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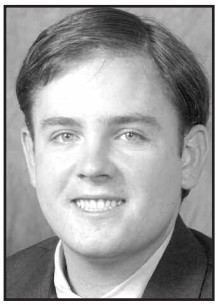
Testamentary Capacity, Summary Judgment and a Testator's Diagnosis of Dementia

By Robert M. Harper

Although summary judgment in a contested probate proceeding historically has been rare, the recent trend has been for Surrogate's Courts to grant such relief with increasing frequency. Consistent with that recent trend, Surrogate's Courts have granted summary judgment dismissing probate objections alleging that a testator lacked testamentary capacity, notwithstanding the testator's diagnosis of dementia before executing the propounded will. This article discusses several cases in which a testator's diagnosis of dementia prior to executing the propounded will was insufficient to raise a triable issue of fact to withstand summary judgment dismissing a capacity objection.

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: understand the nature and consequences of making a will; know the nature and extent of his or her property; and know the natural objects of his or her bounty and relations with them.[2]

Additionally, 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] As a result, it should come as no surprise that Surrogate's Courts have granted summary judgment dismissing capacity objections, despite that the subject testators were diagnosed with dementia before they executed testamentary instruments.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Case in point, in *Matter of Schure* (a case in which the author represented the proponent of the testator's will), the testator's children opposed the proponent's motion for summary judgment, alleging that a trial was necessary on the issue of capacity because the testator had been diagnosed with dementia several years before he executed the propounded instrument. Nassau County Surrogate Edward W. McCarty, III did not credit the objectants' argument and, instead, granted summary judgment dismissing the capacity objection, among all of the other objections. In admitting the testator's will, dated December 21, 2005, to probate, Surrogate McCarty cited the following evidence: in July 2005, the testator called the propounded instrument's attorney-draftsperson and made an appointment to discuss his estate planning; in July 2005, the testator met with the attorney-draftsperson and his associate to discuss his estate planning and family; in late-November 2005, the testator once again met with the attorney-draftsperson, his associate, and another colleague from their firm to discuss the terms of the testator's will; in early-December 2005, the testator met with one of his treating physicians, who made no notes in his file of the testator having psychological difficulties during their meeting and signed an affidavit stating that he would have noted such difficulties had he observed any; on December 21, 2005, the testator executed the propounded will in the presence of the attorney-draftsperson, his associate, and another experienced trusts and estates practitioner; and the attorneys attested to the fact that the testator was of sound mind at the time that he executed the will.

Monroe County Surrogate Edmund A. Calvaruso's decision in *Matter of Petix* is also instructive. There, the testator died on April 29, 2005, just six months after executing his last will and testament on November 2, 2004.[8] Inasmuch as the testator's son was the nominated executor and sole beneficiary under the propounded will, the testator's granddaughter, the daughter of his predeceased daughter, filed probate objections, alleging that the testator 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 [the testator] was demented to the point where his driving was impaired;" and "two police reports, one where [the testator] had lost his car, and one where [the testator] had lost his wallet."

Notwithstanding the granddaughter's proof that the testator had been diagnosed with dementia, Surrogate Calvaruso 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 testator 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.

To withstand a motion for summary judgment dismissing a capacity objection, a probate objectant generally will need to do more than show that a testator was diagnosed with dementia prior to executing the propounded will. In light of *Schure* and *Petix*, among other decisions, a diagnosis of dementia may not be sufficient to raise a triable issue of fact to survive a motion for summary judgment on the issue of capacity.

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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).