

## **The Estate Planning Advisor**

### **Planning for Persons With Diminished Capacity**

**By Richard J. Shapiro, J.D.**

Although people are living longer lives, we know that a significant percentage of seniors will be afflicted with Alzheimer's, Parkinson's or some other condition that limits their cognitive abilities. While it is always a good idea for people to engage in estate planning when they are mentally sound, in reality many people do not get around to doing any estate planning until later in life – often during a period of mental decline.

When a senior first meets with an attorney to create an estate plan, as a threshold matter the attorney will need to determine whether the Senior has the mental capacity necessary to reasonably articulate their desires concerning their legal affairs. Simply because a person has some form of mental impairment – even Alzheimer's or other form of dementia – the existence of such a condition will not automatically preclude that person from executing a will or completing other forms of estate planning, especially when such condition is in the earlier stages.

In working with a person exhibiting diminished capacity, the attorney will need to consider a number of factors before commencing with the representation of that client. Such factors include: (1) the client's ability to articulate the reasoning behind his or her planning decisions; (2) the variability of the client's state of mind; (3) the client's appreciation of the consequences of their planning decisions; (4) the irreversibility of the client's decisions (such as transferring title to real property to another person); (5) the substantive fairness of the transaction; and (6) the consistency of the proposed action with the client's prior lifetime activities and decisions.

There are actually different standards of capacity required for the execution of various types of estate planning documents. To execute a will, a person must be of "sound mind" – that is, they must be cognizant of the persons who are the natural "objects of their bounty;" they must exhibit a reasonable understanding of the nature and extent of their property; and they must be able to interrelate those elements sufficiently to be able to dispose of their property pursuant to a rational plan. Execution of a revocable trust will largely follow the same criteria, since a revocable trust is seen as a "will substitute" and the trustmaker will retain full control of the trust property during his or her lifetime.

Irrevocable trusts – which are often used for Medicaid planning purposes – will require a heightened standard of mental capacity. Unlike the execution of wills or revocable trusts that can be modified at any time, the creation and funding of an irrevocable trust results in the trustmaker making a completed gift of the trust assets to one or more beneficiaries. Engaging in such an irrevocable act logically requires that the client exhibit a heightened level of awareness as to the nature and consequences of his or her actions.

A particularly challenging issue faced by elder law attorneys in dealing with cognitively impaired clients is that many such clients exhibit varying degrees of lucidity depending upon factors such as the time of day, the location of the meeting, and the presence (or absence) of family members. In scheduling

an appointment with such an individual, the attorney should strive to hold a meeting at a time and in a place in which the client is likely to be functioning at their highest level.

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