
Volume 117
Issue 4 *Dickinson Law Review - Volume 117,*
2012-2013

3-1-2013

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Robert Whitman, *Capacity for Lifetime and Estate Planning*, 117 DICK. L. REV. 1061 (2013).
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Capacity for Lifetime and Estate Planning

Robert Whitman*

Abstract

Clients consulting with elder and estate planning attorneys for estate planning documents will likely receive a “package” of five documents: a will, a trust (revocable or irrevocable), a health care power, a durable power of attorney, and a living will. Although capacity standards have varied for each of the items in the “package,” an informal survey of American College of Trust and Estate Counsel (ACTEC) members reveals that practitioners do not pay attention to these distinctions when they create the “package.” Practitioners are either unwilling to accept the engagement for lack of competence or willing to overlook the capacity distinctions when accepting the engagement. This article thus advocates for a uniform test for capacity when an attorney considers preparing the “package” for a client.

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I. INTRODUCTION

In lifetime and estate planning today, a client on consulting an attorney—whether the attorney holds herself out as a general practitioner,¹ elder lawyer,² or trusts and estates lawyer³—often will receive five planning documents at the same time. These documents include a will, a trust (revocable or irrevocable), a health care power, a durable power of attorney, and a living will.

For this article's purposes, these items will be termed the "package." Usually, the package includes all of the documents mentioned above. The issue posed here is whether lawyers should apply the same standards for mental capacity for all lifetime and estate planning done at the same time. This article will proceed as follows: Part I will provide an overview of the capacity questions. Part II will explore historical roots for capacity standards and will evaluate modern trends for the varying standards for judging capacity. Part III will review recent cases dealing with varying standards for mental capacity, and Part IV will advance a unitary test for capacity.

II. VARYING STANDARDS FOR MENTAL CAPACITY

This Part surveys the varying standards for mental capacity. Section A traces the historic development of the different standards for judging mental capacity for lifetime and estate planning. Section B then discusses specific standards of capacity for specific legal transactions, such as capacity to make an *inter vivos* gift, capacity to convey real property, and capacity for health care proxies. Finally, Section C

1. Any individual in good standing as an attorney in a state is qualified to conduct a general practice in that state, including a practice of elder law or trusts and estates law.

2. Attorneys may refer to themselves as elder lawyers, or as trusts and estates lawyers. While elder lawyers may carry out many of the tasks done by trusts and estates lawyers, the elder lawyer is likely to also deal with matters that particularly affect the elderly and disabled. Social security issues, transfer of assets, guardianships (also known in some states as conservatorships), capacity, and working with a functional family group are often some of the matters dealt with by elder lawyers.

3. Trusts and estates lawyers are more likely to draft complex instruments with international, federal, and state tax issues in mind, prepare buy-sell agreements, irrevocable life insurance trusts, grantor retained annuity trusts, generation skipping trusts, and deal with complex estate and trust administrations. It is important to note that there are no set boundaries. Rather, the attorney will deal with matters depending on her experience and expertise.

evaluates the actual judgments practicing lawyers make when deciding whether to create the package for a client.

A. Historical Standards for Mental Capacity

Historically, different standards developed for judging mental capacity for various items in the package. At common law in England, different courts (*e.g.*, the law courts and the ecclesiastical courts) would deal with various items of the package. Varying standards of capacity in various situations came to the common law through Roman law.⁴ Capacity standards continue to be different depending on the transaction involved.⁵ For instance, state law may require that, for making gifts, a person must understand the property dispositions being made, the persons and objects of his or her bounty, and the amount that the gift would deplete the donor's assets.⁶ By contrast, for a valid durable power of attorney, health care directive, or living will, a higher standard for mental capacity has been required.⁷ For a will, the capacity standard likely will be lower.⁸

Practitioners who prepare the package tend to overlook the varying standards for capacity. In representing a client, many practitioners disregard nuances in the tests, either drafting documents for the entire package or withdrawing from the engagement. If the attorney finds the client mentally capable for part of the items contained in the package, the attorney will often find competency for all of the items. In other words, from a practical point of view, the differences in capacity standards are essentially overlooked⁹ when the documents are drafted. This result occurs in spite of the fact that varying degrees of capacity remain in the law and that they would be meaningful if documents for the package are completed at different times or the issue is brought up in some later litigation.¹⁰

4. EUNICE L. ROSS & THOMAS J. REED, WILL CONTESTS § 2.4 (2d ed. 2012) (citing HENRY SWINBURNE, A BRIEF TREATISE OF TESTAMENTS AND LAST WILLS (Garland Publ'g 1978) (1590).

5. *Id.*

6. *See infra* Part II.B.

7. *See infra* Part II.B.

8. *See infra* Part II.B.

9. E-mails from members of the American College of Trust and Estate Counsel (ACTEC) to Robert Whitman, Professor of Law, University of Connecticut Law School (Dec. 2012) (on file with author). An informal survey of several members of the ACTEC reveals little concern for the variations in capacity standards when all the documents for the package are being prepared at the same time.

10. In litigation, the rules concerning who has the burden of proof may have a substantial effect on the ability to prove capacity or incapacity. Commonly, experts for each side will clash over the capacity question.

A partial explanation for this oversight is the fact that the counseling-drafting lawyer realizes that she is not the ultimate decider. Rather, if the documents are later challenged in court, it will be the judge or the jury that will decide the issue. Thus, in a close case, the lawyer may feel that she owes her client the chance to demonstrate intent, even if, at a later stage, the trier of fact rejects the document.¹¹ Another explanation may be that the counseling-drafting lawyer may not feel qualified to make a decision on capacity.¹² For information on dementia and other specific capacity issues, see the Appendix.

B. Standards of Capacity for Specific Legal Transactions

At common law, different standards for judging mental capacity developed for specific legal transactions.

1. Testimony Capacity

By Anglo-American legal tradition, those who wish to make a will must possess "sound mind."¹³ This prerequisite was developed not from the English common law, but from Roman canon law.¹⁴ Medieval ecclesiastical courts had jurisdiction over probate matters and followed Justinian's *Institutes*.¹⁵ Under Roman law, a testator could not make a valid will unless he or she was experiencing a moment of lucidity: "[T]hose in the power of others are so absolutely incapable that they cannot make a testament even with the permission of their parents."¹⁶

Medieval canonists were also concerned that testators not of sound mind were subject to undue influence and duress;¹⁷ therefore, if the testator was not of sound mind, the will could not be considered to be a valid statement of her last wishes.

11. See generally Robert Whitman, *Testamentary Capacity and Undue Influence*, 108 TR. & EST. 567 (1969).

12. While the American Bar Association stresses the advantages of consulting with a psychologist or psychiatrist at the drafting stage, often the client will reject this suggestion. See AM. BAR ASS'N & AM. PSYCHOLOGICAL ASS'N, ASSESSMENT OF OLDER ADULTS WITH DIMINISHED CAPACITY: A HANDBOOK FOR LAWYERS 31-34 (2005), available at <http://bit.ly/cBslZm>. It is rare for a lawyer to be trained as a psychologist or psychiatrist. Nonetheless, a lawyer may be called upon to make a judgment on mental capacity. However, as stated above, a suggested referral to a medical professional may be against the client's wishes.

13. Lawrence A. Frolik & Mary F. Radford, 'Sufficient' Capacity: The Contrasting Capacity Requirements for Different Documents, 2 NAELA J. 303, 307 (2006).

14. ROSS & REED, *supra* note 4, § 2.4.

15. *Id.*

16. J. INST. 2.12.1 (J.B. Moyle trans., Oxford Press 4th ed. 1906).

17. ROSS & REED, *supra* note 4, § 2.4.

In a 1590 treatise, *A Brief Treatise of Testaments and Last Wills*, Henry Swinburne argued that probate courts should presume that the testator was of sound mind.¹⁸ He shifted the burden to those contesting the will to prove that the testator had not been capable at the time of the making of the will.¹⁹ Swinburne was especially concerned with the testator making his will on his deathbed.²⁰ He described three possible scenarios:

(a) the kind made by a man having a good understanding and sound memory who utters his own will, although he may have difficulty in speaking; (b) the man whose degree of understanding and memory is impaired to some extent, whose will may be proved if he is able to speak distinctly enough to be understood; and (c) the man who is hardly able to speak, who is interrogated by some other person who tries to record his answers to leading questions about his will.²¹

Swinburne believed that, on their deathbeds, property holders might be bullied or persuaded to make wills that were more the reflection of the bullies' wishes than their own. Wills such as these, he stated, should be voided by the courts.²²

England's common law courts then developed a test to determine the testator's mental capacities at the time of the making of the will.²³ The test was developed in the 1790 case *Greenwood v. Greenwood*²⁴ and the 1840 case *Harwood v. Baker*.²⁵ In *Greenwood*, a young man dying from tuberculosis made a will in favor of his cousin. His brother contested the will, arguing that, when he made the will, the testator was insane. A nurse testified that Greenwood did indeed have moments of insanity, to such an extent that he had to be confined in a straightjacket. In his instructions to the jury,²⁶ the judge described a test the jury should use in determining the testator's mental capacity:

[T]he single inquiry in this case is: whether he was of sound and disposing mind and memory at the time when he made his will. . . . If he had a power of summoning up his mind so as to know what his

18. See ROSS & REED, *supra* note 4, § 2.4 (citing HENRY SWINBURNE, *A BRIEF TREATISE OF TESTAMENTS AND LAST WILLS* (Garland Publ'g 1978) (1590). Henry Swinburne (1551-1624) was an ecclesiastical lawyer and scholar.

19. See ROSS & REED, *supra* note 4, § 2.4.

20. See *id.*

21. *Id.*

22. See *id.*

23. See *id.*

24. *Greenwood v. Greenwood*, (1790) 163 Eng. Rep. 930 (K.B.).

25. *Harwood v. Baker*, (1840) 13 Eng. Rep. 117 (P.C.).

26. Probate litigation can be held before a trial judge or a jury. Many experienced litigators would prefer a jury, feeling that their developed skills can help them to sway the jury to their cause.

property was, and who those persons were that were the objects of his bounty, then he was competent to make his will.²⁷

In *Harwood v. Baker*, a wealthy businessman made a deathbed will leaving all his property to his second wife.²⁸ His children pointed out that he had suffered a stroke and probably had little understanding of the ramifications of his actions.²⁹ His attending physicians confirmed that their patient lapsed in and out of consciousness.³⁰ The servants' testimony seemed to have as much to do with their opinion of Mrs. Baker as with the facts of the case.³¹ Mr. Baker's friend testified that the testator had intended to leave the bulk of his property to his family.³² The court, not surprisingly, affirmed the lower court's overturning of the will, stating:

[T]heir Lordships are of opinion, that in order to constitute a sound disposing mind, a testator must not only be able to understand that he is by his will giving the whole of his property to one object of his regard; but that he must also have capacity to comprehend the extent of his property, and the nature of the claims of others, whom by his Will, he is excluding from all participation in that property; and that the protection of the law is in no cases more needed than it is in those cases where the mind has been too much enfeebled to comprehend more objects than one, and most especially when that one object may be so forced upon the attention of the invalid, as to shut out all others that might require consideration.³³

Mrs. Baker had been in constant attention at her husband's bedside, and the court feared that her husband's concern had been thus diverted from the rest of his family.³⁴

The *Greenwood-Baker* test that developed from these cases has three factors. The testator is considered of sound mind if, at the time he makes his will, (1) he knows "the natural objects of his bounty," (2) the extent of his property, and (3) the disposition he is making of this property. Nevertheless, a testator's capacity is most likely to be questioned if he leaves his property to someone other than "the natural objects of his bounty," particularly if the recipient is unusual or controversial.

27. ROSS & REED, *supra* note 4, § 2.6.

28. *See Harwood*, 13 Eng. Rep. at 118.

29. *See id.* at 118-19.

30. *See id.* at 118-20.

31. *See id.* at 121.

32. *See id.*

33. *Harwood*, 13 Eng. Rep. at 120.

34. *See id.*

Historically, heirs have had a better chance of overturning wills made in favor of much-younger partners or partners found later in life,³⁵ gay partners,³⁶ or the testator's dogs.³⁷ As Swinburne warned, departures from the familial norm raise red flags, and beneficiaries are accused of undue influence and duress.³⁸ Relatives might not be able to accuse the dogs of undue influence, but they frequently do accuse the much-younger partners or a non-family beneficiary who arrives on the scene shortly before the testator's death.³⁹

2. Mental Capacity to Make an *Inter Vivos* Gift

The *Restatement (Third) of Property's* mental capacity requirements for making an *inter vivos* gift might be described as "*Greenwood-Baker Plus*."⁴⁰ At common law, the donor must have the capacity required to make a will, as well as an understanding of the economic ramifications of the gift: "the effect that the gift may have on the future financial security of the donor and of anyone who may be dependent on the donor."⁴¹ Court decisions on the validity of *inter vivos* gifts tend to be very fact-specific. Judges and/or juries look closely at the events surrounding the gift to determine the following question: Did a donor's behavior show evidence that she was no longer capable of controlling her financial affairs without assistance, or that she was giving away all of her property, or that she did not understand the consequences of her gift?⁴²

Parties contesting the validity of an *inter vivos* gift on mental capacity grounds typically claim that the donor was subjected to undue influence by the donee.⁴³ They argue that, under this influence, the

35. See, e.g., *In re Estate of Burkland*, 504 P.2d 1143 (Wash. Ct. App. 1972), review denied, 82 Wash. 2d 1002 (1973).

36. See, e.g., *In re Kaufmann's Will*, 247 N.Y.S.2d 664 (N.Y. App. Div. 1964), aff'd, 205 N.E.2d 864 (N.Y. 1965); Jeffrey M. Alden, Note, *Testamentary Capacity in a Nutshell: A Psychiatric Revolution*, 18 STAN. L. REV. 1119, 1126-42 (1966).

37. Pressure from animal lovers has caused the Uniform Trust Code to provide a trust provision for a testator's pets. See UNIF. TRUST CODE § 408 (amended 2005).

38. See ROSS & REED, *supra* note 4, § 2.4.

39. See *supra* notes 23-33 and accompanying text.

40. See RESTATEMENT (THIRD) OF PROPERTY: WILLS AND OTHER DONATIVE TRANSFERS § 8.1 (2003). *Greenwood-Baker Plus*: testamentary capacity along with the donor's understanding of the financial impact of his or her gift.

41. *Id.* § 8.1(c) (2003).

42. *Id.* If, for instance, the donor gave away all her property before having an operation, the question would be has the donor thought about how she would live if she survives?

43. See ROGER W. ANDERSON & IRA M. BLOOM, FUNDAMENTALS OF TRUSTS AND ESTATES 99 (3d ed. 2007) (discussing the relevant factors to be considered in determining the presence or absence of undue influence).

incapacitated donor was unable to look after his own welfare, and perhaps, more importantly, those of his rightful heirs.

In the 2011 case *Goodman v. Atwood*,⁴⁴ an elderly lady's guardian contested her gift of a large sum of money to her veterinarian.⁴⁵ At trial, the judge applied the lesser standard of testamentary capacity.⁴⁶ He also placed the burden of proof on the plaintiff to prove that the donor did not have the required mental capacity.⁴⁷ The appellate court denied that the donor lacked sufficient capacity: "The plaintiff's own witness conceded the possibility that the donor experienced periods of mental awareness in addition to her lucidity regarding financial affairs."⁴⁸ As for the burden of proof, the defendant was not in a position of fiduciary responsibility to the donor; therefore, the burden remained with the plaintiff.⁴⁹

Similarly, in *Landmark Trust (USA), Inc. v. Goodhue*,⁵⁰ a plaintiff attempted to contest her brother's gift of an apple farm to a land conservation trust.⁵¹ The donor wanted to ensure that the land would not be developed, and he executed a deed of gift to Landmark Trust.⁵² A few months later, the donor began to show signs of deteriorating mental capacity, and he was placed under involuntary guardianship.⁵³ The guardian and the sister contested the gift of the farm, claiming that the donor was mentally incapacitated at the time of the gift's execution.⁵⁴ They lost at trial, and they appealed, claiming that the judge had applied the wrong test for mental capacity.⁵⁵ The defendants' first claim was that the "court erred in applying the standard for testamentary capacity to the *inter vivos* transfers. Defendants claim[ed] the tests are different and that competence to enter a highly complex *inter vivos* transaction should be different from the competence necessary to execute a will."⁵⁶

The appellate court, however, stated that the Vermont standard was understanding and comprehension of the nature of the gift.⁵⁷ The court pointed out that the donor had consistently stated that he wanted his

44. *Goodman v. Atwood*, 940 N.E.2d 514, 514 (Mass. App. Ct. 2011).

45. *Id.* at 516.

46. *Id.* at 517.

47. *Id.*

48. *Id.* at 518.

49. *Id.* at 518 n.9.

50. *Landmark Trust (USA), Inc. v. Goodhue*, 782 A.2d 1219, 1219 (Vt. 2001).

51. *Id.* at 1222.

52. *Id.*

53. *Id.* at 1223.

54. *Id.*

55. *Goodhue*, 782 A.2d at 1223.

56. *Id.* at 1223-24.

57. *Id.* at 1224; see also RICHARD A. LORD, WILLISTON ON CONTRACTS § 10.8 (4th ed. 2012).

property to be preserved as farmland.⁵⁸ The court implied that, if the donor's sister got control of the land, it would soon be sold to a developer, thus defeating the donor's intent.⁵⁹ Additionally, at the time of the execution of the gift deed, the donor did not show any signs of mental deterioration.⁶⁰ When setting up the trust, he had ensured that he might continue living on the farm.⁶¹ The court thus denied the plaintiff's claim that Landmark Trust personnel had subjected the donor to undue influence, noting that he had had an arm's length relationship with the trust's representatives.⁶²

From the above cases, the test applied by some courts for mental capacity to make an *inter vivos* gift is the same as that applied for testamentary capacity, plus the donor's understanding of his or her affairs. This test is a lesser standard than contractual capacity,⁶³ which requires not only that the parties have an understanding of much more complicated documents but also that parties control their behavior in such a way that they exhibit decision-making capacity.⁶⁴

3. Contractual Capacity

In determining an individual's capacity to execute a contract, courts generally assess the party's ability to understand the nature and effect of the act and the business being transacted.⁶⁵ Accordingly, if the act or business being contracted is highly complicated, a higher level of understanding may be needed to comprehend its nature and effect, in contrast to a very simple contractual arrangement.⁶⁶ While courts normally hold that a bargained for exchange provides adequate consideration, in a situation where a party has contracted in a way that obviously is a very poor bargain, the court may refuse to uphold the contract.⁶⁷

58. *Goodhue*, 782 A.2d at 1226-27.

59. *Id.* at 1229.

60. *Id.* at 1226.

61. *Id.* at 1222.

62. *Id.* at 1229.

63. *See* LORD, *supra* note 57, § 10.8.

64. *Id.* The need for the client to "understand" the documents is hard to enforce where the documents are complex and tax driven. Indeed, many lawyers cannot understand these documents. However, by signing a document, a client is held to have understood it.

65. *Id.*

66. *Id.*

67. *See id.*

4. Capacity to Convey Real Property

To execute a deed, a grantor typically must be able to understand the nature and effect of the act at the time he or she makes the conveyance.⁶⁸ If the transfer is part of a contractual agreement, the grantor must have contractual capacity.⁶⁹

An individual wishing to appoint a holder of a durable power of attorney or execute a living will must have the mental capacity required to execute a contract.⁷⁰ Under the common law, contracts made by parties lacking mental capacity are either void or voidable. In many states, such contracts are void by statute.⁷¹ In general, the level of capacity required to execute a contract is higher⁷² than that required to make a gift⁷³ or to establish a trust.⁷⁴ The common law test for contractual capacity has been stated to be “cognitive,” meaning the individual must understand the scope and effect of the transaction.⁷⁵

The *Restatement (Second) of Contracts* has added another criterion for contractual capacity: Parties to a contract must not only understand what they are doing, they must also have the ability to “act reasonably in relation to the transaction.”⁷⁶ This requirement is especially relevant in cases where it appears that one party was aware of the other’s mental capacity and used it to make an unfair bargain.

A 2001 Tennessee case, *Rawlings v. John Hancock Mutual Life Insurance Company*,⁷⁷ reiterated that individuals granting a durable power of attorney should have contractual capacity.⁷⁸ In *Rawlings*, a woman suffering from dementia was placed in a nursing home.⁷⁹ When her husband informed her that he wanted a divorce, she granted her brother a power of attorney.⁸⁰ She substituted her brother for her husband as the beneficiary of her life insurance.⁸¹ After her death, her husband sued when he discovered he was not the beneficiary of the

68. See *Farnum v. Silvano*, 540 N.E.2d 202, 204 (Mass. App. Ct. 1989).

69. See *id.*

70. *Frolik & Radford*, *supra* note 13, at 313.

71. See *id.* at 317.

72. See *id.* at 304.

73. See *id.* at 312.

74. See *id.* at 311.

75. See *LORD*, *supra* note 57, § 10.8.

76. *Id.* (citing *RESTATEMENT (SECOND) OF CONTRACTS* § 15(1)(b) (1981)).

77. *Rawlings v. John Hancock Mut. Life Ins. Co.*, 78 S.W.3d 291 (Tenn. Ct. App. 2001).

78. See *id.* at 296-97.

79. *Id.* at 294.

80. *Id.* at 295.

81. *Id.*

insurance policy.⁸² He alleged that his wife had been incapacitated when she granted a power of attorney, thereby voiding her power to change beneficiaries.⁸³ The appeals court applied the Second Restatement test: the grantor must not only know what she is doing, but also must be able to “act in a reasonable manner.”⁸⁴ After reviewing the evidence, the court decided that the plaintiff had not proved that his wife was too incompetent to execute a contract at the time she had granted the power of attorney to her brother.⁸⁵

5. Mental Capacity and Health Care Proxies

State statutes govern health care proxies. Hence, standards for mental capacity will vary by jurisdiction. In general, courts presume patients to be competent to make decisions about their health care.⁸⁶ The American Bar Association has developed a cognitive test to determine if the patient is capable of informed decision-making: considerations include the patient’s awareness of medical needs, the patient’s ability to express preferences, and the patient’s understanding of the “risks, benefits, and alternatives.”⁸⁷ Those who wish to contest a health care appointment on mental capacity grounds must prove that, at the time the proxy was executed, the patient was incapable of decision-making.⁸⁸

Unless a health care proxy is appointed before the patient becomes incapacitated, her choice of agent may be challenged. Where there is a challenge, the burden of proof may then be shifted to the agent to prove that the patient had been competent at the time of appointment.

In a 2002 New York case, *In re Rose S.*,⁸⁹ a patient appointed a health care proxy.⁹⁰ One day later, Rose was diagnosed with dementia.⁹¹ Her agent claimed that he had suggested a health care proxy because her doctors indicated that Rose was no longer capable of informed decision-making.⁹² He had read the proxy to her, but he could not be sure that she truly comprehended the document she signed.⁹³ The court held that the

82. *Rawlings*, 78 S.W.3d at 295.

83. *Id.*

84. *Id.* at 297 (quoting RESTATEMENT (SECOND) OF CONTRACTS § 15(1)(b) (1981)).

85. *Id.* at 299.

86. See Frolik & Radford, *supra* note 13, at 315.

87. MICHAEL L.M. JORDAN, DURABLE POWERS OF ATTORNEY AND HEALTH CARE DIRECTIVES § 3.7 (4th ed. 2011).

88. See *In re Rose S.*, 741 N.Y.S.2d 84, 85 (N.Y. App. Div. 2002).

89. *In re Rose S.*, 741 N.Y.S.2d 84 (N.Y. App. Div. 2002).

90. *Id.* at 86.

91. *Id.*

92. See *id.*

93. See *id.*

fact that Rose had not made a choice of agent until after she was incapacitated deprived her of the power to make that choice.⁹⁴

The lack of “informed consent” is often an issue in medical malpractice claims.⁹⁵ Informed consent requires that one’s consent to treatment be competent, voluntary, and informed.⁹⁶ Capacity is only one element of the test of informed consent.⁹⁷ A person may have capacity to make a treatment decision, but the treatment decision will lack informed consent if it was either involuntary or unknowingly made.⁹⁸

While clinicians may be employed to evaluate a patient’s mental capacity to execute a health care power or another instrument or action, lawyers need to be knowledgeable about capacity as well.⁹⁹ In particular, the counseling-drafting lawyer, who will ultimately be responsible for deciding whether she will draft instruments for the client, must be aware of the legal standard for mental capacity to be applied. It would not be atypical to find that the legal standard will be far different from the standards applied by psychologists, psychiatrists, and other medical personnel.¹⁰⁰ A lawyer may need to determine the legal tests for a client’s capacity to execute an advance directive for health care if there is litigation, or to establish in court a client’s incapacity to make a particular health care decision.¹⁰¹ The test of capacity to execute a health care directive is generally parallel to that of capacity to contract.¹⁰² However, because the capacity to contract varies with the complexity of the contract terms,¹⁰³ a finding of capacity may depend on other factors.¹⁰⁴

6. Mental Capacity to Execute a Trust

The *Restatement (Third) of Trusts* requires that settlors of irrevocable trusts have contractual capacity.¹⁰⁵ Settlor of revocable trusts, however, need only testamentary capacity.¹⁰⁶ The *Second Restatement*, by contrast, requires that all settlors have contractual

94. See *In re Rose*, 741 N.Y.S.2d at 86.

95. See JORDAN, *supra* note 87, § 3.6.

96. *Id.*

97. See *id.* § 3.7.

98. *In re Rose*, 741 N.Y.S.2d at 84.

99. See AM. BAR ASS’N & AM. PSYCHOLOGICAL ASS’N, *supra* note 12, at 13.

100. *Id.* at 33.

101. See JORDAN, *supra* note 87, § 3.7.

102. See LORD, *supra* note 57, § 10.8.

103. See *id.*

104. See *id.*

105. RESTATEMENT (THIRD) OF TRUSTS § 11 (2003).

106. *Id.*

capacity.¹⁰⁷ The higher standard for irrevocable trusts is said to be justified by the potential effects upon an incapacitated settlor during his lifetime.¹⁰⁸ By contrast, revocable trusts are typically used as a form of will substitute, hence the requirement for testamentary capacity only. The general rule is that those who could not legally dispose of property by deed cannot dispose of it by trust.¹⁰⁹

A Massachusetts case, *Farnum v. Silvano*,¹¹⁰ illustrates the courts' view on the mentally incapacitated and their right to dispose of property either by deed or by trust. An elderly woman, Viola Farnum, sold her Cape Cod home for half its value to the man who mowed her lawn.¹¹¹ This woman's capacities had been deteriorating for some time, to the point where she believed that the police were trying to arrest her cat.¹¹² Her guardian contested the sale, and Silvano defended by claiming that Ms. Farnum was experiencing a "lucid interval" when the deed was executed.¹¹³ The court felt that this moment of lucidity was certainly not enough:¹¹⁴

Competence to enter into a contract presupposes something more than a transient surge of lucidity. It involves not merely comprehension of what is 'going on,' but an ability to comprehend the nature and quality of the transaction, together with an understanding of its significance and consequences.¹¹⁵

Thus, the court extended contractual capacity to include an understanding of the "reasonableness and consequences of the transaction." Ms. Farnum clearly did not possess this capacity and, as such, the court ordered rescission.

In the treatise *Scott and Ascher on Trusts*, the authors note that capacity tests for revocable and irrevocable trusts are distinguishable.¹¹⁶ In addition, they indicate that more than one test is appropriate for determining whether a settlor had the mental capacity to create a trust.¹¹⁷ A settlor creating a testamentary trust would need the mental capacity required to make a will.¹¹⁸ A settlor creating an *inter vivos* trust would

107. RESTATEMENT (SECOND) OF TRUSTS § 22 (1959).

108. *Id.* § 18-22.

109. *See* Frolik & Radford, *supra* note 13, at 313.

110. *Farnum v. Silvano*, 540 N.E.2d 202 (Mass. App. Ct. 1989).

111. *Id.* at 203.

112. *See id.*

113. *Id.*

114. *See id.* at 205.

115. *Farnum*, 540 N.E.2d at 204 (citations omitted).

116. MARK L. ASCHER & MARGIT T. RIGNEY, *SCOTT AND ASCHER ON TRUSTS* § 3.2 (5th ed. 2006).

117. *Id.*

118. *Id.*

need the capacity for “an outright transfer of the property during lifetime, as by gift or otherwise.”¹¹⁹ Revocable trusts, in their opinion, are “often nothing other than will-substitutes,”¹²⁰ and therefore, the test for capacity should be the settlor’s ability to make a will.¹²¹ Irrevocable trusts, on the other hand, represent “a transfer of property by gift,” and a higher level of mental capacity should be required.¹²²

Ironically, Scott refused to deal with the mental capacity issue in the 1935 *Restatement (First) of Trusts*. “The extent of the capacity of married women, infants, insane persons, aliens, and other persons of limited capacity, to transfer property is not within the scope of the [original *Restatement of Trusts*].”¹²³

Depending upon the nature, complexity, and consequences of the act at issue, lawyers and judges have few road signs in seeking an answer to the question of capacity for many of these transactions.¹²⁴ Accordingly, the clinical models of capacity may be used to help supplement legal notions with scientifically grounded indicators.¹²⁵

C. *How Much Does the Lawyer Have to Know About Diminished Capacity?*

What are legal standards of diminished capacity?¹²⁶ It is said that lawyers need to be familiar with standards of capacity under controlling statutes, case law, and ethical guidelines for assessing capacity, as set forth in the ABA’s *Model Rules of Professional Conduct* (MRPC). Rule 1.14 provides:

(a) When a client’s capacity to make adequately considered decisions in connection with a representation is diminished, whether because of minority, mental impairment or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.

(b) When a lawyer reasonably believes that the client has diminished capacity, is at the risk of substantial physical, financial or other harm unless action is taken, and the client cannot adequately act in the client’s own interest, the lawyer may take reasonably necessary

119. *Id.*

120. *Id.*

121. ASCHER & RIGNEY, *supra* note 104, § 3.2.

122. *Id.*

123. RESTATEMENT (FIRST) OF TRUSTS § 18(b) (1935).

124. See Frolik & Radford, *supra* note 13, at 313.

125. See Daniel C. Marson et al., *Testamentary Capacity and Undue Influence in the Elderly: A Jurisprudent Therapy Perspective*, 28 LAW & PSYCHOL. REV. 71, 71-96 (2004).

126. See *supra* notes 10-11.

protective action, including consulting with individuals or entities that have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian ad litem, conservator, or guardian.

(c) Information relating to the representation of a client with diminished capacity is protected by Rule 1.6. When taking protective action pursuant to paragraph (b), the lawyer is impliedly authorized under Rule 1.6(a) to reveal information about the client, but only to the extent reasonably necessary to protect the client's interests.¹²⁷

In non-adversarial situations, such as estate planning or the handling of specific transactions, issues of capacity are confronted more informally in daily practice. In such a setting, legal practitioners by necessity make implicit determinations of clients' capacity on at least two points. First, the lawyer must determine whether a prospective client has sufficient legal capacity to enter into a contract for the lawyer's services.¹²⁸ Otherwise, representation cannot proceed.

Second, the lawyer must evaluate the client's legal capacity to carry out the specific legal transactions desired as part of the representation (*e.g.*, making a will, buying real estate, executing a trust, making a gift, *etc.*). Fortunately, for the typical adult client, the presence of adequate capacity is obvious.¹²⁹ Moreover, as a legal and ethical matter, courts presume capacity.¹³⁰ It is only in cases where there are signs of questionable capacity that a capacity determination becomes a conscious mental process—one either deliberately undertaken, or haphazardly muddled through.¹³¹

III. LEANING TOWARDS A UNITARY STANDARD

While some courts may continue to recognize the varying standards for mental capacity (even when all of the documents constituting the package are prepared at the same time), these courts only pay lip service to the differences in capacity tests. There appears to be a tendency now

127. MODEL RULES OF PROF'L CONDUCT R. 1.14 (2011).

128. Usually, the lawyer will present to the client an engagement letter. This can be drawn in a very simple way. Whereas trusts and estates lawyers see themselves as representing only the client, elder lawyers may include other family members as well.

129. One need not ask legal questions in order to judge capacity. A simple conversation about daily activities may suffice. For instance, does the client keep his own checking account, pay his own bills, deal with everyday problems, and keep up relations with long-term family and friends?

130. See *Gilmer v. Brown*, 44 S.E.2d 16, 20 (Va. 1947) (guardians named in the morning and will was executed in the afternoon).

131. See *In re Estate of Raney*, 799 P.2d 986, 996-97 (Kan. 1990) (overturning jury verdict of insane delusion).

to apply one standard across the board, particularly where all lifetime and estate planning is carried out at the same time.¹³²

For example, in *Ware v. Ware*,¹³³ John and Margaret Ware placed their homestead in a revocable living trust known as the “Ware Family Trust.”¹³⁴ After John’s death, Margaret became owner of the family homestead.¹³⁵ In 2000, when Margaret was 83 years old, she transferred the property into “another revocable living trust entitled the Margaret Ware Revocable Living Trust,”¹³⁶ naming her four children as the beneficiaries.¹³⁷ In 2003, Margaret, as trustee of the Trust, gifted the entire homestead to one child;¹³⁸ and the child, upon receiving title to the property, “quit-claimed his mother a life estate in the property.”¹³⁹

The child’s sister sued her brother who had received the property.¹⁴⁰ The sister argued that the brother had exerted undue influence over their mother.¹⁴¹ The brother moved for summary judgment, claiming his sister alleged no facts to support her claim of undue influence.¹⁴² The court granted the motion for summary judgment, finding no issue regarding Margaret’s competence.¹⁴³ On appeal to the Supreme Court of Alaska, summary judgment was upheld.¹⁴⁴ In evaluating the claim of lack of mental capacity, the court stated:

Additionally, we have held that a testamentary gift may be void if the grantor lacked the mental capacity to understand the nature and extent of the gift he or she is making. We see no reason not to apply this reasoning to an inter vivos gift such as the one in this case.¹⁴⁵

IV. A UNITARY APPROACH TO CAPACITY TO CARRY OUT LIFETIME AND ESTATE PLANNING

Should there be a unitary test for lifetime and estate planning? If there is to be one unitary standard for finding mental capacity in connection with the preparation at the same time of the documents

132. See, e.g., *Ware v. Ware*, 161 P.3d 1188 (Alaska 2007).

133. *Ware v. Ware*, 161 P.3d 1188 (Alaska 2007).

134. *Id.* at 1191.

135. *Id.*

136. *Id.*

137. *Id.*

138. *Ware*, 161 P.3d at 1191.

139. *Id.*

140. *Id.*

141. *Id.*

142. *Id.*

143. *Ware*, 161 P.3d at 1191-92.

144. *Id.* at 1200.

145. *Id.* at 1193.

constituting the package, what should that standard be? Consider the following suggestion:

- A. For purposes of finding mental capacity to carry out acts of lifetime and estate planning, an individual at the time of executing the documents that make up “the package”¹⁴⁶ must have an understanding:
 - (1) Of the acts to be carried out, whether it be the act of:
 - (a) transferring assets,
 - (b) gifting,
 - (c) execution of a durable power of attorney,
 - (d) creating a health care power,
 - (e) creating a revocable or irrevocable trust, or
 - (f) creating a will;
 - (2) Of the property to be dealt with;
 - (3) Of the natural objects of bounty; and
 - (4) How the acts to be done will affect the client and whether the intent of the client will be carried out.
- B. To the extent that an individual fails to understand any of the above, with regard to the act to be carried out, the carrying out of the acts involved shall be invalid.
- C. The above Unified Approach shall also be applied to lifetime and estate planning carried out at different times, unless the circumstances that exist at that time of executing a document are different.

This uniform approach is preferable to current standards because it is easier to apply in practice. It sets the highest capacity standard as the unitary standard for the entire group of documents. This approach thus minimizes the risks and consequences of equating higher capacity standards with lower standards.

V. CONCLUSION

Law is built upon past precedents.¹⁴⁷ However, when these precedents are no longer meaningful, practitioners tend to disregard them, and new standards are created. For lifetime and estate planning, the question to consider is whether there are any real advantages to

146. As discussed previously, the package includes the following: a will, a trust (revocable or irrevocable), a health care power, a durable power of attorney, and a living will.

147. See Charles P. Sabatino, *Competency: Refining Our Legal Fictions*, in *OLDER ADULTS' DECISION-MAKING AND THE LAW* (Michael Smyser, K. Warner Schaie & Marshall B. Kapp eds., 1996).

holding on to the present system of varying degrees of mental capacity as opposed to moving to one unitary system. Realistically, practitioners tend to overlook and equate the varying standards for capacity. A change in the capacity rules that mirrors what is actually being done in practice should help to allow for judgments that are more consistent. Perhaps it is time to consider adopting a new unitary standard for mental capacity.

APPENDIX: DEMENTIA AND ALZHEIMER'S DISEASE

The lawyer may be called upon to make a judgment on mental capacity. Often, the thought is that the client is suffering from dementia. A wide range of diseases affecting the brain can cause dementia. Alzheimer's disease is the most common cause.¹⁴⁸ Sixty to seventy percent of dementia cases are related to Alzheimer's.¹⁴⁹ New drug therapies are emerging to slow the progress of Alzheimer's, but it remains incurable and irreversible.¹⁵⁰

How can a lawyer without medical training identify Alzheimer's? Everyone experiences occasional episodes of forgetfulness, especially as they grow older. Alzheimer's, however, goes much further than typical absentmindedness.

But how can one distinguish between simple "senior moments" and dementia? It is probably normal if you forget small things, like where you put your car keys or the name of someone in your outer social circle. Researchers think this forgetfulness may be a result of changes in the brain that begin around age 50, such as a gradual loss of receptors on brain cells and a decline in certain neurotransmitters.¹⁵¹ However, when someone begins forgetting pertinent information or their memory is disrupting their daily activities and life, it is probably time to seek advice from a medical professional. Besides memory loss, people with Alzheimer's may exhibit symptoms like a decrease in ability to concentrate or navigational skills.¹⁵²

Mild cognitive impairment falls in between normal memory function and dementia. People with mild cognitive impairment are able to carry on daily activities without difficulty, but at least one cognitive skill is below normal or in decline. They are at increased risk of developing dementia. Below are some common warning signs of each of these three stages:¹⁵³

Typical age-related changes:

- Experiencing some memory loss, but can be independent in daily activities and describe instances where you forgot something
- Making a bad decision once in a while

148. AM. BAR ASS'N & AM. PSYCHOLOGICAL ASS'N, *supra* note 12, at 67.

149. *Id.*

150. *Id.*

151. *Id.* at 68-69.

152. *Id.* at 68

153. AM. BAR ASS'N & AM. PSYCHOLOGICAL ASS'N, *supra* note 12, at 68-69.

- Missing an occasional monthly payment
- Forgetting which day it is and remembering later
- Sometimes forgetting which word to use
- Losing things from time to time
- May have to pause a moment to remember the way, but doesn't get lost in familiar territory
- You are more concerned about your forgetfulness than your close family members and friends are

Mild Cognitive Impairment:

- One cognitive skill—usually memory—is below normal or in decline
- In some cases, subtle problems in cognitive skills like language, attention, spatial skills, and problem solving
- Confirmation of impairment on neuropsychological tests
- Difficulty with learning and delayed recall of information compared with others of the same age and education level

Warning Signs of Alzheimer's Disease:

- Memory changes that disrupt daily life
- Challenges in planning or solving problems
- Difficulty completing familiar tasks at home, at work, or at leisure
- Confusion with time or place
- Trouble understanding visual images and spatial relationships
- New problems with words in speaking or writing
- Misplacing things and losing the ability to retrace steps
- Decreased or poor judgment
- Withdrawal from work or social activities
- Changes in mood and personality
- Person gets lost in familiar places
- Person complains of memory problems only if specifically asked; cannot recall instances where memory loss was noticeable
- Dependence on others for key daily living activities