor the prospective client's best intent, trust, but verify pain points and triggers that may cause distress.

Careful Documentation and Full Disclosure:
Take extra care to document all steps taken to confirm client wishes, capacity, and the voluntary nature of the engagement. Check the invocation of attorney-client privilege, which may prevent the establishment of an elderly client's intent.

During Trial:

Make the Court Aware of Elderly Client's True Intent:
California Probate Code Section 4234(b) allows an agent to disobey the principal's instructions, but only with approval by the court. This ensures the agent is acting with the best interest of the principal. Raising this contention with the court may leave a better record to show an agent is not acting with the best interest of an elderly client, should a disagreement between the retained attorney-at-law and an existing attorney-in-fact arise.

Establish the Presumption of Competence:
AB 1663 reformed California's probate conservatorship system and aimed to empower elders to have more control over their lives. A provision in the law, WIC 21000(a), provides that adults with disabilities are presumed competent and have the capacity to make their own decisions regarding their daily health, safety, welfare, social and financial affairs unless otherwise determined through legal proceedings. Establishing this presumption early would allow a more thorough check on allegations of undue influence.

Similarly, Probate Code Section 810(a) begins with a rebuttable presumption that all persons have the capacity to make decisions for themselves. And, 810(b) provides 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." Although it may be routine to assume the court is aware of these presumptions, explicitly raising them may allow for a cleaner record and a more defensible appeal, if necessary.

A diagnosis is not dispositive on capacity, look to a prospective client's functional capacity. Diminished capacity for one act may not carry over to a separate act. Probate Code Sections 810(c) and 811(a-b) provide that a determination of incapacity shall be supported by deficit in mental function. That determination should be based on evidence of a deficit in mental function rather than a diagnosis of a mental or physical disorder and the evidence showing incapacity must correlate between the deficit and the acts in question. So there may be occasions where a diagnosis for one incapacity does not preclude capacity if evidence would support the potential client could still function and act with another capacity.

Conclusion

The *Herren* case demonstrates that attorneys representing elders, especially those known to be vulnerable, should prioritize transparency, independent capacity evaluation, and thorough communication with all fiduciaries to avoid or mitigate elder abuse claims.

If a challenge appears, attorneys should ensure they raise the proper legal objections and cite laws that protect their ability to engage with elderly clients out of an abundance of caution.

In summary, mitigating financial elder abuse risks is possible for attorneys who understand their potential liability for knowingly assisting wrongful conduct, maintain heightened awareness of exploitation warning signs, avoid facilitation of suspicious transactions, and recognize that the elder abuse statutory framework imposes both preventive obligations and significant consequences for violations.

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[1] Welfare and Institutions Code § 15600 et seq.

[2] "...Herren cites no authority indicating that Susannah was required to rebut a presumption of George's capacity in order to have authority or standing to request a restraining order pursuant to section 15657.03 of the Elder Abuse Act, or that the trial court was required to determine George's capacity before adjudicating the restraining order application." *Herren*, 109 Cal. App. 5th at 424.;
"Not only does Herren's proposal to require an adjudication of capacity appear contrary to the language of the Elder Abuse Act, but it would discourage restraining order applications for elders who are not incapacitated but are nonetheless vulnerable to abuse, which appears contrary to the Legislature's intent to broadly allow standing in elder abuse cases." *Id.* at 426.;
"[w]e conclude substantial evidence supports the trial court's finding that Herren committed elder financial abuse by exerting undue influence to obtain a property right from George." *Id.* at 428.

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