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Legal Advice or Elder Abuse: Advising the Elderly After *Herren*

Woodland Hills Tax & Estate Planning Council

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Agenda

- Ethically Advising the Elderly
- Evolution of Elder Abuse Claims
- Case Study: *Herren v. George S.*



Ethically Advising the Elderly

Ethical Duties When Advising the Elderly

- California Rules of Professional Conduct, Rule 1.4
  - Duty to communicate with client and take instruction from client
  - No exception for a client that becomes incapacitated
- California Rules of Professional Conduct, Rule 1.6
  - (Almost) absolute duty of confidentiality
  - A lawyer may, but is not required to, reveal confidential information if the lawyer reasonably believes the disclosure is necessary to prevent a criminal act that the lawyer reasonably believes is likely to result in death or substantial bodily harm. (Rule 1.6(b).)

Ethical Duties When Advising the Elderly

- TEXCOM's failed attempt (see ABA Model Rules of Prof. Conduct, Rule 1.14)
- If effective communication is not possible, consider resigning under California Rules of Professional Conduct, Rule 1.16
- State Bar of California Committee on Professional Responsibility and Conduct Opinion Number 1989-112
  - Lawyer cannot institute conservatorship proceedings for a client
  - Even when (the lawyer believes) it is in the best interest of the client

Ethical Duties When Advising the Elderly

- Attorneys must have written contract for services over $1K (Bus. & Prof. Code § 6148(a))
- Client must have contractual capacity to sign contract (Prob. Code § 812)
- Fiduciary duty to act in client's best interest, not other family members
- Duty of confidentiality limits defenses against elder abuse claim

California State Bar Ethics Opinion 2021-207

- Analyzes ethical obligations of lawyer for client w/ diminished capacity
- Authorizes use of advance consents to disclose confidential info, if:
- 1) Consent is informed within the meaning of Rule 1.0.1(e), in that the lawyer has communicated “(i) the relevant circumstances and (ii) the material risks, including any actual and reasonably foreseeable adverse consequences of the proposed course of conduct.”
- 2) Consent is revocable at any time, so long as the client has the legal capacity to revoke, and the right to revoke is highlighted in the informed consent.

Planning Strategies to Assist with Client's Future Decline

- Advance consent under California State Bar Ethics Opinion No. 2021-207
  - Standard procedure of practice?
  - Case by case?
- Settlor resigns as trustee and successor takes over
  - Can attorney represent both?
    - California Rules of Professional Conduct, Rules 1.7 and 1.0.1(e)
    - Conflict of interest and informed written consent
  - What if settlor (and former client) becomes incapacitated and attorney resigns?
    - California Rules of Professional Conduct, Rule 1.9 - Duties to Former Clients

Practical Steps to Minimize Likelihood of Elder Abuse Claims

- Red flags to consider
  - Who contacted you first?
  - Does client have diminished capacity?
  - What is the nature of client's goal?
- Proactive steps for estate planning
  - Mental evaluation
  - Review by independent attorney
  - Confirm client's wishes over 2+ meetings with time gap in between
- Proactive steps for conservatorship litigation
  - If client approves, ask Court to appoint you as court-appointed counsel
  - Britney bill (aka Adam Streisand bill) (AB 1194): proposed conservatee may express preference for counsel (Prob. Code § 1471(c))



Evolution of Elder Abuse Claims

Types of Elder Abuse

- Financial Elder Abuse v. Physical Elder Abuse
- Financial: As provided in WIC section 15610.30, subdivision (a), "'financial abuse' of an elder occurs when a person or entity does any of the following: (1) Takes, secretes, appropriates, obtains, or retains real or personal property of an elder or dependent adult for a wrongful use or with intent to defraud, or both."
- Elder is 65 or older and resides in California
- Undue influence can constitute financial elder abuse
- When does influence become undue?

Property Rights Subject to Elder Abuse Act

- *Mahan v. Charles W. Chan Ins. Agency, Inc.* (2017) 14 Cal.App.5th 841
- Elderly couple set up trust funded with life insurance policies
- New life insurance agents convinced couple to surrender existing life insurance polices and purchase new policies, requiring them to pay $100,000 in commissions to the insurance agents
- Interest in trust was property right for purposes of Elder Abuse Act

Who Has Standing to Pursue Elder Abuse Restraining Order?

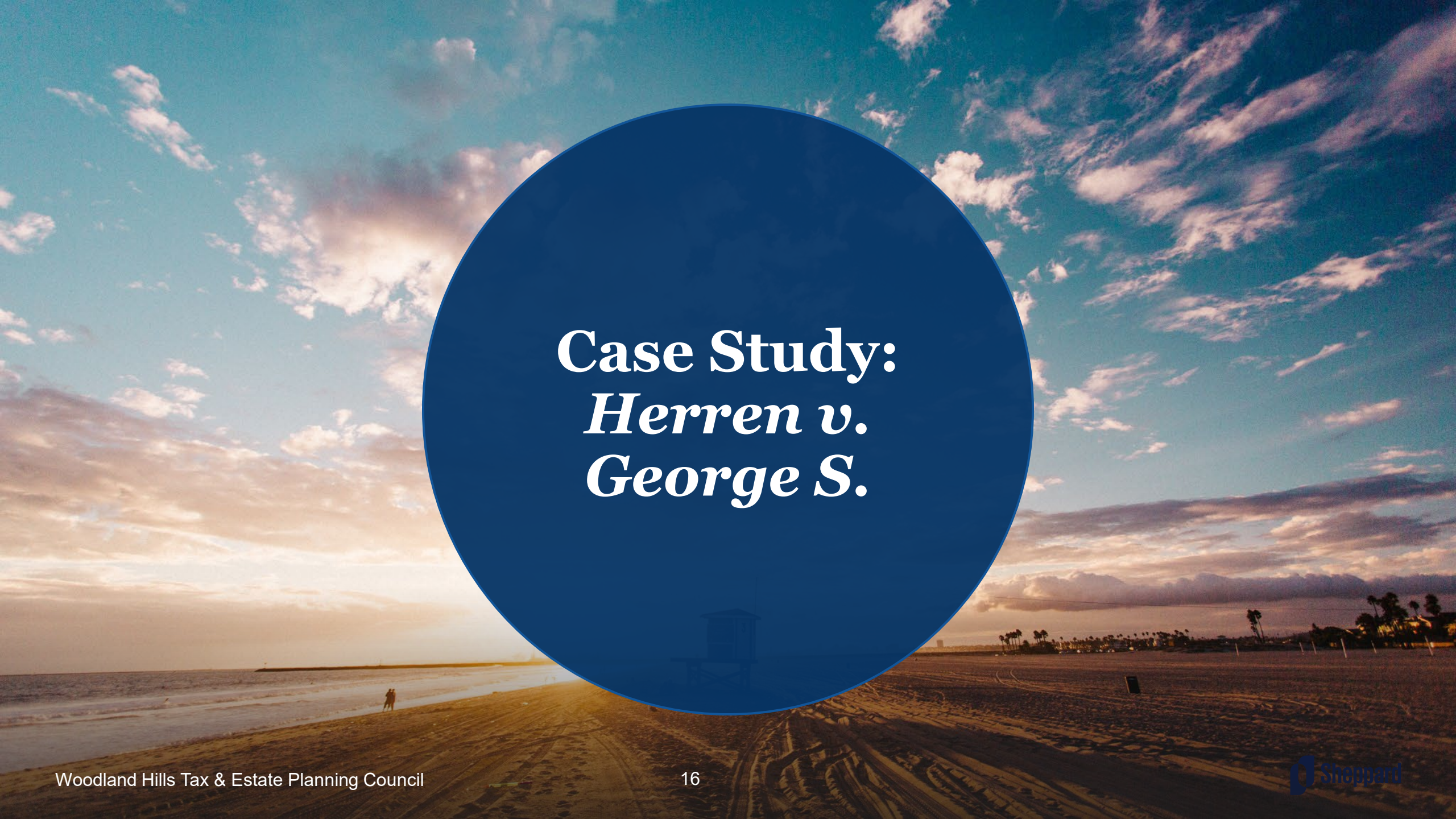
- Welf. & Inst. Code § 15657.03(a)(1)
  - Elder
- Welf. & Inst. Code § 15657.03(a)(2)(A)
  - Conservator
  - Trustee
  - Attorney-in-fact
  - Guardian ad litem
  - Other persons legally authorized to seek the relief

Other Potential Claims Against Attorneys/Advisors

- This presentation focuses on elder abuse, but there are other claims
- Aiding and abetting elder abuse
- Intentional interference with expected inheritance (or aiding/abetting)
  - *Beckwith v. Dahl* (2012) 205 Cal.App.4th 1039
- Breach of fiduciary duty (or aiding/abetting)

Malpractice Cases Re Duty to Non-Clients

- *Moore v. Anderson, et al.* (2003) 109 Cal.App.4th 1287
  - Disappointed heirs alleged estate planning malpractice, claiming lawyers failed to assess or document the testator's capacity when executing will and trust amendments
  - Court of Appeal upheld dismissal, emphasizing that lawyers' duty to assess capacity runs solely to the client, not to nonclient beneficiaries, to preserve the duty of loyalty.
  - The court cited Model Rule 1.14(a), noting the lawyer must maintain a normal client-lawyer relationship whenever possible, even when client capacity is impaired
- *Boranian v. Clark* (2004) 123 Cal.App.4th 1012
  - Lawyer prepared testamentary documents for a terminally ill individual, directed by a third party, without meeting the client; the "gift" favored that third party and was contested by the testator's children. Trial court found legal malpractice in favor of the children.
  - Court of Appeal reversed, emphasizing the lawyer's primary duty is to the client's intentions, not a third-party beneficiary. The appellate court held lawyers are not liable to third-party beneficiaries when intent or capacity is unclear, as this would create divided loyalty and undermine client representation.



Case Study: *Herren v. George S.*

Herren v. George S. (2025) 109 Cal.App.5th 410

- George is a wealthy octogenarian with two daughters: Susie and Gabriella
- 2022: George restated his trust, naming Susie as a successor co-trustee
- 2022 (Nov.): George signed a POA and AHCD naming Susie as his agent
- 2023 (Feb.): George declared incapacitated, triggering successor trustee provisions
- 2024 (May): George met with attorney, Jaime Herren, regarding trust advice
- Herren met privately with George, determined he had capacity to retain her, and obtained his signature on a $100,000 retainer agreement
- Susie, acting as attorney-in-fact for George, filed for a restraining order against Herren (Judicial Council Form EA-100)
- Evidence showed George was vulnerable, lacked orientation, and was distressed by financial conversations
- After trial, elder abuse restraining order entered against Herren

Herren v. George S. (2025) 109 Cal.App.5th 410

- The Court of Appeal affirmed the restraining order, finding substantial evidence that Herren engaged in elder financial abuse by exerting undue influence to secure the retainer agreement from George
- Under the Elder Abuse Act, a protective order may be sought and issued without a prior judicial determination of the elder's capacity

Statutory Authority for *Herren* Decision

- When a trustee or an attorney-in-fact brings a petition on behalf of an elder (Welf. & Inst. Code § 15657.03(a)(2)(A)), a protective order may be issued, with or without notice, to restrain any person for the purpose of preventing a recurrence of abuse, if a declaration shows, to the satisfaction of the court, reasonable proof of a past act or acts of abuse of the elder. (Welf. & Inst. Code § 15657.03(c).)
- A court may issue any of the statutorily enumerated restraining orders, including orders enjoining a party from abusing, harassing, telephoning, contacting, or coming within a specified distance of, or disturbing the peace of, the elder. (Welf. & Inst. Code § 15657.03(b)(5)(A),(h).)

Jaime's Story - Jaime's Declaration

- May 1, 2024: Jaime contacted by Gabriella
- May 2, 2024: Jaime has Zoom meeting with Gabriella
- May 3, 2024: Jaime meets with George, at his home; George signs engagement letter
- May 3, 2024: Jaime sends a letter to attorneys for the co-trustees
  - Trust makes clear the physician letters obtained by Susie are not conclusive
  - Under Trust, George has express right to petition court for a final determination of competency and the trustees are expressly required to cooperate
  - George is inherently entitled to counsel separate and apart from his trustees
  - Requests payment from the trustees (and provides payment instructions + copy of EL)

Jaime's Story - Jaime's Declaration (cont'd)

- May 6, 2024: Susie and Karie's attorneys respond – denying request
- May 16, 2024: Jaime sends a second letter to attorneys for Susie and Karie requesting a meeting with George
- May 20, 2024: Jaime receives a letter from a different attorney, representing Susie as agent under DPOA, informing her that a temporary restraining order was issued against her on May 8

Should Adjudication of Incapacity Be Required?

- Court held that no adjudication of incapacity was required
- Rejected Herren's argument that a restraining order could not be issued without first adjudicating George's competence
- While incapacity may be a factor in finding undue influence, it is not a requirement, in part because it is on the list of potential and nonexclusive factors the Court may consider:
- "Evidence of the alleged victim's vulnerability may include, but is not limited to, ***incapacity***, illness, disability, injury, age, ... impaired cognitive function, emotional distress, isolation, or dependency, and whether the influencer knew or should have known of the alleged victim's vulnerability." (WIC § 15610.70(a)(1) (emphasis added).)

Should the Victim/Elder Have to Participate?

- George never attended the proceedings or testified
- Herren tried to speak on his behalf, but her requests were denied
- Herren was restrained from speaking with George
- How do we know George agreed with the positions taken by his agent?
- On the other hand, if George didn’t agree, and he did have capacity, wouldn’t he have made an appearance?

Engagement Letter as Property Right

- In finding that Herren engaged in elder financial abuse, the court concluded the evidence established that:
  - 1) Herren obtained a property right from George by undue influence (WIC § 15610.30, subd. (a)(3)), and
  - 2) Herren knew or should have known the taking would be harmful to George (WIC § 15610.30, subd. (b)).
- Even though no money was ever paid to Herren
- Holding is consistent with *Mahan* decision discussed above
  - *Mahan v. Charles W. Chan Ins. Agency, Inc.* (2017) 14 Cal.App.5th 841

Is a $100K Retainer Suspect?

- Herren's contention was that it was standard (median range)
- Many practitioners find this to be an unreasonably high retainer
- Scope of litigation suggested $100K could easily be incurred
- Trust value was substantial

Litigation Tools to Determine Elder's Wishes

- What could the attorney have done to prove client's wishes?
- Deposition of elder
  - But: likely impossible to initiate if elder is your client (adversity/confidentiality)
- Motion to compel independent mental evaluation
  - But: likely impossible to initiate if elder is your client (adversity/confidentiality)
- Application to appoint guardian ad litem
  - But: agent under POA has priority
  - And: Herren tried this and her request was denied

Impact of *Herren* Decision: Chilling Effect?

- Incapacity finding not even required
- Merely being vulnerable to undue influence triggers potential elder abuse liability for attorneys meeting with elderly clients
- Concerns:
  - More difficult for elderly to retain counsel
  - POA/Trustee can completely block elder's access to counsel
- Amicus letters supporting Herren: from California Advocates for Nursing Home Reform (CANHR), Legal Assistance for Seniors, Community Legal Aid SoCal, Elder Law and Advocacy, Justice for Aging, Legal Services of Northern California, and SF Bar

Questions



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