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**Capacity Issues in Executing Estate Planning Documents**

There are many different occasions that give rise to capacity issues in executing estate planning documents. One of the most common impairments is dementia. Dementia can be caused by a traumatic brain injury or by other diseases like Alzheimer's. The Alzheimer's Association estimates that about 14 million baby boomers can expect to develop dementia, including Alzheimer's disease, in their lifetime and one and a half million people are diagnosed with a traumatic brain injury each year nationwide. Dementia is a progressive illness. Persons in the mild or mild to moderate stages may retain the capacity to execute a valid will, power of attorney, trust and advance directive. Persons may have "lucid intervals."

Mental illness can also play a big role in capacity issues in estate planning. Evaluating the need for estate planning is important for everyone—aging or not—but if you or a loved one is suffering from a form of dementia or mental illness, it is imperative. Aging can exacerbate mental illness issues that were manageable in earlier years. Physical changes associated with age (combining medications for mental illness and age-related illness) and social changes (isolation or a change in living conditions) can also trigger mental illness disturbances or even provide the catalyst for an otherwise "dormant" illness to manifest. Mental illness can produce intervals when otherwise competent people may exhibit behaviors that are out of control.

It is important to note that eccentric choices are not automatically choices made without understanding. This author firmly believes that drafting attorneys may jump to a conclusion of incapacity based on eccentricity. An older client's capacity should not be judged solely on eccentric behaviors or choices that are different from the attorney's own.

It is because of this that determining capacity can be a delicate and complicated aspect of probate law, specifically in the execution of estate planning documents. There exist different standards for determining capacity depending on which estate planning document you are executing. This serves to add another layer of complexity. This makes capacity task-specific rather than global; capacity may fluctuate, and is best determined within context.

### **CAPACITY: DURABLE POWERS OF ATTORNEY**

A durable power of attorney is perhaps the most important tool in the arsenal of estate planning documents. The standard for determining if a client has the requisite capacity to execute a power of attorney depends on whether or not that person has the ability to understand and comprehend his or her actions.

Ability to understand and comprehend the nature and effect of his or her actions at the time of execution

Does the person have "sufficient capacity to understand in a reasonable manner the nature and effect of the act which he was doing," Ex Parte Chris Langley, 923 So.2d 1100, 1105 (Ala. 2005) (quoting earlier Alabama cases). Was the person able "to understand and comprehend what he was doing" at the time of execution? Queen v.

Belcher, 888 So. 2d 472, 477 (Ala. 2003). This standard is sometimes referred to as the capacity for general business affairs and is a higher standard than testamentary capacity. The law is clear that this higher standard is required in order to execute a Power of Attorney. There are three “Belcher” cases issued in 2004, 2006 and 2009. All of the Belcher cases hold that the proper standard for a Power of Attorney, a Partnership Agreement and a Revocable Trust is the higher standard for “general business affairs.”

“Thus, the trial court was correct in recognizing that there are two standards of legal capacity — one for "general business affairs" and one for "a will or other documents"; however, the trial court erred when it held the power of attorney, the partnership agreement, and the trust agreement to the standard applicable to wills. Those are not testamentary documents.

In Abbott v. Rogers, 680 So.2d 315,317 (Ala.Civ.App. 1996), the Court of Civil Appeals held that a person challenging a conveyance on the ground of mental incapacity need show only "that the grantor was unable to understand and comprehend what he or she was doing" (citing Thomas v. Neal, 600 So.2d 1000 (Ala. 1992)). A trust agreement is an inter vivos conveyance of property, and is, therefore, subject to the standard governing conveyances. See I A.W. Scott & W.F. Fratcher, *Scott on Trusts* §§ 18 & 19, at 243-44 (4th ed. 1987) stating that an owner of property is capable of placing that property in trust if he is otherwise capable of conveying it, but if his conveyance would be voidable because of insanity or the like, his declaration of trust would likewise be voidable). This same higher standard has also been applied to powers of attorney. See Morris v. Jackson, 733 So.2d 897 (Ala.Civ.App. 1999).”

Queen v. Belcher, 888 So. 2d 472, 477 (Ala. 2004). The principal should be able to anticipate a variety of possible future contingencies, consider possible options for handling those contingencies, decide how much authority and discretion to give to the attorney-in-fact and how much to retain for himself. This requires an assessment of the possible choices for serving in the role of attorney-in-fact, and an assessment of the judgment of the attorney-in-fact in relationship to the possible contingencies and options

which might arise, together with an assessment by the principal of his own ability, now and in the future, to deal with the contingencies and options himself or to allow the attorney-in-fact to do so; and if so, under what conditions and circumstances and with what limitations.

### **CAPACITY: LAST WILL AND TESTAMENT (TESTAMENTARY CAPACITY)**

A last will and testament may be the most important tool in planning for the distribution of one's estate after death. The standard for determining if a client has the requisite capacity to execute a will—testamentary capacity—is not very high. A testator must know generally what property he has, know what he wants to do with this property, know the persons to whom he wishes to devise the property and generally comprehend the results of his choices.

- ~ Know generally what property he has
- ~ Know what he wants to do with it
- ~ Know the persons to whom he wishes to devise the property
- ~ Comprehend the results of his choices

In Bolan v. Bolan, 611 So.2d 1051, 1057 (Ala. 1993), the court held that

"In order to execute a valid will, one must possess `mind and memory sufficient to recall and remember the property she was about to bequeath, and the objects of her bounty, and the disposition which she wished to make — to know and understand the nature and consequences of the business to be performed, and to discern the simple and obvious relation of its elements to each other."

quoting Knox v. Knox, 95 Ala. 495, 503, 11 So. 125, 128 (1892); Pirtle v. Tucker, 960 So.2d 620, 632 (Ala. 2006). In Denson v. Moses, 2 So.3d 847 at 851 (Ala.Civ.App. 2008), the Court of Civil Appeals simply uses the definition of Testamentary Capacity contained in the Alabama Pattern Jury Instructions:

"The testator must have at the time of the execution of the will memory of mind sufficient to recall and understand:

"1. The property he is about to bequeath or devise.

"2. The objects of his bounty.

"3. The disposition he desires to make of his property.

"4. The nature and consequences of the business to be performed.

"5. The relation of these elements to each other."

2 *Alabama Pattern Jury Instructions Civil* § 38.04 (2d ed. 1993). See also Ex parte Helms, 873 So.2d 1139, 1147 (Ala. 2003).

The law presumes that every person has the capacity to execute a will and the burden is on the contestant to prove the lack of testamentary capacity. 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, the drafting attorney must make a determination of the testator's capacity. If there is reason for the testator's mental capacity to be questioned due to a physical infirmity, it is important for the drafting attorney to be cognizant of the steps and stages of the disease.

There are measures that can be taken to reduce the likelihood of a will contest or to support the validity of the will in a contest. One measure the drafting attorney might

seek is a written opinion from the testator's doctor as to the testator's capacity on the same day as the execution of the will or on a day close in time. It is important to note that the facts upon which a health care professional relies in forming his opinion should be clearly recorded since they may be challenged later during a will contest.

A drafting attorney could also draft a memorandum to include in the testator's file regarding the execution. The memorandum could include information such as the day and time, the testator's demeanor and a description of their person and affect. One might want to document what was discussed prior to the execution and possibly some orienting questions. One could require that in addition to the witnesses signing the will, the witnesses also execute a certification specifying their relationship to the testator and indicating their observations of the testator and his capacity during the will execution ceremony.

There is a lot of discussion surrounding the pros and cons of videotaping the execution of a will. Proponents state that it is prudent to videotape the will execution as evidence of the testator's mental capacity. However, the attorney's custom and practice should be the overriding factor in deciding whether or not to video a will execution.

Many attorneys state that there exist more snares in using video in a will execution than without video. For instance, videotaping may make the testator nervous, anxious, or bring about a certain level of apprehension on the part of the testator. The stress of the situation when coupled with the importance of the event is likely to create additional agitation. It is important to remember that there is only one shot at a perfect video. If it does not work as planned, the drafting attorney must maintain the defective product or he could face a charge of spoliation of evidence. Because of these external

factors, the drafting attorney may unwittingly create a script by rehearsing the ceremony with the client. Instead of producing a seamless and natural video, the drafting attorney may end up leading the client and unintentionally sending cues to the client regarding the answers. This places a heavy burden on the drafting attorney to not only address, but to cure all the factors that could negatively affect the video. If a video is to be used for execution, it is critical that it be narrative and conversational. If possible, the lawyer should use open ended questions which invite natural and unrehearsed responses. What may be a better use of videotape is a “*day in the life*” of the testator where he is in his normal day-to-day surroundings and engaging in his typical activities. The testator’s desires and a discussion of her estate and its disposition could be incorporated into the video.

### **CAPACITY: TRUSTS**

The Uniform Trust Code does not set forth the standard for the requisite capacity to execute a trust. However, the courts have held that the capacity for the creation of a trust is the same as that for powers of attorneys (see above).

Ability to understand and comprehend the nature and effect of his or her actions at the time of execution

They reasoned that because a trust is, in effect, a transfer of property, the higher standard of understanding and comprehending the business applies to the formation of a trust. “. . . we reiterate the statement made by this Court in Queen that “[a] trust agreement is an inter vivos conveyance of property, and is, therefore, subject to the

[competency] standard governing conveyances." Belcher v. Queen, 1080452 (Ala. 9-18-2009) at 36.

These same considerations apply to trust capacity, where contingencies, often involving tax considerations, must be understood and evaluated by the person chosen as a trustee, including how such trusts mesh with powers of attorney that may also exist, and with wills which at some future point might also become operative. The thinking process for dealing with these matters involves memory to hold in mind the possible contingencies and options, cognition to understand the consequences of going one way versus another, and judgment as to how to assess, filter, weigh and evaluate a multitude of pieces of information and possible contingencies and options.

### **CAPACITY: ADVANCE DIRECTIVES**

In Alabama, any competent adult may execute an advance directive, including a living will directing the providing, withholding, or withdrawal of life-sustaining treatment and artificially provided nutrition and hydration. Alabama Code § 22-8A-4(a).

Competent adult

An adult is defined as one who is 19 (nineteen) years of age or older. A minor is defined as anyone under the age of 19 who has not otherwise had the disabilities of minority removed. Alabama Code § 26-2A-20(11).

In 2001, the Alabama legislature revised the then current 1997 Advance Health Care Directive form with a shorter, simpler document. However, the Code makes no special provisions for advance decision making by adults of impaired mental ability. It is important to note that many developmentally disabled adults would not be considered

incompetent and we should encourage clients with varying degrees of diminished capacity to discuss their wishes with trusted persons and document those wishes to the fullest extent possible.

## **CONCLUSION**

The drafting attorney needs to have procedures in place to assess capacity. Certain behaviors should send a red flag to the drafting attorney such as disjointed or nonresponsive conversation, problems with memory or recall and difficulty making and / or expressing decisions. Additionally, a diagnosis of cognitive impairment should immediately create a warning in the drafting attorney's mind. Other behaviors include making an odd or unusual choice of agent, personal representative, trustee or other fiduciary.

When a client is unable to drive or attend an appointment without the help of a friend, family member and / or caregiver, a drafting attorney should make all attempts to gather the information necessary from the client and not from the anecdotal evidence offered by others. A best practice is to speak with the client alone at some point during the appointment where an independent analysis can be obtained free from any influence. However, legitimate reliance on transportation or appointment-making by an older client should not, on its own, be reason for suspicion.

If an estate planning document is questioned, the burden is on the contesting party to prove incapacity. Should a contesting party be successful, then consideration may be given to whether or not the execution was during a lucid interval. In this context, a lucid interval can be described as a temporary period of rationality or

neurological normality between periods of diminished capacity. Drafting attorneys should examine the potential for these possible outcomes anytime estate planning documents are executed.