

Proving Diminished Mental Capacity Post-Death

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I. INTRODUCTION

One of the most difficult tasks of a practitioner in the estate litigation field is attempting to prove capacity or lack thereof after the death of the decedent. Due to the low standard of capacity required to create a testamentary instrument, courts generally hold that a testator had capacity at the instrument's creation absent extreme or extenuating circumstances.¹ Attempting to prove or disprove capacity post-death poses special problems for litigators in the trusts and estates and elder law practice areas. This article will explore those special concerns in proving capacity post-death. Section II of this article will give a brief overview of the common causes of diminished mental capacity. Section III will delve into the ethical and professional responsibility considerations when entering into an attorney-client relationship with a client who may suffer from diminished mental capacity. Section IV will set forth the capacity continuum explaining the varying levels of capacity required for different functions. Finally, section V will clarify the common way of proving or disproving capacity for various transactions after the death of the decedent.

II. COMMON CAUSES OF DIMINISHED MENTAL CAPACITY

There are many different mental disorders that may cause a person's diminished mental capacity. It is important to know how these disorders may affect a person's decision-making and communication skills. These disorders range from several different kinds of dementia to depression. Professionals who are aware of the signs and symptoms of such disorders can detect whether the client's decision-making and communication skills have been compromised, and further, how to deal with such a situation if the client can no longer exercise his or her right of autonomy in the estate planning scheme.

A. DEMENTIA

In general, dementia is an overall term to describe a "clinical syndrome characterized by generalized cognitive impairment and a normal level of consciousness."² The most common form of dementia is Alzheimer's disease, which affects 60 to 80 percent of all cases of dementia.³ Each year more and more studies and reports project that the number of people affected by Alzheimer's disease will only continue to increase in the upcoming years.⁴ The Alzheimer's Association attributes the increase to the number of baby boomers in the country and the "growth of the oldest-old population."⁵ Alzheimer's can cause a person to forget recent conversations, names, and events. It can also impair one's ability to communicate, make judgments, and cause severe behavioral changes.⁶ All of these symptoms can prospectively and retrospectively affect a person's estate plan if he or she suffers from Alzheimer's disease. The disease is caused by the accumulation of certain proteins inside and outside of the neurons in a person's brain, which are believed to be the culprit of memory loss and other symptoms of Alzheimer's.⁷ The buildup of these proteins damages the neurons and interferes with communications between them, leading to the death of brain cells.⁸ Those who suffer from a Mild Cognitive Impairment (MCI) are more likely to develop Alzheimer's because their brains are already susceptible to changes that affect thinking abilities.⁹ A small percentage of people with genetic abnormalities may be prone to developing Alzheimer's at an age as

young as 30.¹⁰ Further, age and family history may also indicate a person's risk factor for developing Alzheimer's.¹¹ It is predicted that in 2016, between research, medical care, and caregiver's costs, Alzheimer's will cost the nation \$236 billion.¹² Although MCI dementia can be detected early on and it is a slow-progressing brain disease, there still is no cure for it.¹³

Vascular dementia, dementia with Lewy bodies, mixed dementia, frontotemporal lobar degeneration, Parkinson's disease dementia, Creutzfeldt-Jakob disease, and normal pressure hydrocephalus are all other forms of dementia with symptoms that can also affect a person's mental capacity.¹⁴ Impaired motor skills and judgment are a hallmark of all of these other types of dementia. These cognitive symptoms are all affected by changes and damage to vital parts of the brain that control behaviors, judgment-making, communication, and memory.¹⁵

B. APHASIA

Some people may suffer from Aphasia, which can be confused with dementia because Aphasia can be a symptom of dementia.¹⁶ Aphasia is "a general term used to refer to deficits in language functions."¹⁷ A diagnosis of Aphasia does not necessarily mean that the person's decision-making capacity has been compromised.¹⁸ For example, Primary Progressive Aphasia (PPA) is a cognitive impairment that affects a person's language function.¹⁹ People with PPA may appear to have a difficult time with common words while speaking or writing and often it is assumed that when elderly clients present this kind of behavior they are suffering from dementia.²⁰ Although the parts of the brain responsible for language begin to deteriorate, usually a person's memory, reasoning, and visual perception are not affected if they have Aphasia.²¹ Therefore, people with PPA usually do not suffer from diminished capacity, but from difficulty in communicating with others.

Professionals must also remember that capacity is not a fixed condition.²² A client's capacity can fluctuate throughout the day; it can be affected by the time of day, mood, medication dosage, and other external surrounding circumstances.²³ For instance, seniors are most familiar and comfortable within their own homes and may become irrational, agitated, and confused in a professional's office.²⁴ The National Academy of Elder Law Attorneys (NAELA) recommends that the elder law attorney "[a]dapt[s] the interview environment, timing of meetings, communications and decision-making processes to maximize the client's capacity."²⁵

C. DEPRESSION

Another disorder that affects mental capacity is depression.²⁶ It is also a disorder that does not discriminate against any age group.²⁷ Across the country, as many as 16 million Americans suffer from some sort of depression, and 10 percent of those cases are people aged 65 or older.²⁸ Clients who suffer from depression may exhibit concerning symptoms such as loss of interest, diminished energy, low mood, slow thought and motor skill processing, agitation, and diminished concentration.²⁹ These symptoms can also be easily confused for dementia; however, depression can be treated with medication, which usually becomes effective within one to two months of use.³⁰

Other cognitive impairments can be caused by chronic drug and alcohol abuse or temporary and permanent losses of cognitive functions, such as coma, minimally conscious states, and terminal illnesses.

Professionals must be educated and equipped to be able to determine whether the client suffers from any of the aforementioned conditions that may result in a lack of mental capacity. It is also important for the professional to know what conditions affect what parts of the brain that control decision-making, judgment-making, and other cognitive functions, and whether that condition can be cured. By learning how to identify a client's condition and knowing how to manage the situation, the professional can prepare a proper estate plan for the client, whether the client has the requisite capacity for certain functions.

III. ETHICAL CONSIDERATIONS WHEN COUNSELING CLIENTS WHO SUFFER FROM DIMINISHED MENTAL CAPACITY

When determining the capacity of potential clients, there are ethical considerations that must be taken into account by the attorney before agreeing to representation. The New York Rules of Professional Conduct state that when dealing with clients with diminished capacity, whether it be because of minority, mental impairment, or another reason, the lawyer shall maintain a conventional attorney-client relationship with the client, as far as reasonably possible.³¹ Attorneys are also required to act with “reasonable diligence and promptness in representing all clients, regardless of their capacity,” and shall not neglect any legal matter they are entrusted with by a client.³² However, this duty arises when a confidential attorney-client relationship is formed and may occur when: an attorney agrees to representation; an attorney is appointed to represent; or the client reasonably assumes the attorney is representing his or her interest.³³

Issues often arise when a lawyer wishes to decline or terminate representation of a client with diminished capacity.³⁴ The rules provide that a lawyer may withdraw from representation when it can be done “without material adverse effects” on the client.³⁵ When withdrawal is permitted or even required, the lawyer is obligated to take steps to avoid “foreseeable prejudice to the client.”³⁶ This includes delivering all the papers and files the client is entitled to and refunding any portion of the retainer that was paid in advance and not exhausted.³⁷

It is possible to represent a client with diminished mental capacity provided that the client still satisfies the capacity requirement set by the New York Estates, Powers and Trusts Law, which is a lower capacity standard than the requisite capacity to contract.³⁸ There are also ethical considerations that arise during the course of litigation. When a lawyer reasonably believes a client with diminished capacity is at risk of substantial physical, financial or other harm and is unable to act in their own interest, the lawyer may take “reasonably necessary protective action, and in the appropriate cases, seeking the appointment of a guardian ad litem, conservator, or guardian.”³⁹ Information relating to the representation of a client with diminished capacity is still subject to the confidentiality standards as provided by Rule 1.6.⁴⁰

As the legal profession requires self-regulation, if a lawyer learns of conduct of another lawyer that violates the Rules of Professional Conduct, Rule 8.3 states that lawyer shall report such knowledge.⁴¹ Thus, if a lawyer learns of another lawyer’s disregard for these rules, especially when it comes to clients with diminished capacity, it is important that this neglect is reported to prevent harm to the client.

IV. NEW YORK’S STANDARDS OF CAPACITY

The level of mental capacity fluctuates depending upon the advanced directive that is being executed. The levels of legal capacity are part of a spectrum developed through different state laws.⁴² Testamentary capacity is on the lower end of the spectrum while the capacity to execute a power of attorney and contract is on the higher end of the spectrum.⁴³ The purpose of the legal concept of the different levels of requisite capacity is to determine when a state legitimately may take action to limit an individual’s rights to make decisions about their own person or property, thereby exercising their *parens patriae* powers in relation to a person’s due process constitutional rights.⁴⁴

Testamentary capacity is on the lower end of the capacity spectrum. At common law, the court in *Greenwood v. Greenwood*⁴⁵ set forth four elements to determine testamentary capacity, commonly referred to as the *Greenwood-Baker* test.⁴⁶ The four elements are: (1) Did the testator understand the nature of the act he or she was performing; (2) Did the testator know the nature and extent of his or her property; (3) Did the testator know the identity of those who were the “natural objects of his or her

bounty”; and (4) Did the testator understand the will’s disposition of his or her property.⁴⁷ The *Greenwood-Baker* test has been used widely across the country when determining testamentary capacity.

In New York, pursuant to EPTL 3-1.1, “every person eighteen years of age or over, of sound mind and memory” may dispose of real and personal property and exercise a power to appoint such property.⁴⁸ The N.Y. Court of Appeals reasoned in *In re Estate of Kumstar*⁴⁹ that the court must consider the *Greenwood-Baker* test in conjunction with the EPTL.⁵⁰ The Court of Appeals laid out a modified version of the *Greenwood-Baker* test.⁵¹ The Court stated:

*[I]n a will contest . . . “the proponent has the burden of proving that the testator possessed testamentary capacity and the court must look to the following factors: (1) whether she understood the nature and consequences of executing a will; (2) whether she knew the nature and extent of the property she was disposing of; and (3) whether she knew those who would be considered the natural objects of her bounty and her relations with them.”*⁵²

Oftentimes, litigation involving testamentary capacity has focused on factors such as the decedent’s age, physical condition, and progressive mental illness, such factors, however, are not necessarily inconsistent with testamentary capacity, and may not necessarily be the appropriate inquiry. In *In re Estate of Hedges*,⁵³ the Second Department reasoned that the appropriate inquiry is whether the decedent was lucid and rational at the time the will was made.⁵⁴ Where there is conflicting evidence creating an issue of fact drawing possible inferences the issue of capacity is one for the jury, rather than for summary judgment.⁵⁵

As a practical matter, the objectant will often be at a strategic disadvantage when seeking to defeat a motion for summary judgment regarding the decedent’s alleged diminished capacity. This is the case as the proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact.⁵⁶ Once this showing has been made, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action.⁵⁷ In order to establish a material issue of fact with regard to diminished mental capacity, oftentimes the best evidence is medical records of the decedent. However, an objectant may not be in possession of these medical records or the medical records of the objectant may lack the proper foundation to enable their introduction in a legally admissible form.⁵⁸ When seeking to defeat a motion for summary judgment, it will quickly become apparent that there are several significant obstacles to obtain the relevant medical records from medical professionals and facilities. Accordingly, when seeking to establish there is a material question of fact related to the decedent’s capacity, it is critical to obtain the necessary waivers and/or authority from the court early in the proceeding in order to have sufficient time to compel the production of medical records for the decedent in a legally admissible form.⁵⁹

The capacity necessary to execute a power of attorney is higher than testamentary capacity on the mental capacity spectrum.⁶⁰ Many jurisdictions require a different level of capacity to execute a will versus a power of attorney, which requires the capacity to contract.⁶¹ In order to have capacity to contract, the person must be able to understand the nature and consequences of the transaction and make a rational judgment concerning those consequences.⁶² New York General Obligations Law § 5-1501B(1)(b) defines a power of attorney as a document “by which a principal with capacity designates an agent to act on his or her behalf.”⁶³ The principal is deemed to lack the mental capacity to execute a valid power of attorney if he or she is unable to comprehend the nature and consequences of the act, any provision contracted within the act, or the authority of any person to act as an agent under a power of attorney.⁶⁴ The court will look to the principal’s state of mind at the time the document was signed.⁶⁵

Similar to the requisite capacity to execute a power of attorney, a higher level of capacity is required to execute a health care proxy.⁶⁶ The New York law provides that “every adult shall be presumed competent to appoint a health care agent unless such person has been adjudged incompetent or otherwise adjudged not competent to appoint a health care agent, or unless a committee or guardian of the person had been appointed for the agent.”⁶⁷ Furthermore, pursuant to Pub. Health Law § 2980(3), capacity to make health

care decisions means the ability to understand and appreciate the nature and consequences of health care decisions, including the benefits and risks of and alternatives to any proposed health care, and to reach an informed decision. This definition being very similar to that of General Obligation Law § 5-1501(c) would seemingly indicate that contractual capacity is the requisite to execute a health care proxy. However, in practice, a very low level of capacity is generally required.

Although there is some uncertainty, the standard of contractual capacity may be necessary since both the decision-making granted by a health care proxy and durable power of attorney lasts even after the principal has lost capacity.⁶⁸ This supports the theoretical spectrum of mental capacity because of the impact each of the advanced documents has on the principal or testator. A will only becomes effective upon the testator's death and, therefore, has no effect on the testator's life or financial well-being,⁶⁹ whereas a health care proxy and power of attorney are effective when signed, and set forth an agency-relationship between the principal and agent.⁷⁰

V. PROVING A CLIENT'S CAPACITY POST-DEATH

A. PROVING CAPACITY IN TESTAMENTARY TRANSACTIONS

Under EPTL 3-1.1, every person over the age of 18 and "of sound mind and memory" may dispose of his or her property by will.⁷¹ Nevertheless, the New York statute, similar to those statutes in other jurisdictions, fails to adequately set forth the meaning of "sound mind and memory," rather the determination has been developed by case law as applied to the particular circumstances of each case.⁷² Generally, the capacity needed for executing a will requires the lowest form of capacity while the capacity needed for entering into a contract requires a more exacting level.⁷³ In a contested probate proceeding, the contesters are entitled to a jury trial; thus, unless the contesters waive a jury trial, the issue of capacity will be submitted to a jury when the evidence surrounding the testator's capacity is conflicting or there is a possibility of drawing different conclusions.⁷⁴

Customarily, the proponent of the will has the burden to establish by a preponderance of the evidence that the testator was "of sound mind and memory" when the will was executed.⁷⁵ However, there is a presumption of testamentary capacity where there are affidavits of the attesting witnesses, so long as the will was executed with the proper formalities under EPTL 3-2.1.⁷⁶ The existence of the attesting witness' affidavit is enough to shift the burden of proof on testamentary capacity to the party challenging the will.⁷⁷ The contestant is then required to show by a preponderance of the evidence that the testator lacked capacity by more than mere conclusory allegations.⁷⁸ Moreover, when attempting to prove capacity, there only needs to be a showing that the decedent had a "general, rather than a precise, knowledge of [his/her] assets."⁷⁹

Notwithstanding these general burdens and the circumstances resulting in the shifting thereof, there are limited situations in which the burdens may be modified. For example, if the contestant alleges that undue influence was exhibited over the testator in the creation and/or execution of his or her will, the burden on undue influence may shift back and forth between the proponent and the objectant.⁸⁰ Generally, the objectant has the burden to prove undue influence. However, the burden may shift where there is a confidential relationship. The court in *In re Hayes' Estate*⁸¹ held that where the testatrix drafted her will thereby leaving most of her estate to the scrivener, a presumption of undue influence arose based upon the confidential relationship with the scrivener and, thus, the burden shifted back to the proponent.⁸² The proponent of the will was entitled to the initial presumption of capacity and due execution based upon the affidavits of the attesting witnesses, with the burden on the contestant to prove lack of testamentary capacity and undue execution.⁸³ However, the court held when the contestant can prove that the testatrix

had a confidential relationship with a person who may have exhibited undue influence over the decedent and suspicious circumstances were present, the burden shifts back to the proponent to disprove undue influence.⁸⁴ A confidential relationship where an undue influence is asserted generally exists “when one person is dependent on and subject to the control of the other.”⁸⁵ Some examples of confidential relationships are: a testator and the scrivener;⁸⁶ the testator and an attorney or doctor;⁸⁷ the testator and a nurse;⁸⁸ the testator and a psychologist;⁸⁹ the testator and a nursing home director;⁹⁰ the testator and a member of the clergy;⁹¹ the testator and an accountant or financial advisor;⁹² and the testator and an attorney-in-fact.⁹³ Examples of suspicious circumstances include: “a fiduciary relationship; a change of testamentary intention; advanced age, and mental and physical condition of the decedent; the fact that the proponent was the drafter and principal beneficiary under the will and took an active part in procuring its execution; and that the testator acted without independent advice.”⁹⁴

Based upon the test set out in *Kumstar*, the relevant inquiry is whether the testator had capacity at the time the will was executed.⁹⁵ Due to the concept of freedom of disposition and that the testators intent should be given deference in most jurisdictions, courts generally lean toward finding capacity unless the contestant has demonstrated extenuating circumstances.⁹⁶ Although New York’s statutory standard for testamentary capacity, which requires only “sound mind and memory” may seem to suggest a simplistic analysis, the Surrogate is charged with balancing all factors and determining whether the testator possessed the “task-specific functional capacity” at execution.⁹⁷ As the court in *In re Horton’s Will*⁹⁸ stated,

*Each case depends on its own factual situation. But in general, a testator must have sufficient intelligence and capacity to understand the nature and consequences of his testamentary act, to know the nature and extent of his property, and those who may have just or natural claims upon his bounty in its disposition.*⁹⁹

For example, even documentary evidence supporting a finding that the testator suffered from Alzheimer’s is not sufficient alone to prove that a person lacked testamentary capacity because testamentary capacity is limited only to the moment in time when the testator executed his or her will.¹⁰⁰ It need only be shown that he or she had a lucid interval at the time of execution.¹⁰¹ The court in *In re Chiurazzi*¹⁰² held that despite the fact that the decedent suffered from “periods of confusion,” the proponent of the will adequately satisfied the capacity threshold by establishing that the decedent was aware of the natural objects of her bounty and had a general idea of her property at the time of the execution of her will.¹⁰³ Similarly, the court in *In re Estate of Williams*¹⁰⁴ found the testator to be competent to execute a will despite the presence of medical records that showed that the testator had been diagnosed with permanent dementia and that his doctor indicated he did not always know the date.¹⁰⁵ The fact that the evidence showed that the testator was released from a hospital on the condition that he receive 24-hour care was not sufficient on its own to establish that the testator lacked capacity.¹⁰⁶

Another potential problem for an objectant attempting to prove the testator’s lack of capacity is the Dead Man’s Statute, codified in CPLR 4519.¹⁰⁷ The Dead Man’s Statute essentially renders parties and other interested persons incompetent to testify on their own behalf as to communications with the decedent.¹⁰⁸ New York’s Dead Man Statute’s three elements require:

*(1) [a]ny person “interested in the event,” or a predecessor in interest of such person, may not testify in his or her own behalf or that of the successor in interest against; (2) certain protected persons with a specified relationship to the mentally ill person; and (3) concerning a transaction or communication with the decedent or mentally ill person.*¹⁰⁹

These elements are referred to as the disqualified witness, the person that may invoke the protection of its application, and the subject matter that is prohibited by its operation.¹¹⁰

As to the “disqualified witness” element, there are three types of witnesses that are disqualified: “(1) a party interested in the event; (2) a person interested in the event; and (3) a person from, through or under whom such a party or person derived his or her interest by assignment or otherwise.”¹¹¹ All such persons who are witnesses are incompetent to either give testimony on their behalf or on behalf of a successor in interest to him or her.¹¹² Courts have construed the “event,” as referred to in CPLR 4519, as a future

occurrence, in which the person has either a pecuniary or fee interest.¹¹³ Moreover, to fall within the purview of the statute, the interest itself must be “present, certain, and vested . . . and not an interest uncertain, remote, or contingent.”¹¹⁴ To be interested in the event, the witness must “either gain or lose by the direct legal operation and effect of the judgment, or . . . the record will be legal evidence for or against him in some other action.”¹¹⁵

With respect to the second element, protected persons who can invoke the protection of the statute, fall into three categories: “(1) the executor or administrator of the decedent’s estate or the guardian of the mentally ill person; (2) a ‘survivor’ of the decedent; and (3) a person deriving his or her title or interest from, through, or under the decedent or mentally ill.”¹¹⁶ There is a plethora of case law on the application of the statute regarding the executor or the administrator of the decedent’s estate. The executor or the administrator may invoke the protection of the statute no matter if he or she is defending a claim against the estate or bringing a claim on behalf of the estate.¹¹⁷

Finally, once it is known who is disqualified and who may invoke the protection of the statute, you must determine what subject matter is prohibited by operation of the statute. The Court of Appeals in the seminal case of *Griswold v. Hart* held that an interested witness may not testify against members of the protected class “concerning a personal transaction or communication between the witness and the deceased person or [mentally ill person.]”¹¹⁸ In addition, the application of the rule also prohibits the witness from giving “negative” testimony in relation to the things that the decedent did, said, or his or her failure to do things.¹¹⁹ While the purpose of the Dead Man’s Statute is to prevent witnesses from giving testimony against a deceased person who cannot controvert such testimony, the statute and its application causes a perplexing problem for practitioners as it may preclude the testimony of the person that is most likely to have knowledge of the cognitive capabilities of the decedent before his or her death.

Generally, the Surrogate’s Court’s determination of whether the testator had capacity is subject to great deference and will not be disturbed absent the great weight of the evidence to the contrary.¹²⁰ The Fourth Department in *In re Will of Buckten*¹²¹ reversed the Surrogate’s findings that the proponent failed to demonstrate “due execution” of the will.¹²² The court reasoned that, generally, an appellate court will not disturb the determination of a Surrogate with respect to due execution and capacity.¹²³ However, when the great weight of the evidence shows to the contrary, the determination should be reversed.¹²⁴

B. PROVING CAPACITY FOR CONTRACTS, TRUSTS, AND INTER VIVOS TRANSFERS

The burden of proof for capacity for contracts, trusts, and inter vivos transfers differs from the burden of proof of proving capacity to make a will. The court will look to the transaction itself to determine what standard of proof should apply. A will is considered to be a unilateral transaction, but a trust is deemed to be a bilateral transaction that is consistent with a contract.¹²⁵ Therefore, the capacity to create a valid trust is the same as the capacity to make a valid contract.¹²⁶ The Surrogate’s Court, in *In re Rosen*,¹²⁷ opined that the standard of capacity to make a valid gift is the same as a trust.¹²⁸ Where the transfer is by gift, the donee bears the burden of proving, by clear and convincing evidence, that the gift was voluntary and knowingly made by the donor, uninfluenced by fraud, duress or coercion.¹²⁹

A. INTER VIVOS TRANSFERS

In *Kirshtein v. AmeriCU Credit Union*,¹³⁰ the Appellate Division reviewed the Supreme Court’s determination, which involved a dispute regarding capacity to make an inter vivos transfer of stock certificates.¹³¹ The court instructed the jury that the contestant had the burden to prove by clear and convincing evidence that, at the time of the stock transfers, the decedent had lacked the mental capacity to enter into a contract.¹³² The court reasoned that the burden of proof in will contests is different from the burden of proof in inter vivos transfers. More specifically, in an action to probate a will, the proponent of the will must establish the decedent’s testamentary capacity by a fair preponderance of the evidence only

once that capacity has been put in issue.¹³³ However, in an action involving an inter vivos transfer, the contestant has the burden of establishing the transferor's incapacity.¹³⁴

The contestant in this case submitted evidence including a police report and hospital records indicating that the donor suffered from dementia.¹³⁵ The evidence further included testimony from an attorney who had drafted the decedent's will but ultimately determined the decedent did not have the capacity to execute the will; and testimony of an expert psychiatric witness, a nursing home physician, and an expert witness in geriatric medicine, who all maintained that the decedent did not have the capacity to understand the nature of the stock transfers.¹³⁶ The court subsequently held that the donor did not have the capacity to execute the inter vivos transfer.¹³⁷

B. TRUSTS

The first case to address the issue of the capacity standard to execute a trust was *In re ACN*.¹³⁸ The Surrogate's Court found a unitrust to be analogous to that of a contract given its bilateral relationship between the settlor and the trustee.¹³⁹ The court followed the two-part test set forth in a decision rendered by the Court of Appeals in *Ortelere v. Teacher's Retirement Bd.*¹⁴⁰ The test involves (1) application of the *cognitive test* in which the focus is on whether an individual could understand the nature and consequences of the transaction and "be able to make a rational judgment concerning the particular transaction," and (2) the question of whether "by reason of *mental illness or defect*" the settlor is "unable to act in a reasonable manner in relation to the transaction."¹⁴¹ Following the burden in *Kirshtein*, the court in *Ortelere* held that the contestant bears the burden to prove by clear and convincing evidence that the settlor lacked the requisite mental capacity to enter into a contract.¹⁴²

In this case, the decedent was a savvy tax lawyer and executed a trust in which the decedent and his wife held life-time interests with a fee simple remainder to a charitable organization.¹⁴³ The court considered the creation of the trust to be that of a contract because there was a present property interest, which was surrendered in exchange for annual interest.¹⁴⁴ The court considered the testimony from longtime friends of the decedent; attorneys with whom he shared office space; family; a personal physician; an expert on unitrusts; the guardian ad litem appointed for the decedent during his conservatorship proceeding; and a forensic psychiatrist, who all supported the position that the decedent lacked mental capacity.¹⁴⁵ Based upon the totality of the evidence, the court found that a showing of "clear and convincing credible evidence" had been made on the part of the contestant.¹⁴⁶ The court reasoned that the settlor suffered from insane delusions and lacked the capacity to execute the trust, which satisfied the two-part test.¹⁴⁷

C. ANTENUPTIAL AGREEMENTS

In *In re Will of Goldberg*,¹⁴⁸ the decedent executed a will releasing his wife from their antenuptial agreement and a dispute arose as to whether he had the capacity to do such through his will.¹⁴⁹ The court held that the requisite capacity for revoking the antenuptial agreement, even though it was effectuated in the decedent's will, was, in fact, higher than the capacity required for making and executing a will. The capacity to release the spouse from the antenuptial agreement was that of entering into a contract.¹⁵⁰ The decedent was diagnosed with organic brain syndrome resulting from two heart attacks and a stroke.¹⁵¹ The court held the antenuptial agreement required a higher level of capacity because the "[decedent's] revocation . . . represented the surrender of his testamentary freedom in response to his wife's future needs," creating a bilateral transaction.¹⁵² Proving incapacity involved many factors, including whether the decedent understood the revocation, whether his decision was guided by independent advice and most importantly, whether the transaction is one that a "reasonably competent person" would make.¹⁵³ The court subsequently held that the decedent did have the requisite mental capacity to execute such a release in his will.¹⁵⁴

VI. CONCLUSION

The trusts and estates practice area, especially in the areas of estate litigation and elder law, poses unique problems for litigators. Generally, in other areas of litigation, the attorney has the benefit of the testimony of the aggrieved party to assist in carrying his or her client's burden and/or defending against a claim. In our realm of practice, a practitioner must rely on the testimony of others, which oftentimes is influenced by personal financial motivations, bias or may be barred entirely by operation of law. Accordingly, the court or the trier of fact is often left to draw inferences from the medical records and other pieces of documentary evidence, in addition to wading through self-serving sworn statements and testimonial evidence from interested parties. For the most litigating attorneys, it can be a great challenge to marshal compelling evidence to establish the decedent possessed or lacked mental capacity. Practitioners, especially scriveners, should take special note of these concerns when attempting to assist clients with advanced directives and testamentary transactions as their contemporaneous correspondence, notes and records are often relied on to determine if the decedent possessed sufficient capacity to execute the challenged legal document.

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ENDNOTES

1. *In re Estate of Kumstar*, 487 N.E.2d 271, 272 (1985). See generally *Horn v. Pullman*, 72 N.Y. 269 (1878); *Clarke v. Sawyer*, 2 N.Y. 498 (1849); *In re Will of Slade*, 106 A.D.2d 914 (4th Dep't 1984); *In re Beneway's Will*, 272 A.D. 463 (3d Dep't 1947); *In re Horton's Will*, 26 Misc. 2d 843 (Sur. Ct., Suffolk Co. 1960), *aff'd*, 13 A.D.2d 506 (2d Dep't 1961).
2. Robert P. Roca, *Determining Decisional Capacity: A Medical Perspective*, 62 Fordham L. Rev. 1177, 1180 (1994).
3. Informational Brochure, The Alzheimer's Ass'n, 2016 Facts and Figures (last visited Oct. 13, 2016), http://alz.org/documents_custom/2016-facts-and-figures.pdf (2016 Facts and Figures).
4. *Id.*
5. *Id.*
6. *Id.*
7. *Id.*
8. *Id.*

9. *Id.*
10. *Id.*
11. *Id.*
12. 2016 Facts and Figures Overview, The Alzheimer's Association (last visited Oct. 13, 2016), <http://alz.org/facts/overview.asp>.
13. Robert B. Flemming, *Representing the Elderly Client or the Client with Diminished Capacity*, 50 *Fam. L.Q.* 27, 28 (2016).
14. See *2016 Facts and Figures*, *supra* note 3.
15. *Id.*
16. Informational Brochure, Nw. Univ. Feinberg Sch. of Med, What Is Primary Progressive Aphasia (last visited October 9, 2016) <http://brain.northwestern.edu/dementia/ppa/index.html>.
17. *Id.*
18. *Id.*
19. *Id.*
20. *Id.*
21. *Id.*
22. Walter T. Burke, *Ethical and Psychological Aspects of Representing the Elderly*, 13 *Experience* 5, 8 (2003).
23. *Id.*
24. *Id.*
25. A. Frank Johns & Bernard A. Krooks, *Elder Clients with Diminished Capacity: NAELA's Response to Specific Case Applications and Its Development of Aspirational Standards That May Cross Professional Organization Boundaries*, 1 *Nat'l. Acad. of Elder L. Attorneys J.* 197, 214 (2005).
26. Lindsay Holmes, *11 Statistics That Will Change the Way You Think About Depression*, *The Huffington Post* (Jan. 20, 2015, 8:21 AM), www.huffingtonpost.com/2015/01/20/depression-statistics_n_6480412.html.
27. *Id.*
28. *Id.*
29. Roca, *supra* note 2, at 1185.
30. *Id.*
31. N.Y. Rules of Prof'l Conduct Rule 1.14(a) (2015).
32. N.Y. Rules of Prof'l Conduct Rule 1.3(a)(b) (2015).
33. N.Y. Rules of Prof'l Conduct Rule --1.2 (2015).
34. N.Y. Rules of Prof'l Conduct Rule 1.6(a) (2015).

35. N.Y. Rules of Prof'l Conduct Rule 1.16(c)(1) (2015).
36. N.Y. Rules of Prof'l Conduct Rule 1.16(e) (2015).
37. *Id.*
38. *In re Ernest*, 271 A.D. 1059, 1059 (4th Dep't 1949).
39. N.Y. Rules of Prof'l Conduct Rule 1.14(b) (2015).
40. N.Y. Rules of Prof'l Conduct Rule 1.6(a) (2015).
41. N.Y. Rules of Prof'l Conduct Rule 8.3(a) (2015).
42. Lawrence A. Frolik, *Sufficient Capacity: The Contrasting Capacity Requirements for Different Documents*, 2 Nat'l. Acad. of Elder L. Attorneys J. 303 (2006).
43. See generally *In re Estate of Kumstar*, 487 N.E.2d 271 (1985); N.Y. Gen. Oblig. Law § 5-1501(c) (McKinney 2009).
44. Frolik, *supra* note 42, at 303.
45. 163 Eng. Rep. 930 (1790).
46. *Id.* at 931.
47. *Id.*
48. N.Y. Est. Powers & Trusts Law 3-1.1 (McKinney 1966).
49. 487 N.E.2d 271 (1985).
50. *Id.* at 272.
51. *Id.*
52. *Id.* (quoting *In re Slade*, 106 A.D.2d 914, 915 (4th Dep't 1984)).
53. 100 A.D.2d 586 (2d Dep't 1984).
54. *Id.* at 587.
55. N.Y. Est. Powers & Trusts Law 3-1.1 (McKinney 1966) (practice commentary) (Patrick Rohan Pg. 275).
56. *Alvarez v. Prospect Hosp.*, 501 N.E.2d 572, 573 (N.Y. 1986).
57. *Zuckerman v. City of New York*, 404 N.E.2d 718, 719–20 (N.Y. 1980).
58. *Joseph E. G. v. East Irondequoit Cent. Sch. Dist.*, 273 A.D.2d 835, 836 (4th Dep't 2000) (granting summary judgment as the uncertified, unsworn medical records were not in admissible form).
59. This is normally accomplished through certification of the medical records pursuant to CPLR 3122-a(c) and CPLR 4518(c).
60. See generally N.Y. Gen. Oblig. Law § 5-1501(c) (McKinney 2009).
61. *Id.*; 22 N.Y. Jur. 2d *Contracts* § 26 (2016).

62. 22 N.Y. Jur. 2d *Contracts* § 26 (2016).
63. N.Y. Gen. Oblig. Law § 5-1501(c) (McKinney 2009).
64. *Id.*
65. *In re Imre B.R.*, 40 Misc. 3d 1237(A) (Sup. Ct., Dutchess Co. 2013).
66. N.Y. Pub. Health Law § 2981 (McKinney 2012).
67. *Id.*
68. Frolik, *supra* note 42, at 303.
69. *Id.*
70. N.Y. Gen. Oblig. Law § 5-1501(c) (McKinney 2009).
71. N.Y. Est. Powers & Trusts Law 3-1.1 (McKinney 1966).
72. N.Y. Pattern Jury Instr. Civil § 7:48 (2015).

Under our law a person of sound mind and memory is said to possess testamentary capacity and may dispose of (his, her) property by will. The question you must decide is whether the testator possessed these mental qualities at the time (he, she) executed this will. The law does not define any particular grade of mental ability necessary to qualify a person to make a will. Wills are made by all types of people, in every stage of life and condition of health; by persons of weak intellect and by those of great ability. The fact that a person is old, or uneducated, or sick, or lacking in business experience, does not prevent him or her from making a valid will. Testamentary capacity, therefore, must be judged by all the circumstances of the case, taking into consideration the particular testator and the particular will involved.

73. *In re Estate of Donaldson*, 38 Misc. 3d 841, 844–45 (Sur. Ct., Richmond Co. 2012); *In re Matter of Will of Goldberg*, 153 Misc. 2d 560, 565 (Sur. Ct., N.Y. Co. 1992).
74. *Id.*
75. *In re Donovan's Estate*, 47 A.D.2d 923, 924 (2d Dep't 1975). See *In re McCloskey*, 307 A.D.2d 737, 738 (4th Dep't 2003).
76. *In re Estate of Johnson*, 6 A.D.3d 859, 860–61 (3d Dep't 2004); N.Y. Est. Powers & Trusts Law 3-2.1 (McKinney 1974).
77. *Id.*
78. *Id.*
79. *In re Estate of Vosilla*, 121 A.D.3d 1489, 1491 (3d Dep't 2014).
80. *In re Hayes' Estate*, 49 Misc. 2d 152 (Sur. Ct., Bronx Co. 1966).
81. *Id.*
82. *Id.* at 153.
83. *Id.*
84. *Id.*

85. 2 Harris N.Y. Estates: Probate Admin. & Litigation 24:278 (6th ed. 2015).
86. *In re Putnam's Will*, 257 N.Y. 140 (1931).
87. *In re Burke*, 82 A.D.2d 260 (2d Dep't 1981).
88. *Petrie v. Chase Manhattan Bank*, 38 A.D.2d 206 (1st Dep't 1972).
89. *Estate of Reiner*, 86 Misc. 2d 511 (Sur. Ct., N.Y. Co. 1976).
90. *Estate of Arnold*, 125 Misc. 2d 265 (Sur. Ct., N.Y. Co. 1983).
91. *Estate of Eckert*, 93 Misc. 2d 677 (Sur. Ct., N.Y. Co. 1978).
92. *Will of Bartel*, 161 Misc. 2d 455 (Sur. Ct., N.Y. Co. 1994), *aff'd*, 214 A.D.2d 476 (1st Dep't 1995).
93. *Matter of Bach*, 133 A.D.2d 455 (2d Dep't 1987).
94. 2 Harris N.Y. Estates: Probate Admin. & Litigation § 24:278 (6th ed. 2015).
95. *Estate of Kumstar*, 66 N.Y.2d 691, 691 (1985).
96. Jesse Dukeminier & Robert H. Sitkoff, *Wills, Trusts, and Estates* 19 (Vicki Been et al. eds., 9th ed. 2013).
97. See generally *In re Will of Khazaneh*, 15 Misc. 3d 515 (Sur. Ct., N.Y. Co. 2006).
98. 26 Misc. 2d 843 (Sur. Ct., Suffolk Co. 1960).
99. *Id.* at 847 (citing *Delafield v. Parish*, 25 N.Y. 9 (1862); *In re Coddington's Will*, 281 A.D. 143 (3d Dep't 1952), *aff'd*, 120 N.E.2d 777 (1954)).

One may be able to make a will though afflicted with a fatal disease. A will is not necessarily rejected because testator does not make it until near death, nor because he is ill or weak. [O]ne need not have perfect mind or memory[.] An elderly person may have good days and poor days. Testamentary capacity is not destroyed retroactively by events happening after execution. (citations omitted)

100. *In re Minasian*, 149 A.D.2d 511, 511 (2d Dep't 1989).
101. *In re Estate of Buchanan*, 245 A.D.2d 642, 645 (3d Dep't 1997).
102. 296 A.D.2d 406 (2d Dep't 2002).
103. *Id.* at 407.
104. 13 A.D.3d 954 (3d Dep't 2004).
105. *Id.* at 956–57.
106. *Id.*
107. CPLR 4519 (McKinney 1962).
108. *Id.* (practice commentary) (Vincent C. Alexander § C4519:1). CPLR 4519 provides in pertinent part:

Upon the trial of an action or the hearing upon the merits of a special proceeding, a party or a person interested in the event, or a person from, through or under whom such a party or

interested person derives his interest or title by assignment or otherwise, shall not be examined as a witness in his own behalf or interest, or in behalf of the party succeeding to his title or interest against the executor, administrator or survivor of a deceased person or the committee of a mentally ill person, or a person deriving his title or interest from, through or under a deceased person or mentally ill person, by assignment or otherwise, concerning a personal transaction or communication between the witness and the deceased person or mentally ill person, except where the executor, administrator, survivor, committee or person so deriving title or interest is examined in his own behalf, or the testimony of the mentally ill person or deceased person is given in evidence, concerning the same transaction or communication.

109. *Id.* (practice commentary) (Vincent C. Alexander § C4519:1).
110. *Id.*
111. *Id.*
112. *Id.*
113. *Tworkowski v. Tworkowski*, 181 Misc. 2d 1038, 1041 (Sup. Ct., Kings Co. 1999).
114. *Laka v. Krystek*, 261 N.Y. 126, 130 (1933).
115. *Id.*
116. CPLR 4519 (McKinney 1962) (practice commentary) (Vincent C. Alexander § C4519:3).
117. *De Laurent v. Townsend*, 243 N.Y. 130, 132–33 (1926).
118. 205 N.Y. 384, 387 (1912).
119. *Endervelt v. Slade*, 162 Misc. 2d 975, 980 (Sup. Ct., N.Y. Co. 1994), *aff'd*, 214 A.D.2d 546 (1st Dep't 1995).
120. *In re Chiurazzi*, 296 A.D.2d 406.
121. *Id.*
122. *Id.* at 981–82.
123. *Id.*
124. *Id.*
125. *In re ACN*, 133 Misc. 2d 1043 (Sur. Ct., N.Y. Co. 1986).
126. *Id.*
127. 17 Misc. 3d 1103(A) (Sur. Ct., Kings Co. 2007).
128. *Id.* at *5–6.
129. *Id.*
130. 83 A.D.3d 153 (4th Dep't 2011).
131. *Id.* at 155.
132. *Id.* at 159.

133. *Id.* at 158.
134. *Id.*
135. *Id.* at 156.
136. *Id.* at 156.
137. *Id.* at 161.
138. *ACN*, 133 Misc. 2d at 1043.
139. *Id.* at 1046–47.
140. *Id.* at 1047 (citing *Ortelere v. Teachers Retir. Bd.*, 25 N.Y.2d 196, 201–02 (1969)).
141. *Id.* at 1047 (emphasis added).
142. *Id.* at 1048.
143. *Id.* at 1044.
144. *Id.* at 1047.
145. *Id.* at 1046.
146. *Id.* at 1048.
147. *Id.*
148. 153 Misc. 2d 560 (Sur. Ct., N.Y. Co. 1992).
149. *Id.* at 561.
150. *Id.* at 565.
151. *Id.* at 561.
152. *Id.* at 565.
153. *Id.* at 566.
154. *Id.* at 567.