Testamentary Capacity

The Concept of 'Sound Mind' Is Not a Black-and-White Matter

By TODD C. RATNER, Esq.

At the turn of the 20th century, the average life expectancy was a mere 49 years, and dementia was a rare phenomenon. Today's average life expectancy exceeds 77 years. As lifespans increase, estate-planning attorneys confront the growing challenge of representing older clients who may have started to suffer capacity-related health issues such as Alzheimer's disease.

So how is mental capacity determined with regard to legal matters?

As a threshold, when a client initially meets with an attorney, the attorney must determine whether or not the client has the requisite mental capacity necessary to reasonably articulate his or her wishes concerning their legal affairs. Testamentary capacity is a legal term that refers to one's ability to be of sound mind in reference to altering or creating estate-planning documents.

Unfortunately, legal testamentary capacity or competence is not a black-and-white determination.

The Massachusetts Supreme Judicial Court provided the following standard definition of capacity to execute wills:

"Testamentary capacity requires ability on the part of the testator to understand and carry in mind, in a general way, the nature and situation of his property and his relations to those persons who would naturally have some claim to his remembrance. It requires freedom from delusion, which is the effect of disease or weakness and which might influence the disposition of his property. And it requires ability at the time of execution of the alleged will to comprehend the nature of the act of making the will."

In general, the requirements of testamentary capacity are fairly simple. The testator must meet only this minimal test at the moment the estate-planning documents are executed. Therefore, documents may be valid even if the testator is in the midst of delusion immediately prior to and subsequent to execution, as long as the testator possesses the requisite testamentary capacity at the moment of execution. So, even if the testator does not recall signing the document the day following execution, it does not invalidate the document if the testator understood it when he or she signed it.

Testamentary capacity ... refers to one's ability to be of sound mind in reference to altering or creating estate-planning documents.

The mere existence of the onset of dementia does not preclude the signing of estate-planning documents, provided that the necessary criteria for mental capacity are met. However, the drafting of, or revisions to, current estate-planning documents should be considered in the early stages of dementia.

The attorney's duty to confirm a client's testamentary capacity exists in every estate-planning matter, and confirmation is usually determined while conversing with the client. The attorney should inquire further at the first sign that the client may not have testamentary capacity. It is important to confirm that forgetfulness is not a sign of a larger capacity issue, because not every forgotten fact or misstatement results from incapacity. Clients may exhibit varying degrees of lucidity depending upon factors such as time of day, location of the meeting, and the presence or absence of family members. Attorneys should attempt to schedule the appointment at a time and in a place in which the client is likely to be functioning at their highest level.

It is important to note that the requisite capacity to execute estate-planning documents differs from the requisite capacity to execute contracts. The competency necessary to enter into a formal contract is greater than that to execute estate-planning documents. The standard for entering into a contract is different because the individual must know not only the nature of their property and the person with whom they are dealing, but also the broader context of the market in which they are agreeing to buy or sell services or property.

The estate-planning attorney must be aware of not only the mental-capacity standards for a client to execute estate-planning documents, but also the appropriate steps to take to prevent a successful challenge to an estate plan. The potential threat of litigation over estate-planning documents is always a consideration for the drafting attorney. The possibility of a contest and subsequent litigation, and the corresponding costs associated, are even greater if the testator's mental capacity is in question prior to the execution of the estate-planning documents.

In order to curtail the potential of a contest, the attorney must determine if the testator has the requisite mental capacity. In the event that the testator has reduced mental capacity due to dementia, the attorney must be well-informed of the diagnostic steps and stages of the disease to determine testamentary capacity. Estate planners should include a standardized series of questions designed to confirm tes-

tamentary capacity in every estate-planning matter to ensure that they are fully focused on the question of capacity. These noninvasive questions provide probative evidence and also increase credibility to the attorney's testimony in a subsequent litigation contesting the client's capacity. Typically, the attorney does not have the requisite skill to make definite capacity determinations in complex cases. As such, physicians and other health care workers should be engaged.

Doctors and other medical personnel cannot personally make a determination as to whether or not an individual has testamentary capacity, since only a judge has the authority to render a person incompetent. However, they can provide a professional evaluation that will both help the attorney make this decision and provide significant evidence in the event of a subsequent incapacity challenge. As such, it is imperative for the drafting attorney to keep accurate and complete records of any evaluations.

In the event that the client has been deemed to not have the requisite testamentary capacity to execute their estate-planning documents and does not have a health care proxy and/or a durable power of attorney, a guardianship and/or conservatorship may be necessary. A guardian is a person appointed by the probate and family court to handle the personal affairs of an 'incapacitated person,' and a conservator is person who is appointed by the court to manage the estate of a protected person. Petitioning the court for a guardian and/or conservator is a potentially costly, time-consuming, and public process that should be avoided if possible. As such, if your loved one has been diagnosed with dementia, they should immediately contact an experienced estate-planning attorney.

It is essential that the individual making decisions relative to their estate-planning considerations have the testamentary capacity to do so. Oftentimes, the determination is a joint effort by attorneys and medical personnel to confirm the capacity of a client. Attorneys must ensure that additional measures are undertaken, especially with those inflicted with the onset of dementia, to reduce the likelihood of a contest. ❖

Todd C. Ratner is an estate-planning, business, and real-estate attorney with the law firm Bacon Wilson, P.C. He is a member of the National Academy of Elder Law Attorneys and the Estate Planning Council of Hampden County; (413) 781-0560; baconwilson.com/attorneys/ratner_2