The Estate Planning Attorney's Role in Establishing Testamentary Capacity

Although estate planning attorneys cannot be expected to be physicians capable of diagnosing medical conditions, they do need to look for signs of diminished capacity among older clients.

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Whether a decedent had sufficient testamentary capacity to make a Will arises frequently in trusts and estates practice. Was the decedent of "sound mind" with the necessary mental ability to understand and execute a Will? If not, the Will will be invalid and either a previously revoked Will will be revived or the intestacy law will apply.

Aging Population and Prevalence of Dementia

By 2034, people age 65 and older will outnumber children for the first time in U.S. history. See www.census.gov. As people live longer and the population ages, it can be expected that the frequency of Will contests alleging age-related diminished capacity will increase. Dementia cases continue to grow. As one commentator noted, "A diagnosis of dementia is a reality becoming all too familiar in recent years," Law, Anderson and Frederick, "Diminished Capacity," 46 Estate Planning 22 (July 2019). According to Braintest.com, as of 2015, 7,700,000 new cases of dementia are diagnosed world-wide each year, and 47,500,000 people are living with dementia. In the U.S., it is estimated that one out of every six women and one out of every 10 men over age 55 will develop dementia. Of these, 70% have Alzheimer's Disease. See www.nia.nih.gov/health/alzheimers/basics.
In New Jersey, there were an estimated 180,000 people living with Alzheimer's Disease in 2018. This is expected to increase to 190,000 in 2020 and 210,000 in 2025. In 2015, 2,260 New Jersey residents died from Alzheimer's Disease and it was the sixth leading cause of death. See www.alz.org/facts.

Factors for Testamentary Capacity

Although there is no universal definition of testamentary capacity, it is a much lower threshold than for other legal documents such as contracts. As the Court stated in In re Rasnick, 77 N.J. Super. 380 (1962), "As a general principle, the law requires only a very low degree of mental capacity for one executing a Will." Factors relevant to testamentary capacity are:

1. Whether the testator understood and intended to create a Will;
2. Whether the testator generally knew the nature and extent of his or her assets;
3. Whether the testator intended to pass assets under his or her Will;
4. Can the testator identify the beneficiaries under the Will and understand his or her relationship to them?; and
5. Did the testator know the "natural objects of his or her bounty" i.e., immediate family who would inherit if there was no Will?

In Gellert v. Livingston, 5 N.J. 65 (1950), the Court stated that, "The gauge of testamentary capacity is whether the testator can comprehend the property he is about to dispose of; the natural objects of his bounty; the meaning of the business in which he is engaged; the relation of each of the factors to the others; and the distribution that is made by the Will."

Furthermore, the Court in In re Liebl, 260 N.J. Super. 519 (App. Div. 1992), stated that, "A testator's misconception of the exact nature or value of his assets will not invalidate a Will where there is no evidence of incapacity." Liebl cited In re Livingston's Will, 37 A. 770, 772 (Prerog. 1897) in which the Court stated that, "It is not ignorance of the kind or amount of property owned by the testatrix which invalidates a Will, but ignorance resulting from a mental incapacity to comprehend the kind and amount of such property." In Liebl, the decedent was found to have sufficient capacity to make his Will. Although he was mistaken on his net worth, that did not invalidate the Will since there was no medical evidence of diminished capacity.

In In re Riordan (N.J. App. Div. 2011), the Court found that the testatrix suffered from "a dementia condition of undefined specific proportions." Yet, she was often lucid and clear in her thoughts and behavior, so the Court held that she had testamentary capacity.

In In the Matter of the Estate of Vivian Fassett (App. Div. 2012), the plaintiff's attempt to invalidate his sister's Will failed because he did not introduce sufficient medical testimony to overcome the legal presumption of capacity. Although the sister died within 30 days after executing her Will, that was not dispositive.

Practice Pointers for Estate Planning Attorneys

It is the responsibility of the estate planning attorney to assess the client's testamentary capacity both when preparing a Will and again at the time of execution. If the client is elderly or there are "red flags," the attorney should meet with the client in person, rather than simply have a phone call. It is easier to assess someone's mental state when sitting with them face to face.

The client's family members, friends and caregivers should not attend the meeting. A second attorney from the same firm could sit in at the meeting to get another impression of the client's capacity and both prepare memos. The attorney will need to decide if the meeting should be held at his or her office or the client's home. The client would likely be more comfortable in a familiar environment, but there could be other people present. With regard to videotaping, unless the attorney videotapes all meetings, the fact that this particular meeting was videotaped shows doubts about capacity. The video could not be edited and it may turn out differently than anticipated.

Signs of Diminished Capacity

During the client meeting, the attorney needs to be alert for cognitive, emotional and behavioral signs of diminished capacity. Testamentary capacity is rarely clear cut; rather, it is a gray area requiring judgment.

Cognitive signs include (1) short term memory loss; (2) difficulty in communicating; (3) problems with concepts other than a simple "yes" or "no" answer; (4) difficulty comparing

alternatives, making decisions or adjusting to changes; (5) problems with simple math; and (6) disorientation or confusion. On an emotional level, the attorney may see: (1) anxiety, tears or panic; and (2) quick mood changes or fear about a routine issue. Behavioral signs may include (1) delusions or paranoia; (2) hallucinations; and (3) inappropriate dress or unclean hygiene.

If signs of incapacity are observed, there could be counter balancing "mitigating" factors. For example, (1) the client may be depressed or grieving a recent loss; (2) medications may cause confusion, or the client may not have proper nutrition or hydration; (3) older adults often experience mental fatigue especially later in the day; (4) vision or hearing loss can affect the ability to read or speak; and (5) older adults of differing backgrounds have a range of cognitive abilities.

Four possible conclusions may be reached: (1) there is no or very minimal evidence of diminished capacity, in which case the attorney can proceed with the representation and drafting the Will; (2) some evidence of diminished capacity exists so the attorney will need to decide whether to proceed or make a referral to a medical professional; (3) there are substantial signs of diminished capacity which means the attorney should proceed only with extreme caution but should more likely refer the client to a medical professional; or (4) severe issues and a clear lack of capacity exist in which case the attorney should NOT proceed but rather make a referral to a medical professional, withdraw from the representation and perhaps consider action under Rule 1.14(b) of the ABA Model Rules of Professional Conduct such as a court appointment of a guardian ad litem or conservator. A useful guide for attorneys is the ABA's Assessment of Older Adults with Diminished Capacity: A Handbook for Lawyers (2005, 2007), www.americanbar.org/groups/law/aging/resources/capacityassessment.

Once the Will is ready to be signed, the attorney should review it with the client in person and look for changes in capacity. Again, it may be beneficial to have another attorney sit in or be a witness to the signing. The attorney and witnesses should write memos giving their impressions of the client and describing what transpired at the signing meeting.

Burden of Proof in Will Contests

Adults are presumed to have testamentary capacity. The presumption is that the "testator was of sound mind and competent when he executed the Will." Haynes v. First Nat'l State Bank of N.J., 87 N.J. 163, 175-176 (1981). Courts generally want to uphold Wills; see Alper vs. Alper, 2 N.J. 105, 114-5 (1949), "Testamentary dispositions are required to be enforced unless contrary to public policy or a rule of positive law." Furthermore, "It is well settled in this State [New Jersey] that every citizen of full age and sound mind has the right to make such disposition of property by will or deed as he or she in the exercise of individual judgment may deem fit." Casternovia v. Casternovia, 82 N.J. Super 251, 257 (App. Div. 1964).

The burden of overcoming the presumption of testamentary capacity is on the person who challenges the Will. That burden must be met by clear and convincing evidence which is a difficult hurdle. See In re Hoover, 21 N.J. Super 323 (1952); In re Will of Davis, 14 N.J. 166 (1953); In re Coffin, 103 N.J. Super. 1 (App. Div. 1968). Each case alleging

lack of capacity will turn on its own facts, so it is important for the drafting attorney to "play defense" and take precautions.

Conclusion

Although estate planning attorneys cannot be expected to be physicians capable of diagnosing medical conditions, they do need to look for signs of diminished capacity among older clients. Given the aging population and the increase in dementia, attorneys cannot simply conduct "business as usual." If signs of diminished capacity exist, the attorney must take appropriate action and if advisable, withdraw from the representation rather than face the prospect of a Will contest or malpractice action after the client's death.

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