

Who can be your client after Herren v. George S?

Presented By:

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What is Herren v. George S

- *Herren v. George S.* (2025) 109 Cal.App.5th 410 – Marin County Superior Court
- Trustee/Attorney-In-Fact of Elder ("George") filed an Elder Abuse and Dependent Adult Civil Protection Act (Welf. & Inst. Code, § 15600 et seq.) claim against Attorney Jaime Herren



What is Herren v. George S

- The abuse: Having an elder sign an engagement agreement with a promise to pay a retainer in the amount of \$100,000.
- Trial court issued a restraining order prohibiting Attorney Herren from abusing and contact her client.



What is Herren v. George S

- Appellate court rejected Attorney Herren's contentions that a restraining order could not be sought or issued under the Elder Abuse Act without the trial court first adjudicating George's competence.



What is Herren v. George S

- Trial court rejected Attorney Herren, an officer of the Court's, contention that she had authority to speak on George's behalf in court and that he was not seeking the requested relief.



What Was Not Raised At the Trial Level?

- Probate Code §4234(b) - "With court approval, the attorney-in-fact may disobey instructions of the principal."
- On officer of the court testified as to George's wishes and his agent was able to usurp them without court order.



What Was Not Raised At the Trial Level?

- AB 1663:
 - WIC 21000 – Findings and Declarations.
 - Adults with disabilities, older adults with disabilities, are presumed competent and retain capacity to make decisions regarding their daily activities.



What Was Not Raised At the Trial Level?

- Probate Code §1471(c) - "If a conservatee, proposed conservatee, or person alleged to lack legal capacity expresses a preference for a particular attorney to represent them, the court shall allow representation by the preferred attorney, even if the attorney is not on the court's list of a court-appointed attorneys, and the attorney shall provide zealous representation as provided in subdivision (d)."



What Was Not Raised At the Trial Level?

- Probate Code §810 - Presumption of Capacity and its interplay with undue influence in creating the attorney client relationship
- Probate Code §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.”



What Was Not Raised At the Trial Level?

- Probate Code §810(c) specifies that in order to be deemed to lack capacity to perform a specific act (e.g. engage an attorney, execute a trust), the determination should be made based on evidence of “a deficit in one or more of the person's mental functions rather than on a diagnosis of a person's mental or physical disorder.”



What Was Not Raised At the Trial Level?

- Probate Code §811(a) provides that a determination that a person is of unsound mind or lacks the capacity to make a decision or do a certain act (contract, conveyance, marry, make medical decisions, execute wills/ trusts), shall be supported by evidence of a deficit in one or more mental functions . . . (b) that “significantly impairs the person’s ability to understand and appreciate the consequences of his/her actions with regard to the decision.” in at least one of the following mental functions, subject to subdivision(b), and evidence of a correlation between the deficit or deficits and the decision or acts in question



What Was Not Raised At the Trial Level?

- “The presumption is always that a person is sane, and the burden is always upon the contestants of the will to show affirmatively, and by a preponderance of the evidence, that the testatrix was of unsound mind at the time of the execution of the will.” (*Eyford v Nord* (2021) 62 CA5th 112, 122 (*quoting Estate of Perkins* (1925) 195 Cal. 699, 703).)



What Was Not Raised At the Trial Level?

- "The fact that a client may lack capacity to make a particular decision does not mean that the client cannot make a different decision involving different issues or different levels of complexity, and the fact that a client may lack the capacity to make a decision at one time does not necessarily mean that the client lacks capacity to make that decision at a different and more favorable time." (The State Bar of California, Standing Committee on Professional Responsibility and Conduct, Formal Opinion No. 2021-207, pp 6-7.)



What Was Not Raised At the Trial Level?

- "The client may be incapable of making or communicating a particular decision, but have the capacity to make other decisions associated with the representation. Alternatively, the client may lack the capacity to make some decisions without some assistance or accommodation, but have the capacity to make those decisions with assistance or accommodation." (The State Bar of California, Standing Committee on Professional Responsibility and Conduct, Formal Opinion No. 2021-207, p 7.)



What Was Not Raised At the Trial Level?

- Result defies logic
 - If the engagement agreement was valid, then George had a valid attorney client relationship which was usurped by an agent without inquiry to the principal
 - If there was no attorney client relationship because the engagement agreement was invalidated, then no deprivation of property right since no property was transferred nor was a claim initiated to collect on it.



Where Do We Go?

- Legislative Response
- State Bar Opinion



Questions???

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