#L-603 10/24/84

Memorandum 84-94

Subject: Study L-603 - Wills (Testamentary Capacity)

Attached is a copy of a letter forwarded to the Commission by the staff of the Senate Committee on Judiciary. The letter suggests that the California standard for testamentary capacity be changed to adopt the New York standard. According to the letter, in New York unnatural wills are to be found invalid if the testator has a disorder of the mind which poisons his affections, perverts his sense of right, or prevents the exercise of his natural facilities. The letter details the reasons for the suggested change.

Does the Commission wish to give serious consideration this suggestion? What response does the Commission wish to make to the Senate Committee on Judiciary staff, to Senator Hart, and to the writer of the letter?

Respectfully submitted,

John H. DeMoully
Executive Secretary

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September 26, 1984

Hon. Gary Hart
800 S. Victoria Avenue
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Dear Senator Hart:

I would appreciate it if you would give serious consideration to sponsoring a bill to change the law on the subject of testamentary capacity.

Testamentary capacity refers to the ability of an individual to make a valid will. Specifically, the law provides that every person over the age of 18 years, of sound mind, may dispose of property by will. The definition of "sound mind" is the subject of the requested legislation.

Under California law, an individual is of "sound mind" for purposes of executing a will if he has sufficient mental capacity to (1) understand the nature of his act (that he is making a will); (2) to understand and recollect the nature and situation of his property (knows what he owns); and (3) to remember and understand his relations to the persons who have claims upon his bounty, and whose interests are affected by the will. In short, in California, a person confined in a mental institution believing he was Napoleon could execute a valid will so long as he understood he was making a will, knew what his assets were, and knew he had a spouse or a child.

Needless to state, given this standard, there are very few cases in which incompetency has been proved. It also leaves us with a standard which is antiquated in the field mental health.

There are many instances where mental illnesses poison an individual's affections, pervert his sense of right or otherwise prevent the exercise of his natural faculties even though he might otherwise be "competent" under the current California standard.

For example:

In the Estate of Peterkin (1937) 23 Cal. App. 2d 597, 600, the son of the decedent testified that "he visited his father . . . up to the time he died; that on some of these occasions his father was normal and they 'got along fine' and at other times, after a few words, his father would go off in one of his rages; that many times they visited together and his father was perfectly normal; that his father took good care of his orange groves and carried on his business transactions; that on his visits they would have a general conversation, talk about something from a newspaper . . . ; that during

all of these conversations his father knew who he was, knew what his own properties were and who his children were; and that ever since he was a child he had thought "more or less" that his father was of unsound mind." The "rages" his father went into included such activities as slashing his wife and children with a horsewhip, brutality with his horses, threatening his children with a gun, incestuous conduct with his daughter and her friends and paranoid behavior. He also "used to shake his head and mumble to himself a great deal."

A doctor testified that this man "was suffering from progressive senile dementia with maniacal outbursts of anger, with gradual evidence of a depressed mental attitude; that such a person has hardening of the arteries which terminates in senile dementia; that such a person is bound to have an erratic and unstable mind and is apt to form opinions that certain persons hate them or that they hate certain persons over imaginary offenses . . .."

Nonetheless, his will was upheld as valid. I suspect that a psychiatrist examining this man today would find that he was psychotic and that he did not have a rational view of his family members. From the point of view of those family members, it would have been impossible to maintain a relationship with him because of his extreme cruelty. Nonetheless, there was nothing they could do because of our antiquated definition of mental compentence.

In the Estate of Perkins (1925) 195 Cal. 699, about six days before the signing of the will, the decedent had delusions that she was going on non-existent trips; that there were non-existent holes in her clothing; that no one should use the telephone because she needed it to call the bridesmaids for her wedding; that babies had been hung on the wall in place of pictures. She could not identify her own brother, confusing him with another brother. On the day the will was signed, a nurse in attendance described her as "delirious" and "incoherent." Her will was upheld as valid.

In Estate of Selb (1948) 84 Cal. App. 2d 46, 49, the court said "It has been held over and over in this state that old age, feebleness, forgetfulness, filthy personal habits, personal eccentricities, failure to recognize old friends or relatives, physical disability, absent-mindedness and mental confusion do not furnish grounds for holding that a testator lacked testamentary capacity." The court went on to cite many cases, including Estate of Wright, 7 Cal. 2d 348, where the evidence showed that the testator lived alone in his little shack with dirt and junk, that he was "not right"; that he gave one of the witnesses a fish which he said he had caught but which she found had been soaked in kerosene; that on occasions he would run out of the house partially dressed; that he picked up articles from garbage cans and hid them around his house, picked up paper flowers and pinned them on his rose bushes, and went away with a blanket wrapped around him. His will was upheld as valid.

The book Mommie Dearest recounts the abusive behavior of Joan Crawford toward her children of many years and numerous instances of other behavior indicative of mental illness. Despite an apparent reconciliation between mother and daughter, the daughter was cut out of the will for imagined misdeeds. There was nothing the daughter could do.

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The present law allows for the following scenerios:

A child molester abuses his daughter and cuts her out of his will for not having relationships with him; nothing can be done by the daughter to challenge the will;

A paranoid schizophrenic who has been institutionalized for delusions omits his natural heirs from his will because he believes they are "out to get him"; nothing can be done to challenge the will (unless some evidence of "undue influence" exists by a third party);

A child abuser burns his initials on his child's back with cigarette butts; the child has no recourse against the will so long as the parent knows he is making a will, knows of his assets, and knows he has a child.

Mental health experts now know that mental illness is not an isolated event; that the mental illness of one family member advesely impacts on other family members and makes relationships that normal families enjoy impossible. When the mentally ill family member is given carte blanche to disinherit the other family members, it does little to promote an admirable state policy. We give "due process" to the mentally ill to the point where we excuse them from murder for eating Twinkies, but we give no due proces to their victims. The family members of the mentally ill are indeed victims and they deserve some protection from the vagaries of psychotic episodes.

A much more enlightened and humane standard is that found in New York in In re Rice's Estate, 19 N.Y.S. 2d 602, 173 Misc. 1038, in which the court held that unnatural wills should be found invalid if the testator has a disorder of the mind which poisons his affections, perverts his sense of right or prevents the exercise of his natural faculties. It is respectfully requested that California law be changed to reflect this standard.

I thank you for any assistance you may be able to give.

Very truly yours,

Melodie Kleiman

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