Estate Planning When Mental Capacity Is In Question

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Every 71 seconds, someone in America develops Alzheimer's disease - the most common cause of dementia. The Alzheimer's Association estimates that about 14 million baby boomers can expect to develop dementia, including Alzheimer's disease, in their remaining lifetime.

What legal issues arise when a loved one suffers from dementia or Alzheimer's disease, leading to decreased mental capacity? Can a mentally incapacitated individual still accomplish his or her estate planning goals?

The most important documents in a typical estate plan are the last will and testament, the power of attorney and the living will. To execute any of these documents, a certain level of mental capacity is required. If that capacity is not present, then the opportunity for estate planning may be irretrievably lost.

Wills. In order to execute a valid will, an individual must possess "testamentary capacity." The requirements for testamentary capacity are minimal: the testator must be an adult (age 18 or older) and must be capable of knowing and understanding in a general way (i) the nature and extent of his or her property, (ii) the natural objects of his or her bounty, and (iii) the disposition that he or she is making of that property, and must also be capable of (iv) relating these elements to one another and forming an orderly desire regarding the disposition of the property.

Given these requirements, can an individual with dementia execute a legally enforceable and valid will?

This question may arise in various circumstances. For instance, a loved one may be in the early stages of Alzheimer's and he or she has not executed a will, or perhaps has executed a will, which is now lost.

How can he ensure that his testamentary wishes are accomplished? May he execute a valid will given his diminished mental capacity? The issue of mental capacity under these circumstances is paramount for at least two reasons: (i) the presence of dementia raises the greater likelihood of a will contest and (ii) current New Jersey law may prevent the probate of a will executed by an individual who is adjudicated incapacitated.

The possibility of litigation over a will is always a consideration for the drafting attorney. The possibility of a will contest and litigation, and the ensuing costs associated therewith, are even greater if the testator's mental capacity is in question prior to the execution of the will.

In order to minimize the potential for a will contest, an experienced attorney must determine if the testator has the requisite mental capacity. If mental capacity is in question due to dementia, the attorney and physician must be well-informed of the diagnostic steps and stages of the disease to determine testamentary capacity. Attorneys might seek a written opinion from doctors and other health care workers as to the capacity of an older person. When a doctor is asked for an opinion on mental capacity, the basis for the opinion, whether negative or positive, must always be clearly recorded since the facts upon which he relies may later be challenged during a will contest. It may also be prudent to videotape the will execution as evidence of the testator's mental capacity. In addition to witnesses signing the will, the witnesses may also execute a certification specifying their relationship to the testator and affirming their observations of the testator which support the testator's lucidity during the will execution ceremony. Finally, the attorney may also draft a memorandum to the testator's file concerning the will execution in case there is future litigation.

The above measures, however, presume that the individual has not already been adjudicated “an incapacitated person” and that proceedings regarding the capacity of the individual have not yet commenced. New Jersey Statute 3B:12-27 provides that "[i]f an incapacitated person dies . . . without any will except one which was executed after commencement of proceedings which ultimately resulted in adjudicating a person incapacitated and before a judgment has been entered adjudicating a return to competency, the person's property shall descend and be distributed as in the case of intestacy." In other words, a will executed after the commencement of a proceeding to determine an

individual's capacity, where the individual is ultimately adjudicated "incapacitated," is *per se* not valid.

In one New Jersey case, for example, the testator was adjudicated mentally incapacitated on June 29, 1973. He executed a will on March 22, 1974. The court set aside his will as invalid stating that the only way an incapacitated individual can be re-vested with legal capacity to manage his own affairs after adjudication of incompetency is through an adjudication that he has returned to competency. In light of that case, it appears that any will executed by an individual who is adjudicated incapacitated, prior to a judicial determination that he has returned to competency, shall be set aside.

There is an argument, however, that N.J.S.A. 3B:12-27 should be construed as creating only a presumption of testamentary incapacity. In Hackensack Univ. Med. Center v. Rossi, 338 N.J. Super. 139, 151 (Law Div. 1998) for instance, the court stated that "in the absence of a specific statutory enactment, an adjudicated incompetent may be relieved of some of the disabilities attendant to that status, prior to a formal judicial declaration restoring competency." Thus, even prior to a judicial determination of a return to incompetency, an individual may, in fact, have the capacity to execute a valid and enforceable last will and testament.

Further, in The Matter of the Estate of Frisch, 250 N.J. Super. 438 (Law Div. 1991), the court asked whether N.J.S.A. 3B:12-27 "conclusively precluded an adjudicated incompetent from executing a valid will until an adjudication of competency or whether the statute merely set up a rebuttable presumption of incompetency." While the court avoided resolving that issue by finding that the incompetent individual had returned to competency, the court did opine that there is a distinction between the test for "testamentary capacity" and the test for "mental incompetency." The test for testamentary capacity in New Jersey, said the court, "has a relatively low threshold." "If the testator is capable of recollecting of what his property consists, and who, either in consequence of ties or blood or friendship, should be objects of his bounty and has a mind sufficiently sound to enable him to know and understand what disposition he wants to make of his property after his death, he is competent to make a valid will." Consequently, it is arguable that an individual, though adjudicated "incapacitated," may very well be competent to make a will.

Power of Attorney and Living Will. In order to execute a valid power of attorney or living will, the principal must satisfy essentially the same tests as those for testamentary capacity set forth above.

While a general (non-durable) power of attorney will lapse when the principle becomes mentally incompetent, a “durable” power of attorney continues to have effect after the principal becomes mentally incompetent. A living will, on the other hand, only comes into effect when an individual loses the ability to make or express his or her health care decisions.

The mere existence of a degree of dementia may not preclude the making of an enduring power of attorney or living will, provided the necessary criteria for mental capacity can still be met. Thus, these documents should always be considered in the early stages of a dementia.

If mental capacity is not present, then a spouse or other family member may seek the appointment of a guardianship through a proceeding with the court. In general, a guardianship should be considered when (i) an individual can no longer manage his affairs because of serious incapacity; (ii) no voluntary arrangements for decision-making and management have been set up ahead of time (or if they have been set up, they are not working well); or (iii) serious harm will come to the individual if no legally authorized decision-maker is appointed.

Conclusion

If you or a loved one is suffering from a form of dementia such as Alzheimer's disease, it is important to evaluate the need and available options for estate planning. While Alzheimer's disease is a progressive dementing illness, persons in the mild or mild to moderate stages may retain the capacity to execute a valid will, power of attorney and/or living will. There are also additional measures necessary to reduce the likelihood of a will contest and/or to support the validity of the will if a contest does in fact, take place.

For further information concerning estate planning when mental capacity is an issue, contact the law firm of Einhorn, Barbarito, Frost & Botwinick, PC

See Restatement (Third) of Property: Wills and Other Donative Transfers 8.1 (2003).

Matter of Bechtold's Estate, 150 N.J. Super. 550 (Ch. 1977).