

# DEALING WITH YOUR CLIENT'S DIMINISHING CAPACITY

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# ANYONE YOU KNOW?



# 80 IS THE NEW 60



# CAPACITY

## WHAT DOES THAT MEAN?



# DIMINISHED CAPACITY

- **DIMINISHED CAPACITY MAY BE MANIFESTED IN THE FOLLOWING EXAMPLE:**
- **JOHN, YOUR CLIENT, WAS ONCE A VERY SUCCESSFUL REAL ESTATE INVESTOR. HE ALWAYS WAS ASTUTE IN READING CONTRACTS AND NEGOTIATING THE TERMS.**
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- **YOU NOTICE THAT HE NO LONGER IS ABLE TO CONCENTRATE ON THE TERMS OF CONTRACTS AND ASKS YOU TO EXPLAIN BASIC CONCEPTS. HE APPEARS UNCERTAIN REGARDING THE CONSEQUENCES OF SIGNING.**
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- **JOHN'S CONTRACTUAL CAPACITY MAY BE DIMINISHED, BUT HE STILL MAY POSSESS TESTAMENTARY CAPACITY.**

# UNDUE INFLUENCE AND ELDER ABUSE

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- **OPPORTUNITY**
- **ISOLATION**
- **FINANCIAL GAIN**
- **MODIFYING ESTATE PLAN**

# DON'T BE CONFUSED

- **TEMPORARY CONDITIONS CAN LOOK LIKE A PERMANENT AND DEBILITATING DISEASE**
  - **DEPRESSION**
  - **DELIRIUM (DEHYDRATION, INFECTIONS)**
  - **MEDICATIONS**

# HOW CAN YOU HELP?

- **1. ASK YOUR CLIENT IF SHE HAS AN ESTATE PLAN.**
- **2. AT THE VERY LEAST, SHE SHOULD HAVE A POWER OF ATTORNEY FOR FINANCIAL MATTERS**
- **3. AN ADVANCE HEALTH CARE DIRECTIVE**
- **4. A LIVING TRUST**
- **5. A WILL**

# WHO CAN HELP YOU?

- **FAMILY MEMBERS**
- **OTHER PROFESSIONALS**
  - CPA
  - FINANCIAL ADVISOR
  - FAMILY PHYSICIAN
- **\*\*\*ADULT PROTECTIVE SERVICES\*\*\***
- **ISSUE: CLIENT –PROFESSIONAL CONFIDENTIALITY**

# LACK OF CAPACITY

## □ ALZHEIMER'S AND DEMENTIA

■ A DIAGNOSIS OF A DISABLING MENTAL CONDITION DOES **NOT** MEAN YOUR CLIENT IS UNABLE TO SIGN DOCUMENTS

## ■ DUE PROCESS IN COMPETENCY ACT-CALIFORNIA

- **REBUTTABLE PRESUMPTION THAT ALL PERSONS HAVE CAPACITY TO MAKE DECISIONS AND BE RESPONSIBLE FOR THEIR OWN ACTIONS- CALIF. PROBATE CODE 810**
- **ATTEMPT TO STEM ELDER ABUSE**

# LACK OF CAPACITY-CONTD.

- **TESTAMENTARY CAPACITY- LEASE AMOUNT OF CAPACITY NEEDED**
- **CONTRACTUAL CAPACITY**
- **CAPACITY TO MAKE A GIFT-TRANSFER ASSETS  
GREATEST AMOUNT OF CAPACITY NEEDED**

# CONSERVATORSHIPS

- **IF YOUR CLIENT DOES NOT HAVE A POWER OF ATTORNEY, WILL AND TRUST OR IF ELDER ABUSE IS PRESENT-**
  - ▣ **COURT SUPERVISED CONSERVATORSHIP**
    - **OVER THE PERSON- MEDICAL**
    - **OVER THE ESTATE- FINANCIAL**
    - **UNLIKE A POWER OF ATTORNEY, MANY FINANCIAL AND ESTATE PLANNING DECISIONS MUST RECEIVE PRIOR COURT APPROVAL**