

Client Capacity

LCBA Wills, Trusts & Probate Seminar
November 21, 2008
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As our clients age, many develop dementia. Dementia is a class of mental disorders, which includes Alzheimer's Disease. Among people over 85 years old, dementia is believed to effect about 50%. This is a serious and, many suspect, growing problem. Life expectancy has lengthened, but the mind may not keep up.

This is a particular problem for estate planners. The decline into dementia may be very slow and gradual. Clients are not well one day and incapable the next. No flashing lights signal the change. To recognize and address the problem, you need to know several things.

First, I'd like to describe a scenario in which you are faced with a client who you believe lacks capacity. Second, I'll review your ethical responsibilities and the standards for capacity to make a will or a living trust. Third, I'll discuss the tools—particularly medical examinations and opinions—that are available to help you and your client. Finally, I'll address what happens if you decide that your client lacks capacity.

A. The Decline of Dennis Crane.

As an estate planning attorney, you have many elderly clients. One of them, Mr. Dennis Crane, has been a client for many years, has a substantial estate, and you have previously written two wills for him. He is in his sixth marriage, this time to Shirley Schimdt-Crane, and has children from his first marriage, but not his current marriage. The phone rings (or the computer buzzes) and Mr. Crane's current wife is on the line. She tells you that Mr. Crane wants to change his will to increase the benefits for her and to eliminate any benefits for Mr. Crane's friend, Alan.

You of course tell Mrs. Crane that her husband is your client and that you cannot discuss his business with her, but that you need to speak directly with him. She tells you that's no problem, but that his physician has recently diagnosed him as suffering from mild, early stage dementia, which may be of the Mad Cow type. She assures you, however, that he can meet with you and that he is very alert.

Mr. and Mrs. Crane arrive at your office and, being the soul of prudence, you have your paralegal sit in on the meeting to take notes. The paralegal is also there to be a witness, but you don't mention that second role to the Cranes.

After a brief introduction, you ask Shirley Crane to excuse you so that you can speak privately with Denny. Shirley wants to know why, since she is his wife and they share everything. You explain that if his friend Alan or his children later question any changes to his will, her absence during this meeting will place you in a better position to defend the will. She agrees and excuses herself.

Mr. Crane appears normal. He is well dressed and seems to recognize you. You ask him about the recent election and he responds that the Republicans will always hope for next year. You then turn the conversation to his estate plan. You ask Mr. Crane if he would like to make changes to his current will. He says that he doesn't know, what do you think? You tell him that his wife brought him to you because she said he wanted to make some changes. He tells you that yes, he loves his wife and he needs her help. You ask him what he would like to do differently from his current will, and he asks what his current will provides. You explain his current estate plan, including a specific bequest to Alan. He tells you that that sounds good. You ask what, if anything, he would like to do differently, and he asks you what you think. You tell him this decision is up to him, your role is to help him make an informed decision and to implement his decision, but you cannot make the decision. This is his estate plan, not yours. He looks confused and does not respond.

You then bring his wife back into the room and explain that you do not believe he can make a decision to change his will. Shirley tells Mr. Crane that he wanted to increase the benefit for her so that she would be taken care of if he died, and that he doesn't want anything to go to his friend Alan because he is a Democrat and because of an incident while at a dude ranch in Utah. She tells Mr. Crane to tell you this. Denny says yes, he wants his wife to be taken care of if he dies. You ask what he would like to do, and he says whatever she thinks is right. She tells you to go ahead and write a new will for Mr. Crane.

You explain to Mr. and Mrs. Crane that there are three requirements for the ability to make a will, known as *testamentary capacity*: (1) the ability to know the nature and extent of your assets; (2) the ability to know and appreciate the natural objects of your bounty; and (3) the ability to make a plan to devise those assets after your death. You tell them that, based on your conversation, you are not comfortable drafting a new will because you do not believe Mr. Crane is able to satisfy the third requirement: you do not feel that he can make a plan that is his and only his. Insulted and hurt, Mr. and Mrs. Crane storm out of your office. Mr. Crane pulls out a gun, but Shirley drags him out before he can shoot you.

Two months later, you get a call from Mr. Crane's friend Alan. He tells you that Mr. Crane has signed a new living trust that names Mrs. Crane as his current trustee and provides that upon his passing, all of Denny's assets will go to her, eliminating the specific bequest. He asks if you will meet with him and Mr. Crane. You (foolishly) agree.

You again meet with Mr. Crane. Denny makes no reference to your prior meeting. His friend Alan gives you a copy of the Dennis Crane Trust, dated one month after you last met with him and prepared by a different attorney. Alan tells you that Denny has signed a deed transferring the specific bequest to the trustee. You ask Mr. Crane what his new trust provides, and he tells you that it has something to do with saving money on taxes. You ask him if he knows the lawyer who prepared the trust and he tells you that his wife brought him to an office to do something about saving money on taxes, but he does

not know the name of the lawyer. You ask him if he wants his wife to be his trustee, and he tells you yes. You ask him if he knows what that means and he asks you: What does it mean? You ask him if he wants his wife to have the greater benefits provided under the new trust, and he responds that he does not know, what do you think? You excuse Denny and Alan.

B. The Ethical Rules and Standards For Capacity.

What, if anything, to do? As a lawyer, you are not the Lone Ranger. You do not have the right or the authority to dispense justice. You only represent clients and in this circumstance, it is very unclear who is your client. Is it Denny? Mr. Crane did not ask you to do anything. He appears befuddled and cannot give you direction. Is it Alan, who brought Mr. Crane? No, that would be a conflict because you previously represented Mr. Crane in a related matter, his estate plan. Do you have no client, and so just leave the situation alone—do nothing?

1. RPC 1.14. Fortunately, you do have some guidance: the Illinois Supreme Court's Rules of Professional Responsibility. Rule 1.14 is titled *Client Under A Disability* and says:

- (a) When a client's ability to make adequately considered decisions in connection with the representation is impaired, whether because of minority, mental disability, or some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship.
- (b) A lawyer may seek the appointment of a guardian or take other protective action with respect to a client, only when the lawyer reasonably believes that the client cannot adequately act in the client's own interest.

Mr. Crane still regards you as his lawyer. He still asks for your guidance in making decisions. He has a reasonable expectation that you will not simply turn your back on him. What about his new lawyer, who drafted the living trust? You do not and cannot know the circumstances.

Can you maintain a “normal client-lawyer relationship” as required by 1.14(a)? Probably not. Can Denny “adequately act” in his own interests? Probably not. So you need to either do nothing or seek a guardianship.

2. Capacity. People, including Mr. Crane, are presumed to have full mental capacity. In the past, we called “capacity” competency, but the term “incompetent” was deemed pejorative in modern parlance, and so now we refer to capacity. The words are used synonymously. Capacity in the legal sense is, of course, not a person’s size (most Americans increase in *that* capacity as they age), but rather the mental ability to legally change something, whether it be the ownership of an asset or a legal relationship such as getting married.

Whether Mr. Crane has capacity depends on what he wants to do. Capacity in the law is used not in a general sense, but rather in relation to specific acts. Creating a new will only requires Mr. Crane to have testamentary capacity, while creating a living trust, or naming a trustee other than himself, or deeding his property to the trust requires him to have the ability to *transact ordinary business*.

There are many legally recognized standards for capacity. Here are seven commonly used standards, which is not by any means an exhaustive list. These standards demonstrate how the law regularly defines capacity in relationship to an act. Let’s go through them briefly.

a. Ability To Transact Ordinary Business. This also called *contractual capacity*. As the Illinois Supreme Court explained long ago, “[A] less degree of mental capacity is required for the execution of a will than for the execution of

contracts and the transaction of ordinary business; that one may be capable of making a will, and yet be incapable of disposing of his property by contract or of managing his estate; **that mental strength to compete with an antagonist and understandingly to protect his own interests is essential to the transaction of ordinary business**, while it is sufficient for the making of a will that the testator understands the business in which he is engaged, his property, the natural objects of his bounty, and the disposition he desires to make of his property.” *Down v. Comstock*, 318 Ill. 445, 454, 149 N.E. 507, 511 (1925). A higher degree of mental capacity is required to make a valid deed than to execute a will. *Akerman v. Trosper*, 95 Ill. App. 3d 1051, 420 N.E.2d 1148 (3d Dist. 1981); *Moneta v. Hoinacki*, 394 Ill. 47, 67 N.E.2d 204 (1946).

Mr. Crane could have the capacity to make a new testamentary plan, whether by will or by living trust, but lack the ability to name a current trustee and to make a deed transferring his property to that trustee. *Ptaszek v. Konczal*, 7 Ill. 2d 145, 130 N.E.2d 257 (1955); *Ring v. Lawless*, 190 Ill. 520, 60 N.E. 881 (1901); *Greene v. Maxwell*, 251 Ill. 335, 96 N.E. 227 (1911).

b. Testamentary Capacity. Incredibly, “a person may be of unsound mind and memory to some extent, but still be capable of making a will” *Challiner v. Smith*, 396 Ill. 106, 124, 71 N.E.2d 324 (1947); *Grosh v. Acom*, 325 Ill. 474, 156 N.E. 485 (1927). A person has sufficient mental capacity to make a will if, at the time he executes the document, he has:

- (1) The ability to know the nature and extent of his property;
- (2) The ability to know the natural objects of his bounty; and
- (3) The ability to make a disposition of his property in accordance with some plan formed in his mind.

It is not necessary that the person actually know these things. It is necessary only that he have the mental ability to know them. IPI Will Contests, 200.05; *Beyers v. Billingsley*, 54 Ill. App. 3d 427, 437, 369 N.E.2d 1320, 1328, (3d Dist. 1977).

c. Disabled Person. A “disabled person” means: “[A] person 18 years or older who (a) because of mental deterioration or physical incapacity is not fully able to manage his person or estate, or (b) is a person with mental illness or a person with a developmental disability and who because of his mental illness or developmental disability is **not fully able to manage his person or estate**, or (c) because of gambling, idleness, debauchery or excessive use of intoxicants or drugs, so spends or wastes his estate as to expose himself or his family to want or suffering, or (d) is diagnosed with fetal alcohol syndrome or fetal alcohol effects. 755 ILCS 5/11a-2.

Note the standard: *Not fully able*. That’s me on most mornings. Any diminution in capacity will render a person “disabled” within the meaning of the Probate Act. A guardianship, however, is another step. Guardianships should only be created for a disabled person if it is necessary to protect that person. To establish a guardianship for a person’s estate, the court must find not only disability, but also that “it has been demonstrated by clear and convincing evidence that because of his disability he is unable to manage his estate or financial affairs” 755 ILCS 5/11a-3.

d. Ability to Marry or Divorce. “[T]o enable a party legally to contract a marriage he or she must be capable of understanding the nature of the act; . . . if the party possesses sufficient mental capacity to understand the nature, effect, duties, and obligations of the marriage contract into which he or she is entering, the marriage contract is binding.” *Larson v. Larson*, 42 Ill. App. 2d 467, 473, 192 N.E.2d 594 (1963).

A similar level of capacity is required to divorce. “The test of the mental capacity required for filing a petition for dissolution of marriage is whether the petitioner has sufficient mental capacity to understand fully the meaning and effect of the petition and whether the petitioner is able to determine in his own interest that he desires a final separation. (citation omitted) This is, in essence, the same test of mental capacity required for entering into a marriage.” *Marriage of Kutchins*, 136 Ill. App. 3d 45, 47, 482 N.E.2d

1005 (1985) (internal citations omitted). A person can be an adjudicated disabled person yet still have the ability to marry or divorce.

e. Ability to stand trial in a criminal case. “The test of mental competence is the ability of the accused to understand the nature of the proceedings against him and to adequately aid in the preparation of his defense.” *People v. Olmstead*, 32 Ill.2d 306, 205 N.E.2d 625.)

f. The Ability To Drive. “Because the public has a compelling interest in safe roads, a driver’s expectations of privacy are significantly diminished. Highway driving is a privilege and not a right. Drivers must demonstrate knowledge of driving rules and their own capacities.” *People v. Jung*, 192 Ill. 2d 1, 5, 733 N.E.2d 1256 (2000).

g. Ability to Consent to or Withhold Medical Decisions. Capacity to make medical decisions is determined under the Illinois Healthcare Surrogate Act. Under the Act, “decisional capacity” is defined as “the ability to understand and appreciate the nature and consequences of a decision regarding medical treatment or forgoing life-sustaining treatment and the ability to reach and communicate an informed decision in the matter as determined by the attending physician.” 755 ILCS 40/10; *Collins v. Lake Forest Hosp.*, 213 Ill. 2d 234, 821 N.E.2d 316 (2004).

C. The Relationship with Medical Concepts of Capacity.

Obtaining a medical opinion is a natural and reasonable step in determining capacity. A medical report is required for the creation of a guardianship. 755 ILCS 5/11a-9. Medical definitions of competency and legal definitions are often like ships passing in the night. The two are created by very different groups of people for different purposes and with different aims.

1. Medical Examinations. Dementia is typically the result of physiological changes in the brain. After death, the brain of a person with Alzheimer's type dementia exhibits marked atrophy. The disease can be well diagnosed using pre-death tests.

Dementia is a disease. The DSM-IV *Diagnostic Criteria for Dementia* requires a diagnosis of (a) memory impairment and (b) one of four other dysfunctions: (i) Aphasia (inability to find words); (ii) Apraxia (loss of the ability to execute or carry out learned purposeful movements); (iii) Agnosia (loss of ability to recognize objects, persons, sounds, shapes, or smells); or Executive Dysfunction (inability to plan or make decisions). Thus, dementia is not just loss of memory.

There are a series of tests that can be used to diagnose dementia. The most famous is certainly the Mini-Mental State Examination. This test takes less than 15 minutes, and experts consider it to be a good screening exam. Although Mini-Mental can tell if there is a problem, it does not diagnose the precise mental deficit.

2. Medical Opinions. Having Mr. Crane seen by a neurologist would probably be ideal. If possible, and if his family will cooperate, a medical examination will benefit him and give more guidance. If the family won't cooperate to help Mr. Crane, then your path to the probate court is clear.

It is worth noting that from an evidentiary standpoint (that is, from a legal standpoint), there is no greater weight given to the testimony or opinion of a physician than there is to a lay person in judging capacity. Just the same, when I'm trying to assess the capacity of an individual, I certainly listen carefully to anything a treating physician has to say, and I think that any judge or jury does also. Even though a physician's opinion may not be decisive *de jure*, it may will be *de facto*.

Medical competency has been defined as the ability to understand and appreciate the nature and consequences of a decision regarding medical treatment or forgoing life-

sustaining treatment and the ability to reach and communicate an informed decision. Thus, it is both the ability to make a decision and the ability to communicate that decision.

I once heard a psychiatrist explain that the same person may have the ability to make decisions over what to order from a menu for lunch but not have the ability to consent to a risky surgical procedure. Medical competency is to some extent a balancing act: the greater the consequences of a decision, the higher the ability required. Doctors seek to balance individuals' rights to make decisions for themselves with the responsibility to protect people who, because of illness, cannot protect themselves.

On several occasions, I have had physicians provide written opinions that clients were mentally competent to make wills, finding testamentary capacity, even though I believed that the persons lacked capacity. To some extent, I think this is because we weighed the consequences differently. Many people, including physicians, do not place a high value on protecting expectancies. I, on the other hand, being likely to outlive the client and likely to have the client's disappointed heirs question the changes made to his estate plan, am more sensitive to the gravity of testamentary decisions.

D. What to do about Mr. Crane.

In Mr. Crane's case, you decided that he could not protect himself and that he was in the middle of a struggle between Shirley and Alan. Therefore, pursuant to RPC 1.14(b), you decide that Denny cannot "adequately protect" his own interests, so you must file a petition to have a guardian appointed for him.

One of the first difficulties that you find when you file a petition to have a client declared disabled is that you have no one to nominate as the guardian. You are very uncomfortable nominating yourself. You should not make a choice between the spouse and the friend, as that is clearly not an appropriate role for them. You could nominate the public guardian, but that also seems inappropriate, and the public guardian will normally

only act when there are no willing family members. In the end, you can nominate no one, and effectively just punt that decision to the court. There are other difficulties as well, such as obtaining the Medical Report. This can be done later in the guardianship process.

Naturally, filing a petition alleging that your client is crazy may not strengthen the attorney-client relationship. This is almost certainly the end of the attorney-client relationship. However, your duty is always to place the client's interests first, and even if the client does not want the protection of the court, the client may need that protection.