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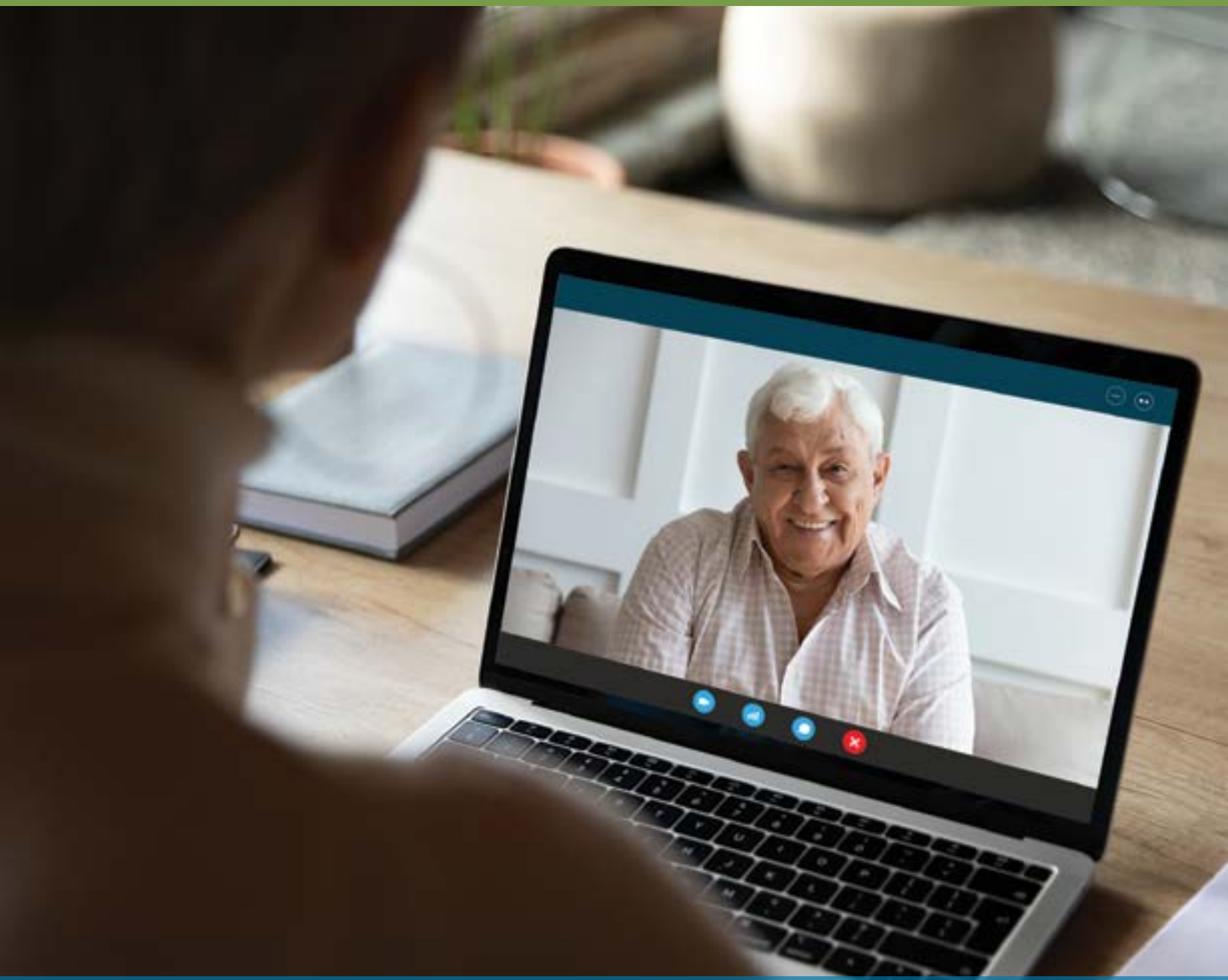

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By Christina Lamm

Introduction

Assessing client capacity is a regular occurrence for elder law and estate planning attorneys. The process is made more complex because there are different levels of capacity required to execute different documents. This article will focus on testamentary capacity and how to proceed when it is "questionable." To make a determination of whether a client has capacity, the attorney must sometimes act as an untrained psychologist, an often difficult task in the murky world of capacity.

This year the COVID-19 pandemic has made judging client capacity even more difficult. With the rapid change of events and the sudden shutdown, attorneys were no longer conducting in-person interviews. Not only were initial client intakes done virtually or over the phone, but Executive Orders from the governor allowed for virtual will executions and notarization. Assessing a client's capacity virtually or over the phone adds another level of complexity to estate planning, something elder law attorneys are still working to traverse.

Testamentary Capacity

Testamentary capacity is the lowest form of capacity required by the law and has been so for centuries.[1] This hearkens back to the strong public policy that a person should be able to direct the way his or her estate should be distributed at death. In New York, the determination of testamentary capacity is governed by *Estate of Kumstar*.[2] In *Kumstar,* the Court of Appeals stated:

> In a will contest that "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."[3]

This standard must be proven by a preponderance of the evidence.[4] The issue of capacity only goes to the jury when the evidence surrounding a testator's capacity is conflicting or there is a possibility of drawing different conclusions.[5] The proponent is entitled to a presumption of testamentary capacity through the affidavits of the attesting witnesses alone.[6] The mere fact that the witnesses to the execution of a will stated that the they observed no physical or mental impairment in the testator that would affect decedent's ability to comply with steps one though three is enough to shift the burden of proof to the contestant.[7] The contestant is then required to show by a preponderance of the evidence that the testator lacked capacity by more than mere allegations.[8]

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Even the documented existence of Alzheimer's Disease, for example, is not enough to prove that a person lacked testamentary capacity, because this type of capacity is really about the slim time period when the testator was actually sitting down signing his will.[9] The proponent of the will must only demonstrate that the testator had a "lucid interval" at the time of execution.[10]

Lucid Interval

A lucid interval is defined in this context as "a period of time during which the person was coherent and the threshold for testamentary capacity is met."[11] A testator with diagnosed dementia, mental illness, or even incompetence can have a lucid interval sufficient to execute a valid will.[12] *In re Estate of Williams*[13] illustrates this point. The court in *Williams* found the testator to be competent to execute a will despite presence of medical records showing the testator had been diagnosed with permanent dementia and that his doctor indicated he did not always know the date.[14]

Complicating matters even further are recent studies suggesting that the idea of a "lucid interval" is simply a legal fiction ensconced in decades of precedent which ef-

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fectively allows the courts to arrive at equitable solutions to complex problems using their own judgment.[15] A 2015 article in the *Journal of the American Academy of Psychiatry and the Law* delves into this very issue, citing numerous clinical studies.[16] The studies conclude that these cognitive fluctuations, or "good days and bad days," generally are attention based and short-lived.[17]

Objections Expected

Whether the testator satisfied the three *Kumstar* factors discussed above is, on a basic level, judged by the people in the room at the time of the will execution, i.e., the attorney and the other witnesses. If and when a will contest is initiated the supervising attorney's judgement of the testator's capacity is questioned and scrutinized. The supervising attorney and the other witness(es) will have to testify about the testator's capacity. If a testator who ofttimes suffers from diminished capacity executes his or her will during a lucid interval how does a proponent demonstrate that? Witnesses will be called and examined, but unless they knew the testator before the signing of the will how can one truly say the testator was lucid both during the execution and when giving the attorney instructions? The question of testamentary capacity, and particularly a lucid interval, is subjective and must be judged on a case-by-case basis by evaluating the testator's mental capacity both at the planning stage and the execution stage.

Once the attorney determines that the client possesses the requisite capacity to execute a will during a his or her lucid interval and moves forward, extra care should be taken to make sure there is strict adherence to the formalities of EPTL 3-2.1. Additionally, there is a presumption of testamentary capacity that follows if a will has a self-proving affidavit, signed by the attesting witnesses, attached to it, hence shifting the burden of proving a lack of testamentary capacity to the objectant(s) to the will.[18] The objectant(s) would then be called upon to raise concrete issues of fact, not mere conclusory allegations, in order to overcome the presumption.

This can prove to be a steep hill for the objectant to climb as "proof." Opinions of doctors that have not examined the testator are given the least weight and it is increasingly difficult to gain access to records of the decedent's medical history on the dates surrounding the will execution.[19] Even a diagnosis of dementia on its own is insufficient to conclude that the testator lacks testamentary capacity.[20] Furthermore, evidence of the testator's general capacity directly before or after the drafting of the will is allowed to come to light, and while this evidence will be admitted, its significance depends entirely on its relevance in regard to the "strength or weakness of mind" at the time of execution.[21]

Going Above and Beyond

Notwithstanding the fact that rebutting a presumption of testamentary capacity can be difficult, preparing for the challenge beforehand can tip the scales. These situations of diminished capacity are exactly the kind where "something more" than the mere formalities of a will execution will go a long way in making sure the wishes of the testator are carried out after death.

One simple and effective way to protect a client with diminished capacity is to take detailed contemporaneous notes surrounding the drafting and execution of the client's will. Memory fades, but the notes stating that the testator understood what was in the will, who were the beneficiaries under the will, and that the testator executed the will only after drafts were reviewed and changes made will go a long way in disputing evidence of incapacity. The attorney should interview the client alone and ask open-ended questions to document and memorialize the client's capacity.

While it is generally not recommended for an attorney to use formal clinical instruments themselves to measure a potential client's capacity as attorneys lack the in-depth training needed to use and interpret these clinical tests,[22] it could be beneficial to have one or more medical/psychological exams conducted around the time of the will execution if a challenge is expected. A client's longtime personal physician could also make a statement that the client was generally of "sound mind" around the time of the will execution. These medical exams or statements could then be stored in the file ready for use should the need arise. The attorney should bear in mind that if a psychological evaluation is conducted and there are real questions of capacity, having that record on file would backfire. An attorney trying to show that a client experiences the lucid intervals requisite for testamentary capacity would not benefit from a mental exam showing severe cognitive impairment.

Another tool that can be used in the right case is videotaping of the execution along with some videotaped questions as to the disposition of property. However, be careful because videotaping may have more drawbacks than advantages. Videotaping itself can make a person nervous, particularly a person with diminished capacity, which could in fact exacerbate the issue.[23]

Assessing Capacity During the COVID-19 Pandemic

COVID-19 has changed the landscape of estate planning. The practice of law turned virtual overnight and assessing a client's capacity is inherently more difficult when not done in person. From Zoom to Skype to Facetime, practitioners now need to sit in front of a screen with their clients, many of whom are elderly, to determine whether or not this person, whom they have never

met before, has the requisite capacity to dispose of their earthly possessions. This novel situation is also happening in the midst of an anxiety producing situation, the likes of which has not been seen in over 100 years. On a general level, many elderly clients have never used these virtual mediums. Just talking to somebody virtually can cause confusion and anxiety. A client with diminished capacity would likely experience these feelings on an even greater scale, causing it to be difficult, if not impossible, to say for sure whether the client is coherent and satisfies the three *Kumstar* factors.

There are steps that can be taken in order to mitigate some of these issues. First and foremost, the attorney should make sure that the client is comfortable with the virtual platform being used. If the client is not, a practice session could come in handy to help the client familiarize him or herself with the process of signing on and using the features of the platform. If that does not work, a telephone call may be the better route for the initial client intake. While the attorney will not be able to visually assess the client, the telephone will likely be familiar to the client and should not cause undue confusion.

Attorneys conducting virtual meetings should also engage the clients in extensive conversation, even more than they would under face-to-face circumstances. This allows for the attorney to really assess what the client does and does not understand. Can the attorney say for certain the client understands the nature and consequences of making a will; knows the nature and extent of his or her property; and knows the natural objects of his or her bounty and relations with them?[24] Ask the client to detail his or her finances, who are his or her nearest relatives, and if relevant, why he or she is making distributions that would differ from who would inherit in the absence of a will. It is critical to **take the notes** and document in written form what was said at the time of the will execution. Additionally, many of these virtual platforms allow for recording of the meetings. In certain instances, it may be beneficial to record the sessions.

Conclusion

Testamentary capacity is not black and white; it is gray. Determining whether a person you just met has the necessary capacity to execute a valid will is not something that can be taken lightly. Again, as an attorney, and not a psychologist, it boils down to instincts and whether the attorney feels comfortable putting his or her reputation on the line. If an attorney decides to move forward with a client who possesses questionable capacity, it is strongly recommended that additional steps are taken to help ensure that the testator with diminished capacity did, in fact, experience those lucid intervals.

Endnotes

1. See *In re Seagrist's Will*, A.D. 615, 620 (1st Dep't 1896), *aff'd*, 153 N.Y. 682 (1897); *Clapp v. Fullerton*, 34 N.Y. 190, 197 (1866); and *In re Delmar's Will*, 243 N.Y. 7, 10-11 (1926).
2. *Estate of Kumstar,* 487 N.E.2d 271 (N.Y. Ct. of App. 1985).
3. *Id.* at 272; quoting *In re Slade,* 483 N.Y.S.2d 513, 514 (App. Div. 4th Dep't 1984).
4. *See In re McCloskey*, 763 N.Y.S.2d 187 (App. Div. 4th Dep't 2003).
5. *Id.*
6. *In re Estate of Johnson*, 775 N.Y.S.2d 107, at 109 (App. Div. 3d Dep't 2004).
7. *Id.*
8. *Id.*
9. *In re Minasian*, 540 N.Y.S.2d 722, 722 (App. Div. 2d Dep't 1989).
10. *Estate of Buchanan,* 665 N.Y.S.2d 980, 983 (App. Div. 3d Dep't 1997).
11. Sarlis, Jim, *The Nature and Extent of a Testator's Property: What Degree of Awareness is Required for Testamentary Capacity in New York,* NYSBA Trusts and Estates Law Section Newsletter (Vol. 45, No. 3).
12. *In re Cookson*, 49 Misc.3d 1219(A) (N.Y. Surr. Ct., 2015).
13. 787 N.Y.S.2d 444 (App. Div. 3rd Dep't 2004).
14. *Id.* at 446.
15. Shulman, Kenneth I., Hull, Ian M., Sam DeKoven, et al., *Cognitive Fluctuations and the Lucid Interval in Dementia: Implications for Testamentary Capacity*, J. Am. Acad. Psychiatry Law 43:3, 287, 288 (2015).
16. *Id.*
17. *Id.* at 289.
18. See *In re Schlaeger*, 74A.D.3d 405, 407 (1st Dep't 2010).
19. See *In re Swain*, 125 A.D.2d 574 (2d Dep't 1986).
20. See *In re Friedman*, 26 A.D.3d 723 (3d Dep't 2006).
21. *In re Hedges*, 100 A.D.2d 586, 592 (2d Dep't 1984).
22. ABA Commn. on L. & Aging & Am. Psychological Assn., *Assessment of Older Adults with Diminished Capacity: A Handbook for Lawyers* (2005), 20.
23. *Id*. at 21.
24. *Estate of Kumstar,* 487 N.E.2d 271 (N.Y. Ct. of App. 1985).