

TRUSTS & ESTATES

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CALIFORNIA'S NEW VIRTUAL REPRESENTATION STATUTE

By Anna K. Soliman, Esq. and Kelly J. Cooksey, Esq.

California's new virtual representation statute (Assembly Bill No. 565 (2025-2026 Reg. Sess.)), effective January 1, 2026, replaces Probate Code section 15804, enabling authorized persons to represent and bind minors, incapacitated, unborn, or unascertainable beneficiaries for trust notice and consent purposes—with the goal of streamlining trust modifications, terminations, and decantings without court involvement.

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By Jennifer F. Scharre, Esq., Frank H. Busch, Esq., and James P. Lamping, Esq.

Herren v. George S. is a controversial elder rights decision with implications for every practitioner. It also raises significant questions for every settlor of every trust with any non-judicial incapacity provision. This article provides insights, advice, and sample trust provisions to help settlors protect themselves.

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WHEN CAPACITY BECOMES A CATCH-22: DEFINING YOUR CLIENTS' DUE PROCESS RIGHTS AFTER *HERREN*

Written by Jennifer F. Scharre, Esq.,* Frank H. Busch, Esq.,*
and James P. Lamping, Esq.**

I. SYNOPSIS

“Catch-22 says they have the right to do anything we can’t stop them from doing.” – Joseph Heller, Catch-22

By its own terms, the fundamental motivation for the Elder Abuse and Dependent Adult Civil Protection Act⁰¹ is “that elders and dependent adults may be subjected to abuse, neglect, or abandonment and [California] has a responsibility to protect these persons.”⁰² As such, the Act seeks to “enable interested persons to engage attorneys to take up the cause of abused elderly persons and dependent adults.”⁰³ As any seasoned attorney in this space well knows, the Legislature was not wrong in its diagnosis of the problem, or the need to help seniors and interested persons retain counsel to protect these vulnerable individuals against abuse.

Arguably, in a recently published case the Court of Appeal applied the Act to chill, rather than encourage, representation of vulnerable seniors. That case, *Herren v. George S.* (2025) 109 Cal.App.5th 410, is discussed in more detail below. In general, however, it addressed a circumstance in which (1) a child-trustee claimed her father George S.⁰⁴ lacked capacity, based upon letters from two medical professionals, and thus required her to manage his substantial trust; (2) another child claimed she was being isolated from George, who should have a voice in his own life; and (3) an attorney claimed she was retained by George to represent his views, including that he had capacity to manage his trust. Notably, the trust contained an express provision permitting George to challenge a determination of incapacity.⁰⁵ Nevertheless, without hearing from George at all, the superior court entered an elder abuse restraining order against the attorney for meeting with

George, agreeing to represent him, and having him sign a retention agreement that included a commitment to pay a retainer. The Court of Appeal affirmed.⁰⁶

This article is not an attempt to re-litigate that case. Instead, its purpose is to highlight the risk of this decision disrupting the desires of settlors throughout the state, now and in the future, who might have relied upon their due process rights, or trust provisions like those George put in place, to ensure they would have access to the court system before losing control of their trusts. In response, the authors offer actionable suggestions for estate planners to discuss with their clients to balance these new concerns against the benefits of an informal capacity-based process that many clients prefer. In the authors’ view, the *Herren* case illustrates new risks to clients, and those risks are best addressed before our clients are faced with the kinds of limited and fraught choices that led to the *Herren* decision.

II. THE *HERREN* CASE

As with many probate actions, the facts of the *Herren* case depend on whom you believe, and were presented differently by each of the three sides.⁰⁷ Key background facts, and each side’s position in litigation, are presented below based upon public filings and arguments made in open court. Regardless of the outcome in this specific case, each set of claims exemplifies a fact pattern common in contested trust matters.

A. The Undisputed Background Facts

As backdrop, the dispute related to a trust established by George that was structured to provide a fixed benefit to each of his two daughters on his death, with the remainder to go to his foundation.⁰⁸ One of the daughters, Susannah S., was named as successor trustee.⁰⁹ The other, Gabriella S., was not.¹⁰ A provision of the trust permitted George to be deemed incapacitated and removed as trustee, when a “medical doctor, . . . or (in the case of the Settlor) the Settlor’s treating physician, examines such person and declares under penalty of perjury that such person is either temporarily or permanently incapacitated”¹¹ The trust also provides that: (1) “If any trustee or any beneficiary whose capacity is in question disputes the determination of incapacity . . . , such person may petition the court for a finding regarding that person’s capacity;” (2) that each “trustee agrees to cooperate in any examination reasonably necessary for the purpose of determining capacity;” and (3) a refusal to cooperate “shall be deemed a resignation by that trustee.”¹²

George’s history reflects the difficulty in applying such language in practice: he was previously conserved, and that conservatorship was terminated by a judicial finding that George regained his capacity.¹³ He was diagnosed with an unspecified dementia and was no longer as sharp as he had been during his successful career.¹⁴ In February 2023, Susannah obtained letters stating that George lacked capacity and thus replaced him as trustee.¹⁵ In 2024, George began asking Gabriella questions about his estate plan and made repeated requests to be introduced to an attorney.¹⁶ Gabriella accommodated that request.¹⁷

Ultimately, George invited an attorney, Ms. Herren, to meet with him (although Susannah contended it was really Gabriella who invited Ms. Herren).¹⁸ Gabriella introduced the two of them at George’s house, then left.¹⁹ Ms. Herren and George ensured others present in the house could not overhear their meeting.²⁰ During the following privileged conversation, the contents of which Ms. Herren could not divulge, she observed that George had no trouble finding words, did not change topics mid-sentence, and that the conversation flowed naturally.²¹ She concluded “that he didn’t just have capacity to retain me, but he understood—he understood each of the topics that we discussed and understood the natural consequences of the topics and the legal—the legal tasks that we discussed.”²² Based upon that conclusion, Ms. Herren agreed to represent George in connection with his right under the trust to dispute the determination of incapacity.²³ George signed a retainer agreement and agreed that his trust would pay a retainer fee. Ms. Herren then sent a letter to Susannah requesting payment.²⁴ Susannah refused.²⁵

Susannah filed petitions for elder abuse restraining orders against Gabriella, Ms. Herren, and others (though the other petitions were not served and ultimately abandoned).²⁶ The Marin County Superior Court granted Susannah’s request for temporary restraining orders, preventing Gabriella and Ms. Herren from contacting George during the pendency of the litigation.²⁷ The petitions were tried across nine court days between May 24, 2025 and July 10, 2025.²⁸

B. Susannah’s Perspective

Susannah asserted that these facts indicated an attempt by Gabriella and Ms. Herren to abuse George.²⁹ She argued that the letters she obtained proved George’s mental decline, and she presented testimony from George’s treating psychologist supporting the psychologist’s opinion letter.³⁰ At base, her case was that Gabriella was not interacting with George properly, and that Ms. Herren could not be retained by George without Susannah’s consent because she believed George lacked capacity.³¹

As a result, Susannah’s closing argument³² focused on her stated desire to “protect George from damaging conversations” about his estate plan and that Ms. Herren “doesn’t appreciate that she is representing nobody because it is undisputed by the experts that George lacks capacity, and so he can’t hire counsel or enter into any contract with anybody.”³³ She argued that in meeting with George, Ms. Herren “had an unresolvable conflict of interest at that point. She knew she could only have him sign the agreement if he was competent to do so. And she set herself out as the sole arbiter of his competency. She knew that she did not have the expertise to overrule a medical doctor or psychologist on that count, and the burden of proof was on her to prove he was competent.”³⁴

C. Ms. Herren’s Perspective

Ms. Herren asserted that attorneys are permitted to make their own evaluation of whether a client can retain them.³⁵ She argued that she took every appropriate step by meeting with George privately for an hour, assuring herself George understood what he wanted, and explaining the terms of her engagement to him before he signed. In Ms. Herren’s view, these facts, coupled with George’s stated desire to retain the right to challenge his removal in court, satisfied her obligations.

As a result, Ms. Herren’s closing argument³⁶ suggested that the petition filed against her would “turn the area of law in which we practice, trust and estate litigation, completely on its head” by treating George as lacking capacity before a Court enters a conservatorship order. She argued it “isn’t unusual” to have a circumstance where a lawyer is “contacted by an elder who had a child that had basically taken over, used the capacity determination by a third-party medical

provider to . . . say that the elder lacked capacity; therefore, the child takes over as trustee.”³⁷ Under those circumstances, and given the trust, she argued that by her retention “George would now have a voice through an attorney in the family dynamics where the daughters were already represented by counsel.”³⁸ Finally, she argued that a finding that George lacks capacity cannot be made in an Elder Abuse Restraining Order proceeding.³⁹

D. Gabriella’s Perspective

Gabriella asserted that she never harassed George, that George was happy with her, and that George was entitled to her help when he requested a lawyer.⁴⁰ She argued that she had never attempted to change George’s estate plan, but believed he was entitled to counsel if he was concerned that Susannah had improperly taken over his life.⁴¹ In Gabriella’s view, this simply did not constitute elder abuse.⁴²

As a result, Gabriella’s closing argument⁴³ suggested the petition was filed because “Susannah has lived off George’s wealth, as she testified, for at least a decade” and “is terrified that George might change his mind.”⁴⁴ As such, “the only way she can think to stop it is to keep him from having a lawyer.”⁴⁵ She argued that George has “a right to have his views heard and respected in some way” and that a lawyer can help him do so.⁴⁶ She argued that, in fact, George was not harmed by meeting Ms. Herren. Ultimately, she noted that “the minimum base line quality of life [George] wants is that he values ‘being a participant in life and in the choices [he] make[s].’⁴⁷ [He] want[s] to be able to communicate meaningfully to those around [him].’ And only one party is here today to prevent him from doing that, that party is Susannah.”⁴⁸

E. George’s Perspective

Other than a comment by Ms. Herren that George would oppose the petitions Susannah sought,⁴⁹ George’s perspective was unavailable in the proceedings. Susannah did not present his testimony, and both Ms. Herren and Gabriella were subject to temporary restraining orders preventing them from obtaining his views.⁵⁰

F. The Decisions

The superior court decision⁵¹ found that George was vulnerable to undue influence at the time he met with Ms. Herren.⁵² It found that Ms. Herren should have known this because caregivers were present, George could not provide contact information, and George could not directly pay her retainer.⁵³ It found apparent authority because she was a legal professional. It found Ms. Herren’s acts of excluding George’s caretaker to have a privileged conversation and causing him to sign a retainer agreement to be actions or tactics used to further a plan of undue influence.⁵⁴ It found that any attempt to change George’s estate plan

constituted an inequitable result.⁵⁵ As such, it found that Ms. Herren’s engagement letter and the retainer it required was a deprivation of a property right sufficient to constitute financial elder abuse and granted Susannah’s petition.⁵⁶ The petition against Gabriella was denied because the court found that George has a strong and loving relationship with her.⁵⁷

The Court of Appeal affirmed, stating:

We reject 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... . We also conclude that substantial evidence supports the trial court’s finding that Herren committed elder financial abuse.”⁵⁸

A full analysis of the remaining opinion is beyond the scope of this article, but it makes clear that a lawyer may be found to commit financial elder abuse under the circumstances of that case.⁵⁹

G. Takeaways

Regardless of one’s opinions about the specific facts presented in this case, any seasoned trust and estate practitioner will be familiar with all three fact patterns. Sometimes, as Susannah urged here, a bad actor will take matters into their own hands to get money out of an elder who no longer has capacity to protect themselves. Sometimes, as Ms. Herren urged, an elder will disagree with a medical letter depriving them of capacity and wish to remain in control of their property, but need help from a lawyer to do so. Sometimes, as Gabriella urged, a trustee will come to rely upon the benefits of that position and do anything in their power to prevent the settlor of the trust from having his opinion heard.

Because each of these scenarios can occur, it is not difficult for a petition to be filed seeking the relief that flows from each of them. The great danger of the *Herren* decision is that it will chill an elder’s ability to present their side of the story, leaving them just as silent about their own affairs as George was in this case. This risk that an elder will not be able to seek the result they believe is just, regardless of whether they are right or wrong, presents new challenges to estate planners and may require a significant rethinking of how their clients can avoid the trap in which George found himself.

III. PROBLEMS ARISING FROM THE HERREN DECISION

A. Overview

The central issue is that *Herren* creates a “chicken and the egg” problem. A settlor who has been removed as trustee

may not be able to challenge their alleged incapacity without the assistance of an attorney. At the same time, even a non-judicial incapacity determination may effectively preclude a settlor from retaining an attorney.

To make matters worse, *Herren* was technically framed as an undue influence matter.⁶⁰ The detailed discussion of the settlor's impaired capacity was employed by the court to support a finding that the settlor was susceptible to undue influence in the context of elder abuse.⁶¹ In fact, the decision specifically rejected the argument that the presumption of capacity under Probate Code section 810 applied under its facts and held that the trial court was *not* required to determine whether the settlor lacked capacity.⁶²

All of this is enough to send a chill up the spine of a diligent estate planner. Mere knowledge of facts tending to imply that a potential client may be susceptible to undue influence—including any level of impaired capacity—may result in the estate planning attorney being on the receiving end of an elder abuse action. Faced with this daunting prospect, many knowledgeable estate planning attorneys may simply refuse to accept engagements in which the slightest hint of these factors is present.

The perverse consequence may be that the elders most in need of the most skillful estate planning attorneys may be effectively denied access to those very attorneys. Perhaps most insidiously, attorneys knowledgeable enough to be attuned to this issue may decline the case without explanation. This is likely to produce one of two outcomes. First, the elder may be left without any representation whatsoever. Alternatively, the elder may be relegated to representation by attorneys who are not diligent enough to understand or care about the dangers presented by this scenario. Regardless of how one feels about the *Herren* decision on its facts, this implication is troubling. The Probate Code and commonly employed drafting techniques are ill equipped to deal with this issue.

B. The Use of Conservatorship Proceedings

Conservatorship proceedings do not appear to be a viable approach to address the *Herren* dilemma. In a conservatorship proceeding, the court is empowered to make determinations that an elderly person lacks capacity or is being subjected to elder abuse; however, an elder pursuing representation from an attorney would be seeking the exact opposite.⁶³

In other words, the elder would be seeking a determination that they *do* have capacity. But this would effectively be a reverse conservatorship for which there is no explicit statutory authorization.⁶⁴ Confronted with this scenario, it is foreseeable that a substantial number of courts may dismiss a conservatorship once the court has determined that the elder is not suffering from the level of incapacity required to

establish a conservatorship, while leaving open the possibility that the elder's capacity may be impaired enough to support an elder abuse finding based upon undue influence. Similarly, conservatorship proceedings were not designed for the purpose of obtaining an adjudication that a particular transaction (e.g., retaining an attorney) was *not* the product of undue influence. In short, a conservatorship may not solve the problem.

C. The Use of Probate Code Section 17200 Petitions

Probate Code section 17200 is similarly ill suited to address these issues. The settlor would almost certainly need to retain counsel to file such a petition; however, the settlor may not be able to retain counsel without the very ruling the petition would request. This, in turn, implies that a third party would need to file the petition. Identifying the person to act as the petitioner opens its own can of worms.

The rights of the settlor of a revocable trust are paramount so long as the settlor is alive and competent.⁶⁵ Thus, for example, a remainder beneficiary cannot compel an accounting under these circumstances.⁶⁶ A remainder beneficiary who files a petition seeking to compel an accounting of a revocable trust while the settlor is alive and competent would therefore almost certainly be met with the argument that the petition is deficient on its face. While the settlor would have standing to compel an accounting from a third-party trustee under this scenario, that right is personal to the settlor.

A person whose sole relationship to the trust is their designation as a remainder beneficiary may face similar challenges in filing a petition under Probate Code section 17200 to seek an advance adjudication of the issues presented in *Herren*. A remainder beneficiary under these circumstances would be petitioning to request a determination that settlor *does* have the requisite level of capacity to retain an attorney.

But if that is the case, the remainder beneficiary would by definition lack standing to file the petition. Much like a remainder beneficiary petitioning to compel an accounting from a revocable trust while the settlor is alive and competent, the predictable response would be a demurrer from the trustee. In other words, such a petition would need to allege that the settlor is competent—an allegation which by definition would deprive the remainder beneficiary of standing. While the settlor would have standing to file such a petition, the argument would go, that right is personal to the settlor and may not be enforced by any third party in the absence of express authorization under the terms of the trust or by statute. Assuming the remainder beneficiary's petition survives the pleading phase, a new set of challenges would await.

A remainder beneficiary filing a petition to have the settlor declared competent to retain counsel would not have access to trust funds to pay the legal expenses incurred in the proceedings. Instead, the remainder beneficiary would be required to pay those expenses out of their own pocket. Meanwhile, the trustee would have access to trust funds to defend against the petition and would likely have significant motive to do so.

A currently acting trustee may have every incentive to prevent the settlor from retaining counsel to draft an amendment potentially removing them as trustee. Further, a trustee who is also a remainder beneficiary may be motivated to obstruct any efforts to amend the trust in a manner that would diminish the trustee's expected inheritance. And since the trustee would have access to the trust funds as a war chest, the trustee would effectively be playing with house money.⁶⁷ This would place the trustee in a position to engage in scorched earth litigation with every motivation to do so. Of course, a court presented with such a case typically will have no easy method to identify which side is the bad actor under these circumstances.

It should be borne in mind that this type of litigation will not be limited to an adjudication of the settlor's capacity. The issue presented in the *Herren* case was undue influence, with the settlor's alleged diminished capacity serving as one factor in determining his susceptibility to undue influence.⁶⁸ Undue influence, by its very nature, must almost always be proven through circumstantial evidence.⁶⁹ This may require a court to analyze the totality of the settlor's circumstances and motivations—in addition to the settlor's capacity. In other words, it may require a relatively complex trial against a motivated trustee who has access to the assets of the trust.

To complicate matters further, the remainder beneficiary's motivations in bringing the petition may be subject to attack by the trustee. A remainder beneficiary petitioning to authorize the retention of an estate planning attorney to amend the trust may stand to benefit from the amendment. When a beneficiary engages in active procurement of a trust amendment, the beneficiary must overcome a presumption of invalidity in subsequent litigation.⁷⁰ While this scenario might not meet the technical definition of active procurement under current law, it may present facts similar enough to further muddy the waters.

D. Beneficiary Notice

The current text of Probate Code section 15800 now requires an individual who would become a beneficiary of a revocable trust at the death of a settlor to receive notice when the settlor has been deemed incapacitated.⁷¹ In theory, this could permit a beneficiary to assist in this sort of litigation. However, as discussed above, many of the

relevant rights and statutory protections are personal to the settlor, and thus even a motivated and altruistic remainder beneficiary will have limited options to act on that notice. In addition, the “outside” remainder beneficiary in *Herren* was, herself, accused of elder abuse for procuring the attorney and could only clear her name through a trial. Even then, the court could not rule on the capacity issue, despite that being a prerequisite for triggering section 15800.

E. The Gaps Exposed by Case Law

While it seems clear that a court may rule on the standing of such a beneficiary to file a petition, Ms. Herren was allegedly hired for exactly that purpose and was prevented from filing the matter by the elder abuse proceedings against her. In theory, a remainder beneficiary may petition for that relief; however, as discussed above, a finding of capacity would mean that the beneficiary lacked standing to file the petition in the first instance.

This paradox illustrates the core problem raised by the *Herren* decision: the gap in the law that is created for proving capacity. While capacity is presumed under California law, that presumption proves somewhat meaningless if an elder cannot rely upon it or hire counsel to help them urge it. While trust drafters, in an effort to avoid being bogged down by court proceedings, often create language that allows for capacity to be determined without leave of court, perhaps the pendulum has swung too far in that direction and more people are at risk of finding themselves in George's position than wish to be.

In fact, the case law seems to require some ancillary proceeding to obtain a finding of capacity. In *Sterling v. Sterling*, the allegedly incapacitated settlor famously challenged a finding of incapacity in conjunction with his removal as co-trustee and sale of a trust asset.⁷² In *Marriage of Greenway*, the allegedly incapacitated individual sought a finding of capacity to move forward with a legal separation.⁷³

Perhaps most terrifying is the case of *Rands v. Rands* in which the terms of a trust were effectively held to make it impossible for the settlor to challenge his own alleged incapacity!⁷⁴ In that case, the settlor created a trust that provided his incapacity would be deemed to have occurred upon the declaration of two physicians.⁷⁵ Two such declarations were executed; however, another physician declared that the settlor did have capacity.⁷⁶ The settlor then revoked his trust.⁷⁷ The settlor's wife responded by filing a petition for dissolution and sought a petition for instructions regarding the revocation.⁷⁸ Despite evidence that the settlor may have had capacity when the trust was allegedly revoked, the court refused to accept this evidence.⁷⁹ Instead, the court pointed to the fact that incapacity was conclusive as a result of the two declarations by physicians, and, therefore,

the settlor was prevented from revoking the trust.⁸⁰ The implication is that a finding of even temporary incapacity may result in a settlor permanently losing their ability to change testamentary dispositions. Further, even a case that is permitted to advance to trial to adjudicate the issue of capacity may not adequately address the issue as a practical matter.

F. A Trial May Not Address the Issue

The delays associated with taking a matter to trial cannot be ignored. These types of cases often involve elderly settlors with fading capacity. *Herren*, for example, involved an octogenarian. A trustee seeking to obstruct any efforts to amend the trust may seek to delay a trial as long as possible. The settlor's death before trial would almost certainly render the petition (and thus the trial) moot.⁸¹

Time typically is not the friend of capacity. Even if the settlor had the requisite level of capacity on the day the petition was filed, an elderly settlor's capacity may deteriorate by the time of trial to such an extent that the trial may be rendered moot. And even if the trial court finds that the settlor may have the level of capacity necessary to amend their trust, the settlor may nevertheless lack the level of capacity necessary to effectuate their intent as a practical matter.

The level of capacity necessary for a testator to execute a will is relatively low.⁸² In fact, even a person subject to a conservatorship may execute a valid will.⁸³ By contrast, a trust amendment is subject to a sliding scale standard of capacity depending upon the complexity of the amendment.⁸⁴

But the fee agreement—in which the attorney agrees to provide estate planning services to the settlor in exchange for money—is a contract. And the execution of a contract between the settlor and the attorney requires that the settlor have the level of capacity necessary to execute a contract—the highest level of capacity.⁸⁵ A trial court might very well find that the settlor has capacity that is in a range that is above testamentary capacity but below contractual capacity. In other words, it is possible that a trial may result in a court determining that the settlor may have the level of capacity necessary to execute a trust amendment, but not the level of capacity to hire an attorney to actually draft the desired amendment.⁸⁶ The net result may be that the settlor's intentions may be frustrated in any event.

While estate planning documents may be drafted to address these issues in the future, legislation will ultimately be necessary to counter the likely unintended consequences of *Herren* and ensure that elders with existing documents have access to competent estate planners. It is not entirely clear how courts will view provisions in estate planning documents designed to address the *Herren* issue or that such provisions would be effective to counter the potentially

united effects of elder abuse statutes. That is particularly true when the guardrails that are in place may be appropriate on a case-by-case basis. The prudent course of action, while awaiting legislative action, would appear to be to include some provision in estate planning documents to deal with the *Herren* issue.

IV. POTENTIAL SOLUTIONS

A. Overview

Of course, every scenario will be different, and attorneys will need to work with their clients to determine the most desirable outcome. In general, our criminal justice system would prefer that “100 guilty men escape than that one innocent person suffer.”⁸⁷ However, it is up to the client to determine what they need to protect against the most. Would they prefer to be protected by their trustee even if they do have capacity? Would they prefer instead to have the right, no matter what, to fight such an incapacity finding? This may depend on family relationships, perceived difficulty of beneficiaries, unique asset classes, or even the settlor themselves. In each case, the client must weigh the risks and potential benefits of each approach. The proposals below seek to accommodate a spectrum of potential options depending on the client concerns.

As discussed above, the litigation in *Herren* exposes a recurring structural weakness in many modern trusts: once a medical declaration of incapacity triggers a successor fiduciary's authority, the settlor's practical ability to contest that determination is often illusory. In George's case, the governing instrument technically allowed him, “or any beneficiary whose capacity is in question,” to petition the court for a finding of capacity, yet the document did not (1) describe how the settlor—now presumed incompetent—could communicate with independent counsel, (2) earmark trust assets to fund that effort, or (3) impose any deadline on the acting fiduciary to cooperate.⁸⁸ The resulting vacuum invited allegations of undue influence and ultimately culminated in a restraining order. In an ideal world, carefully drafted language can reduce that risk, guard against true exploitation, and give diligent counsel a road map that all parties recognize as legitimate.

B. Legislative Fix

Currently, the court has a clear process, with significant due process protections, that it uses to evaluate a claim by a third-party that a person *lacks* capacity. By contrast, there is no equivalent process permitting a third-party to obtain the opposite—a determination that the settlor *does* have capacity. The presently available processes are lengthy and often require another, underlying proceeding. Many procedural safeguards are personal to the person seeking to establish

their capacity, which may be inadequate in circumstances like *Herren*. As a result, the determination can be slow and uncertain.

Given the challenges with petitioning the court specifically for capacity issues and requiring a determination of capacity as a prerequisite to such inquiries, estate planning attorneys currently have no choice but to take a drafting-based approach to protect their clients from becoming like George. Of course, recommending language is challenging and should be considered a mere starting point for further consideration.

C. Trust Provisions

Absent a legislative fix, the most efficient way to address the issue is to draft language that accomplishes the client's desired outcome balancing the potentially competing factors discussed above.

1. Challenge Fund Proposal

This procedure requires notice to the settlor and beneficiaries and a reserve of trust funds for the purpose of determining capacity. Although the amount of the retainer requested in *Herren*—\$100,000— has been criticized, it is not hard to imagine a litigation budget of this size where (1) the asset pool is significant, (2) the trustee is adverse and has access to the large asset pool, and (3) the litigation is expected to be time consuming as a result of the legal hurdles.

In sum, this approach would create, effectively, something identical to a retainer account wherein such assets would be in trust for such litigation. The trustee would be required to hold in trust such assets for an attorney and/or experts of the settlor's choosing. The attorney will be assured of compensation in providing this assistance. Of course, practitioners should keep in mind any applicable ethical rules required for third-party payment.⁸⁹

The risk to this approach is that an unscrupulous practitioner may take advantage of the availability of the trust fund reserve. Creation of a cottage industry that might target seniors would be an unwelcome consequence of this strategy if taken to an extreme. The trust provision could be drafted to include or exclude the "Trusted Contact" and could be used where a settlor does not have friends or family members available to assist in such a scenario. Of course, the relationship between the Trusted Contact and the settlor could be impacted by their role as this individual.

(a) Initial Finding. Incapacity shall be deemed established upon receipt by the successor trustee of (i) a written declaration under penalty of perjury by the Settlor's primary treating physician, or if none [_____] and (ii) a concurring declaration by a board-

certified geriatric psychiatrist or neuropsychologist, each setting forth the medical basis for the opinion.

(b) Trusted Contacts. The following individual(s) shall be deemed a "Trusted Contact" for purposes of this Section ___: [_____].

(c) Notice to Settlor and Trusted Contacts. Within ten (10) days of such receipt, the successor trustee shall deliver to the Settlor and Trusted Contacts, by personal service and certified mail, a "Notice of Incapacity Finding" containing the declarations or opinions of incapacity obtained as a result of subsection (a) as well as a notice providing in bold lettering of at least 14-point font the following: "Notice of Incapacity Finding: The enclosed documents indicate you lack capacity to act on your own behalf. You have a right to challenge such capacity finding and the Trustee shall pay for such challenge. You have a right to an attorney for such purpose which will be paid for by the Trustee. You must contact one of the following individuals: [Trusted Contact] to start this process."

(d) Challenge Fund. Contemporaneously, the successor trustee shall deposit into a segregated account (the "Challenge Fund") an amount equal to the lesser of Twenty-Five Thousand Dollars (\$25,000) or one percent (1%) of the current fair market value of the trust estate, to be used solely for reasonable attorneys' fees, expert fees, and costs incurred by or on behalf of the Settlor in seeking judicial review of capacity.⁹⁰ Subject to subsection (e), the Trustee shall actively facilitate evaluation of the Settlor by an interested party, including such an attorney as provided in subsection (f) below.

(e) Trusted Contact Agreement. Upon receipt of the Notice in subsection (c) any Trusted Contact or the Settlor may initiate the challenge procedure using the Challenge Fund. If no Trusted Contact is able or willing to initiate the challenge procedure with the Settlor, no such safe harbor under subsection (f) shall be available.

(f) Right to Counsel; Safe Harbor. An attorney who (i) is engaged by the Settlor with the agreement of a Trusted Contact, using Challenge Fund assets, (ii) personally interviews the Settlor, (iii) obtains an opinion by a board-certified geriatric psychiatrist or neuropsychologist setting forth the medical basis for capacity, and (iv) files a verified petition under Probate Code section 811 within sixty (60) days of execution of an engagement agreement, shall be deemed to have acted within a contractual safe harbor and shall not, by that engagement alone, be found to have exerted undue influence or committed financial elder abuse.

(g) Summary Judicial Review. The parties hereby consent to the Superior Court's exercise of limited jurisdiction⁹¹ to adjudicate capacity on an expedited basis, which the Trustee shall cooperate with the Settlor to effectuate. Absent an emergency required to preserve trust assets, the Trustee may pursue no other claims with respect to elder abuse or undue influence until said adjudication of capacity is complete.

(h) Reinstatement; Sunset. If the court finds the Settlor has capacity, all fiduciary powers shall revert in the Settlor immediately; the successor trustee's powers shall cease except for the duty to account for actions taken. If capacity is not restored by the Court pursuant to this procedure, the Settlor may re-file upon (1) the expiration of eighteen months from the Initial Finding pursuant to subparagraph (a), or (2) only upon newly discovered evidence or substantial change in medical condition.

2. *The Auto-Challenge Proposal*

Another procedure would be appropriate for a client whose primary concern is their autonomy being taken away.

The procedure requires the trustee to first obtain a court determination of capacity before that trustee files an elder abuse or undue influence claim. However, this procedure does put some guardrails around the attorney representation and requires that such attorney be appointed by the court. It would prevent exploitation since a settlor who lacks capacity to make such a request cannot be manipulated into doing so. The trust provision can be drafted to require that the settlor request such a procedure in writing.

(a) Initial Finding. Incapacity shall be deemed established upon receipt by the successor trustee of (i) a written declaration under penalty of perjury by the Settlor's primary treating physician, or if none, [_____] and (ii) a concurring declaration by a board-certified geriatric psychiatrist or neuropsychologist, each setting forth the medical basis for the opinion.

(b) Trustee Claims. After the date of the Initial Finding pursuant to subparagraph (a), absent an emergency required to preserve trust assets, the Trustee may pursue no claims with respect to elder abuse or undue influence unless the Trustee has first obtained a court adjudication of the Settlor's capacity.

(c) Court Adjudication. Prior to pursuing a claim for elder abuse or undue influence on behalf of the Settlor, the Trustee shall first file a Petition to (1) obtain a court adjudication of the Settlor's capacity, and (2) seek the appointment of either an attorney or a guardian ad litem for the Settlor if the

Settlor so requests. The parties hereby consent to the Superior Court's exercise of limited jurisdiction to adjudicate capacity on an expedited basis, and the Trustee shall cooperate with the Settlor to effectuate that result.

(d) Settlor's Representation. The Trustee shall use trust funds to pay for any such appointed attorney or guardian ad litem and any other evaluations requested by the Settlor, attorney, or guardian ad litem to effectively participate in such Court Adjudication.

3. *The Express Reinstatement Proposal*

While many trust instruments have a procedure for determining incapacity, many do not have provisions for the reinstatement of capacity. While including a provision for reinstatement of capacity would not result in protection of attorneys, such a provision may be appropriate for clients who wish to be able to take control of the process themselves. Of course, "dueling" opinions may result in a court proceeding in any event, in which case incorporation of a right to counsel may be appropriate.

(a) Initial Finding. Incapacity shall be deemed established upon receipt by the successor trustee of (i) a written declaration under penalty of perjury by the Settlor's primary treating physician, or if none, [_____] and (ii) a concurring declaration by a board-certified geriatric psychiatrist or neuropsychologist, each setting forth the medical basis for the opinion.

(b) Restoration of Capacity. After the Initial Finding pursuant to subparagraph (a), the Settlor's capacity shall be established by (i) a written declaration under penalty of perjury by the Settlor's primary treating physician, or if none, [_____] and (ii) a concurring declaration by a board-certified geriatric psychiatrist or neuropsychologist, each setting forth the medical basis for the opinion. The Trustee shall, upon the written request by the Settlor, pay for any evaluations necessary for the Settlor to solicit such an opinion.

4. *Other Language*

The above recommendations may not be perfectly applicable to every matter but can be adjusted for client preferences. Overall, the *Herren* case has brought to the forefront the need for planners to be more thoughtful about incapacity provisions. It is easy to consider such provisions boilerplate but with a population that is living longer than ever before, incapacity is, more than ever, an anticipated life-stage. Thoughtful drafting can ensure the provisions are curated for the settlor's specific desires in such a scenario.

V. CONCLUSION

The *Herren* decision exposed a potential issue that is not fully addressed by current law. Determining the incapacity of the settlor is a particularly thorny issue. In some circumstances, that determination serves to protect the settlor from a bad actor. On other occasions, a determination of incapacity may be used to frustrate the settlor's intentions. To complicate matters further, capacity and undue influence rarely present black-and-white issues.

While the determination of incapacity has often been treated as part of the boilerplate provisions in estate planning documents, *Herren* highlights the risks associated with that approach. As is often the case for estate planning clients, there is no one-size-fits-all solution. After *Herren*, estate planning attorneys must proactively address the issue and custom tailor a solution based on the client's unique circumstances. It is likely that no drafting solution will be perfect. But until a legislative solution is enacted, expressing the settlor's intentions to the extent possible appears to be the most reasonable approach.

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- 01 Welf. & Inst. Code, section 15600 et seq.
- 02 Welf. & Inst. Code, section 15600, subd. (a).
- 03 Welf. & Inst. Code, section 15600, subd. (j).
- 04 We refer to the protected person, George S., by his first name and last initial. Cal. Rules of Court, rule 8.90. So as not to defeat the objective of anonymity, we likewise refer to persons who share his last name by their first name and last initial. For the sake of efficiency, and with no disrespect intended, after these initial references, subsequent references to these persons will be to their first names only.
- 05 *Herren v. George S.* (2025) 109 Cal.App.5th 410, 416.
- 06 *Id.* at p. 423.
- 07 Coblentz, Patch, Duffy & Bass represented Gabriella, who prevailed in her defense against Susannah. Frank Busch served as lead counsel. The discussion of the case reflects only publicly available information.
- 08 *George S. v. Gabriella S.* (Super. Ct. Marin County, June 7, 2024 No. CV0002766) Trial Transcript p. 47.
- 09 *Herren, supra*, 109 Cal.App.5th at p. 416.
- 10 *Ibid.*
- 11 *Ibid.*
- 12 *Ibid.*
- 13 *Herren, supra*, 109 Cal.App.5th at p. 421.
- 14 *Id.* at p. 416.
- 15 *Id.* at p. 417.
- 16 *George S. v. Gabriella S.* (Super. Ct. Marin County, July 10, 2024 No. CV0002766) Trial Transcript at pp. 99-121.
- 17 *Ibid.*
- 18 *George S. v. Gabriella S.* (Super. Ct. Marin County, July 10, 2024 No. CV0002766) Trial Transcript at pp. 99-121.
- 19 *Herren, supra*, 109 Cal.App.5th at p. 417.
- 20 *Id.* at p. 422.
- 21 *George S. v. Gabriella S.* (Super. Ct. Marin County, July 10, 2024 No. CV0002766) Trial Transcript at pp. 83-99.
- 22 *Herren, supra*, 109 Cal.App.5th at p. 422.
- 23 *Id.* at p. 430.
- 24 *Id.* at p. 417.
- 25 *Ibid.*
- 26 *George S. v. Gabriella S.* (Super. Ct. Marin County, July 19, 2024 No. CV0002766) Trial Transcript.
- 27 *Herren, supra*, 109 Cal.App.5th at p. 418.
- 28 *George S. v. Gabriella S.* (Super. Ct. Marin County, July 19, 2024 No. CV0002766) Trial Transcript.
- 29 *George S. v. Gabriella S.* (Super. Ct. Marin County, July 10, 2024 No. CV0002766) Trial Transcript at pp. 72-83.
- 30 *Ibid.*
- 31 *Ibid.*
- 32 *George S. v. Gabriella S.* (Super. Ct. Marin County, July 10, 2024 No. CV0002766) Trial Transcript at pp. 72-83.
- 33 *Ibid.*
- 34 *Ibid.*
- 35 *George S. v. Gabriella S.* (Super. Ct. Marin County, July 10, 2024 No. CV0002766) Trial Transcript at pp. 83-99.
- 36 *Ibid.*
- 37 *Ibid.*
- 38 *Ibid.*
- 39 *Ibid.*
- 40 *George S. v. Gabriella S.* (Super. Ct. Marin County, July 10, 2024 No. CV0002766) Trial Transcript at pp. 99-121.
- 41 *Ibid.*

- 42 *Ibid.*
- 43 *George S. v. Gabriella S.* (Super. Ct. Marin County, July 10, 2024 No. CV0002766) Trial Transcript at pp. 99-121.
- 44 *Ibid.*
- 45 *Ibid.*
- 46 *Ibid.*
- 47 *Ibid.*
- 48 *Ibid.*
- 49 *George S. v. Gabriella S.* (Super. Ct. Marin County, May 24, 2024 No. CV0002766) Trial Transcript at 41.
- 50 *George S. v. Gabriella S.* (Super. Ct. Marin County, July 10, 2024 No. CV0002766) Trial Transcript at pp. 83-99.
- 51 The court's decision was given orally on July 19, 2024, and later reduced to a written order.
- 52 *George S. v. Gabriella S.* (Super. Ct. Marin County, July 19, 2024 No. CV0002766) Trial Transcript.
- 53 *Ibid.*
- 54 *Ibid.*
- 55 *Ibid.*
- 56 *Ibid.*
- 57 *Ibid.*
- 58 *Herren, supra*, 109 Cal.App.5th at pp. 416, 428.
- 59 *Herren, supra*, 109 Cal.App.5th at p. 410.
- 60 *Herren, supra*, 109 Cal.App.5th at p. 423.
- 61 *Id.* at p. 427.
- 62 *Id.* at p. 425.
- 63 See Prob. Code, section 1801.
- 64 By way of example, Probate Code section 1821, subdivision (a) (1) requires that a conservatorship petition "state the reasons why a conservatorship is necessary." In *Herren*, George would be arguing that a conservatorship is unnecessary.
- 65 Prob. Code, section 15800; see, e.g., *Estate of Giralдин* (2012) 55 Cal.4th 1058, 1065-1067.
- 66 *Estate of Giralдин, supra*, 55 Cal.4th at pp. 1065-1067.
- 67 *People ex rel. Becerra v. Shine* (2017) 16 Cal.App.5th 524, 533-534 provides a useful discussion of the circumstances in which a trustee may use trust funds to litigate claims involving the trust. It is predictable that a trustee seeking to preclude the settlor from hiring an attorney will assert that the settlor lacks capacity or is being subjected to undue influence and that the litigation is therefore necessary to protect the settlor's intent at the time the settlor executed the trust. This, in turn, would require a factual determination. Because the issues presented would not involve claims of breaches by the trustee and may be in furtherance of the purposes of the trust, a court is likely to permit the trustee's use of trust funds for the litigation under the terms of most revocable trusts.
- 68 The *Herren* decision noted that the trial court was not required to adjudicate capacity to make a finding of elder abuse. *Herren, supra*, 109 Cal.App.5th at p. 425.
- 69 See, e.g., *Lintz v. Lintz* (2014) 222 Cal.App.4th 1346, 1355 and authorities cited therein.
- 70 See e.g., *Rice v. Clark* (2002) 28 Cal.4th 89, 97.
- 71 Prob. Code, section 15800, subd. (b).
- 72 *Sterling v. Sterling* (2015) 242 Cal.App.4th 185.
- 73 *In Marriage of Greenway* (2013) 217 Cal.App.4th 628.
- 74 *Rands v. Rands* (2009) 178 Cal.App.4th 907.
- 75 *Id.* at p. 909.
- 76 *Id.* at p. 910.
- 77 *Id.* at p. 911.
- 78 *Ibid.*
- 79 *Id.* at p. 912.
- 80 *Id.* at p. 914.
- 81 While a trial preference motion is available to "a party to a civil action who is over 70 years of age" whose health "is such that a preference is necessary to prevent prejudicing the party's interest in the litigation," this again provides a right personal to the settlor, not the remainder beneficiary. Code Civ. Proc., section 36, subd. (a).
- 82 Prob. Code, section 6100.5.
- 83 Prob. Code, section 6100 subd. (b).
- 84 *Andersen v. Hunt* (2011) 196 Cal.App.4th 722.
- 85 Prob. Code, sections 810-812.
- 86 Given that *Andersen* requires a case-by-case sliding scale analysis, the court will almost certainly not be in a position to adjudicate the validity of the yet to be drafted amendment for which representation is sought. While it might be possible for a third-party to enter into a contract to pay the attorney, this may open the door to an active procurement claim. Also, the estate planning attorney might be named as a defendant in a later elder abuse action if it can be alleged that the attorney's involvement while being paid by the third-party resulted in a breach of duties to the settlor.
- 87 Blackstone's Commentaries (1765).
- 88 *Herren, supra*, 109 Cal.App.5th at p. 416.
- 89 Rules Prof. Conduct, rule 1.8.6.
- 90 The authors recognize there may be scenarios in which a trust may be illiquid, making this challenging, or depleted because of a bad actor. Where assets are illiquid, the drafter should consider addressing how this would be funded. With respect to a bad actor, that is an issue outside the scope of this language as it is not a trustee who refuses to provide funds but rather a trustee who has absconded with funds.
- 91 Practitioners could consider whether to designate a particular venue.