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WHAT'S INSIDE

SAVE THE DATE

BBQ AT THE BAR

THURSDAY, SEPTEMBER 7

See insert

WE CARE GOLF AND TENNIS CLASSIC

MONDAY, SEPTEMBER 18

See cover story and pg. 20

JUDICIARY NIGHT

THURSDAY, OCTOBER 19

WE CARE's Hole in One—The Annual Golf and Tennis Classic

Bridget Ryan

The WE CARE Fund is part of the Nassau Bar Foundation, Inc., the charitable arm of the NCBA. Founded in 1988 by then NCBA President Stephen Gassman, WE CARE is supported through donations and fundraising efforts of the legal profession and the community at large. Over $5 million has been raised by WE CARE to fund various programs to help those most in need throughout Nassau County. As the NCBA generously absorbs all of WE CARE's administrative costs, one hundred percent of the money that is raised is disbursed through charitable grants to improve the quality of life for children, the elderly, and others in need throughout Nassau County.

WE CARE's largest fundraising event, the Annual Golf and Tennis Classic, will be held on Monday, September 18, 2023. This year, the Classic will be held at Brookville Country Club and The Mill River Club. Founded in 1996 by Stephen W. Schlissel, the Classic brings the local legal and business community together for a day of fun and fundraising.

Don't be fooled by the title—the Classic has something for everyone to enjoy. Attendees can play golf or tennis, or enjoy a day of wellness by the pool. Guests looking to learn the basics of golf are encouraged to join the Golf 101 session, where a professional teaches the ins and outs of the game as well as ways to improve one's skill. Attendees that know the basics but want a little extra instruction can join Golf 201, a more advanced event with on-course instruction to improve one's game. The Classic boasts a fun-filled day's worth of sports, activities, and an extravagant raffle room.

Each year, the WE CARE Fund honors local community members for their service to WE CARE, the legal profession, and the community at large. At this year's Classic, WE CARE is proud to honor Michael H. Masri, Esq., Partner at Meltzer, Lippe, Goldstein & Breitstone, LLP, and Jeffrey Mercado, CFP, MBA, Seniors Managing Director, Commercial Bank, Law Firm Banking at Webster Bank.

For more information regarding tickets, sponsorships, and journal ad opportunities, visit the WE CARE website at **www.thewecarefund.com**.

Your Membership Matters!

Whether you're looking to learn something new in your area of practice, earn CLE credit, or network, the NCBA has the tools that you need to succeed professionally. Did you know that your membership includes unlimited FREE live CLE, FREE committee CLE, FREE Bridge-the-Gap weekend, ***and now even more exciting new benefits?***

BBQ at the Bar

To kick off the new Bar year, the NCBA will host its annual BBQ at the Bar on the front lawn of Domus on Thursday, September 7—open to NCBA Members, prospective members, and law students. We invite you to gather for a relaxing evening of networking and BBQ favorites. For additional information, see the insert within this issue.

Renew Today!

The 2023-2024 Bar year began on July 1, 2023. Renew online today at www.nassaubar.org or call the NCBA Membership office at (516) 666-4850. We can't wait to welcome you back as a member.

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FOCUS: LITIGATION

Litigating Testamentary Capacity (or Lack Thereof) in New York

Andrew P. Nitkiewicz and Mattie Curry

Reaching a legal determination regarding the ability of a person—alive or dead—to make and understand a specific decision for themselves, at the time the decision is made, can be an extraordinarily complex feat. The legal analysis required to determine mental capacity is oftentimes like the human mind itself—multifaceted, complicated, and intricate. This article will address some of the different issues which arise in proving or disproving testamentary capacity in New York.

The Proponent's Burden

Most often, lack of capacity claims arise in connection with litigation surrounding the validity of testamentary instruments such as wills. In this arena, more than any other, litigants assert capacity claims and defenses based solely upon their non-medical perceptions of various behavior of the decedent—sometimes crafted to meet their desired outcome. The law requires much more, however, therefore litigating counsel become familiar with the vast burden they are facing.

It is the indisputable rule in a will contest that:

> [T]he 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.[1]

The court added: "When there is conflicting evidence or the possibility of drawing conflicting inferences from undisputed evidence, the issue of capacity is one for the jury."[2] The capacity required to make a will, however, is less than any other contract.[3]

While this burden may seem hefty at first glance, the Proponent benefits from some well-settled presumptions. First, there is a presumption that the testator possesses the requisite testamentary capacity to make a valid will until it is proven otherwise.[4] Second, where the will is drafted by an attorney and the drafting attorney supervises the will's execution, there is a presumption of regularity that the will was properly executed in all respects.[5] Third, when the will is accompanied by a self-proving affidavit of the attesting witnesses, where each witness declared that the decedent "was suffering no defect of sight, hearing or speech, or from any other physical or mental impairment that would affect [her] capacity to make a valid Will," a presumption of testamentary capacity is created.[6]

While these presumptions satisfy the Proponent's *prima facie* burden, Proponent's counsel on their laurels. When faced with a will contest or potential will contest, Proponent's counsel should proactively collect as much evidence as possible to demonstrate testamentary capacity. Counsel should speak to the drafting attorney and witnesses to the execution, review video of the execution. Counsel may also need witness statements and medical proof, and if possible speak to family members, treating physicians, mental health providers, and home healthcare attendants and nurses, in order to be prepared for and get in front of potential claims of incapacity.

The Objectant's Burden

Once the Proponent has satisfied their initial burden, the burden then shifts to the Objectant to raise a genuine issue of fact as to testamentary capacity.[7] It is at this point where Objectant's counsel must carefully use discovery to probe into decedent's mental acuity at the time the will was executed, so as to proffer a comprehensive picture evidencing lack of testamentary capacity.

Too often Objectant's counsel seize upon one notation of dementia in medical records to prove lack of capacity. This is a mistake. Testamentary capacity only concerns a person's mental condition at the moment of execution.[8] Evidence relating to the condition of the testator before or after the execution is only significant insofar as it bears upon the strength or weakness of the testator's mind at the exact moment of the execution.[9] A testator needs only a "lucid interval" of capacity to execute a valid will, and this interval can even occur contemporaneously with an ongoing diagnosis of mental illness, including depression,[10] or progressive dementia.[11]

To be clear, a finding or a diagnosis of dementia, in-and-of-itself, is insufficient to demonstrate lack of testamentary capacity. According to the Second Department, "[O]ld age, physical weakness and senile dementia are not necessarily inconsistent with testamentary capacity as long as the testatrix was acting rationally and intelligently at the time the instrument was prepared and executed."[12] In *In re Martinico*, the Second Department held that the testator possessed sufficient testamentary capacity to execute her will, despite an episode of confusion that she experienced prior to her admission to the hospital and a reference to dementia in an unexplained "do not resuscitate" order.[13]

Also insufficient is expert witness testimony by non-treating physicians and mental health professionals based solely upon the expert's review of medical records and testimony. While such expert testimony is generally admissible, such opinions are afforded very little weight. Opinion testimony of a non-treating physician constitutes "the weakest form of proof" as to capacity,[14] based as it is on secondary sources rather than direct observation of and interaction with the subject. Such testimony is also "insufficient to raise a question of fact when it contradicts the testimony of persons who observed and interacted with the testator during the relevant time period."[15]

Any communication or documentation tending to show that at the time the proposed will was executed the decedent lacked capacity should be obtained. Objectant's counsel should therefore likewise depose the Proponent, the drafting attorney, treating healthcare providers, witnesses to the execution, family members, home healthcare attendants, and friends. Financial records may show unusual financial activity by the decedent at or around the time of the will execution. Counsel should also investigate whether police reports of unusual activity by the decedent exist, especially those indicating "wandering," where the decedent became lost or confused about their location. All of the evidence collected—in conjunction with medical proof— should be utilized to provide the Court or jury with a complete picture tending to show lack of testamentary capacity.

Conclusion

In sum, counsel for the Proponent and counsel for the Objectant must be prepared to engage in a lengthy, and sometimes emotional discovery, so as to be able to meet their respective burdens in a manner which provides the Court or jury with the most comprehensive view of the Decedent's mental capacity, without limiting inquiries only to medical records and non-treating expert opinion.

1. *Est. of Kumstar*, 66 N.Y.2d 691, 692 (1985).
2. *Id.*
3. *In re Coddington*, 281 A.D. 143, 146 (2d Dept. 1952).
4. *Matter of Van Horn*, 68 Misc.3d 1217(A), *2 (N.Y. Surr. Ct., Oswego Co. 2020).
5. *In re Moskowitz*, 116 A.D.3d 958, 959 (2d Dept. 2014); *In re Farrell*, 84 A.D.3d 1374, 1374 (2d Dept. 2011).
6. *In re Jacobs*, 153 A.D.3d 622, 622 (2d Dept. 2017). *See also In re Curtis*, 130 A.D.3d 722, 722–23 (2d Dept. 2015).
7. *In re Estate of Cameron*, 126 A.D.3d 1167, 1168-69 (3d Dept. 2015); *In re Scaccia*, 66 A.D.3d 1247, 1251 (3d Dept. 2009).
8. *In re Will of Li*, 72 Misc.3d 988, 998 (Surr. Ct., Queens Co. 2021).
9. *In re Hedges*, 100 A.D.2d 586, 588 (2d Dept. 1984).
10. *See In re Esberg*, 215 A.D.2d 655, 656 (2d Dept. 1995).
11. *See In re Friedman*, 26 A.D.3d 723, 725 (3d Dept. 2006).
12. *In re Martinico*, 177 A.D.3d 882, 884 (2d Dept. 2019).
13. *Id.* at 885.
14. In re Slade, 106 A.D.2d 914, 915 (4th Dept. 1984).
15. *Estate of MacGuigan*, No. 2012-1344, 2015 WL 1756205, at *1 (Surr. Ct., N.Y. Co. 2015) (quoting *In re Redington*, NYLJ, Jul. 18, 2014 at 24, col 1). *See also In re Katz*, 103 A.D.3d 484, 484 (1st Dept. 2013).

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