

*In re Marriage of Greenway*

As our society ages, issues of mental capacity and decision making arise with increasing frequency in a myriad of legal contexts. Attorneys are often faced with ethical dilemmas in dealing with suspected dementia of their clients [see, Zolla, *The California Lawyer's Grey Fog of Uncertainty: Assessing a Client's Diminished Mental Capacity*, in Estate Planning 2012 (UCLA School of Law and California Continuing Education of the Bar) pg. 383]. As a poignant example of how an issue of mental status arises in a non-family law context, see the excellent concurring and dissenting opinion of Justice Liu in *People v. Barrett* (2012) 54 Cal.4th 1081, 1114-1151 which concluded that a distinction between mentally ill persons and mentally retarded persons regarding the statutory right to advisement of their right to a jury trial violates California's constitutional guarantee of equal protection.

In the *Greenway* case, after a 48 year (!) marriage, Lyle (76) sought to end his marriage with Joanne (72); she contended that Lyle was mentally incompetent and incapable of making a reasoned decision regarding his marital status. After taking extensive evidence, the retired judicial officer serving as the trial judge determined that Lyle was in fact mentally capable of making a reasoned decision to end the marriage and granted his request for a status-only dissolution. In affirming, the Court of Appeal determined that the mental capacity required to end one's marriage is similar to the mental capacity required to enter into the marriage, i.e., the baseline presumption of mental capacity is based upon the criteria set forth in *Probate Code* section 811 (part of the Due Process in Competence Determinations Act). As framed by the appellate opinion, notwithstanding the fact that the testifying experts agreed that Lyle had dementia, the question was whether his impairment was such that he no longer had the capacity of making a reasoned decision to end his marriage. In analyzing conflicting arguments, the Court of Appeal determined that a person's mental capacity is fact specific, and the level of required mental capacity changes depending on the issue at hand. Complicating matters are the multiple and overlapping statutes regarding the "capacity" of elders (those over the age of 65) found in the Probate Code, The Welfare and Institutions Code, The Civil Code and the Family Code. The *Greenway* court concluded that mental capacity can be measured on a sliding scale, with mental capacity requiring the least amount of capacity, followed up the scale by testamentary capacity, and, on the high end of the scale, the mental capacity required to enter into contracts. Thus, the burden of proof with respect to mental capacity changes depending on the issue presented. There exists a presumption in favor of a person seeking to marry or make a will, but not so in the context of a person executing a contract. In its summary of overlapping statutes with varying semantics relating to mental capacity, the court held that the required level of understanding rests entirely on the complexity of the decision being made; case authority evidences an extremely low level of mental capacity needed before the decision to marry or to execute a will. Similarly, the standard for testamentary capacity is also relatively low; however, the capacity to contract, which includes the capacity to convey, create a trust, make gifts and to grant powers of attorney,

requires the baseline criteria contained in *Probate Code* sections 811 and 812, as well as the specific guidelines for determining the capacity to contract embraced in *Civil Code* section 39(b).

As our society ages, these issues acquire a more nuanced complexity. *In Re Marriage of Straczynski* [2010 Cal.Fam.Law 416 (December 2010)], saw the appellate court hold that an incapacitated individual may *maintain* a dissolution proceeding only if he or she remains capable of exercising a judgment, and expressing a wish, that the marriage be dissolved throughout the proceeding. In that case, the conservatee had to be capable of making the decision to file the Petition and expressing her desire to end the marriage. *Anderson v. Hunt* (2011) 196 Cal.App.4th 722, was a case where the Court of Appeal held that where a person simply amends a trust, that person's capacity should be determined by the lower standard of executing a will, as set forth in *Probate Code* section 6100.5.

The *Greenway* opinion pointed out that the level of dementia was not the factual issue being decided by the trial court. It was not a conservatorship proceeding. The sole issue before the court was whether or not Lyle had the required level of mental capacity, despite his diagnoses of dementia, to end the marriage. Lyle was found to have had the requisite capacity.

*Greenway* is a lengthy opinion, but is worthy of careful review to remind and sensitize family law practitioners to the legal, ethical and emotional components of this increasingly prevalent mental health issue.

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