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Capacity to make wills, trusts, and gifts

By Robert M. Harper

The issue of capacity is oftentimes hotly contested in disputes concerning the validity of testamentary instruments, trusts, and gifts. While practitioners may be tempted to assume that the capacity necessary to execute a testamentary instrument is the same as that which is required to create a trust or make a gift, they would be mistaken to do so. The Surrogate's Courts have applied differing standards for capacity relative to wills, trusts, and gifts. This article discusses the different standards for capacity, of which practitioners should be mindful when advising their clients.

Testamentary instruments

The threshold for establishing testamentary capacity is extraordinarily low.[1] This is because the capacity that is necessary to execute a valid will is less than that which is required for any other legal transaction. All that is necessary is that a testator: (a) understand the nature and consequences of making a will; (b) know the nature and extent of his or her property; and (c) know the natural objects of his or her bounty and relations with them.[2]

Moreover, as a testator's mental capacity must be assessed at the precise time of the instrument's execution,[3] a testator need only have a "lucid interval" of capacity to execute a valid will.[4] Indeed, courts have found that testators had testamentary capacity, even though the testators were afflicted with ongoing mental illness,[5] progressive dementia,[6] and physical weakness.[7]

Viewed through that lens, *Matter of Petix* is instructive. There, the decedent died on April 29, 2005, just six months after executing his last will and testament on November 2, 2004.[8] Inasmuch as the decedent's son was the nominated executor and sole beneficiary under the propounded will, the decedent's granddaughter, the daughter of his predeceased daughter, filed probate objections, alleging that the decedent lacked testamentary capacity, among other things. The bases for the capacity objection were the following: "a medical note by a Dr. Blackburn, dated 12/19/02, which stated that decedent was demented to the point where his driving was impaired;" and "two police reports, one where decedent had lost his car, and one where decedent had lost his wallet."


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Notwithstanding the granddaughter's proof that the decedent was suffering from dementia, the Surrogate's Court granted summary judgment dismissing the testamentary capacity objection. In doing so, the court found that the granddaughter failed to offer proof to suggest that at any time on November 2, 2004, the date upon which the will was executed, the decedent lacked capacity to make a will. The court also noted that "a dementia diagnosis and lack of testamentary capacity are not one in the same." Accordingly, summary judgment dismissing the testamentary capacity objection was warranted.

In addition to the foregoing, practitioners should be aware of the presumptions that may arise relative to testamentary capacity. A testator is presumed to have capacity when: (a) the testator's testamentary instrument is drafted by and executed under the supervision of an attorney;[9] or (b) the attesting witnesses to the instrument's execution sign a self-proving affidavit.[10]

Despite the fact that wills, trusts, and gifts are oftentimes employed in a singular estate plan, practitioners should not assume that the low threshold for testamentary capacity will suffice for the purposes of creating a trust or making a gift. As explained more fully below, a more rigorous standard of capacity exists for creating trusts and making gifts.

Trusts and gifts

The threshold of capacity to create a trust or make a gift is higher than that which is required to execute a will or codicil.[11] As Richmond County Surrogate Robert Gigante recently explained in *Matter of Donaldson*, the "controlling standard is not the lower standard for a testamentary instrument, but is rather the higher contract standard of capacity . . ."[12] The higher standard of contract "focuses on whether the person was able to understand the nature and consequences of a transaction and make a rational judgment concerning it." Consequently, it is possible that a person might possess the capacity necessary to execute a will and, at the same time, lack capacity to create a trust or make a gift.

Kings County Surrogate Margarita Lopez-Torres's decision in *Matter of Rosen* is illustrative of the impact that the differing standards can have in litigated matters. In *Rosen*, the Surrogate's Court held that the decedent lacked testamentary capacity to execute his Last Will and Testament, which was dated October 6, 1988. In a related accounting proceeding concerning the Preliminary Executor's administration of the decedent's estate, Surrogate Lopez-Torres was called upon to decide whether parties who received totten trust accounts and gifts from the decedent were collaterally estopped from asserting that the decedent possessed capacity to make the inter vivos transfers. The transfers occurred after the decedent executed the will for which he lacked testamentary capacity.

In declining to permit the recipients of the inter vivos transfers to relitigate the issue of the decedent's capacity, the surrogate stated that a party must have the capacity necessary to enter into a contract in order to have capacity to create a trust or to make a gift. Surrogate Lopez-Torres further explained that: (a) "a finding that the decedent lacked testamentary capacity necessarily preclude[d] a finding that the decedent had the capacity to create a valid totten trust or gift"; and (b) "[o]nce lack of capacity [was] shown, there [was] a presumption that it continue[d] until overcome by clear and convincing evidence of capacity." Accordingly, in the absence of clear and convincing evidence to rebut the presumption concerning capacity, the recipients of the disputed inter vivos transfers were bound by the Surrogate's Court's prior determination concerning the decedent's lack of capacity.

In order to have adequate capacity to create a trust or make a gift, a grantor or donor must possess the capacity that is necessary to enter into a contract. Absent capacity to make a contract, a grantor or donor will lack capacity to create a trust or make a gift, even if – however remote the possibility might seem – the grantor or donor possesses testamentary capacity at the same time.

The lesson to take away from this article is that the courts have applied differing standards of capacity to wills, trusts, and gifts. In counseling clients, practitioners should be mindful of the differing standards, so as to ensure that their clients possess capacity to enter into the transactions they desire, most especially as trusts and gifts gain increased prevalence for estate-planning purposes.

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1 *Matter of Rabbit*, 21 Misc.3d 1118(A) (Sur. Ct., Kings County 2008).

2 *Matter of Kumstar*, 66 N.Y.2d 691 (1985).

3 *Matter of Schure*, File No. 358887, 2012 N.Y. Misc. LEXIS 5755 (Sur. Ct., Nassau County Dec. 17, 2012).

4 *Matter of Minasian*, 149 A.D.2d 511 (2d Dep't 1989).

5 *Matter of Esberg*, 215 A.D.2d 655 (2d Dep't 1995).

6 *Matter of Friedman*, 26 A.D.3d 723 (3d Dep't 2006).

7 *Matter of Swain*, 125 A.D.2d 574 (2d Dep't 1986).

8 *Matter of Petix*, 15 Misc.3d 1140(A) (Sur. Ct., Monroe County 2007).

9 *Matter of Feller*, 26 Misc.3d 1205(A) (Sur. Ct., Monroe County 2010).

10 *Matter of Leach*, 3 A.D.3d 765 (3d Dep't 2004).

11 *Matter of ACN*, 133 Misc.2d 1043 (Sur. Ct., New York County 1986); *Matter of Rosen*, 17 Misc.3d 1103(A) (Sur. Ct., Kings County 2007).

12 *Matter of Donaldson*, N.Y.L.J., Dec. 28, 2012, at 45 (Sur. Ct., Richmond County).