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OPINION

Today's Business: Competent to sign legal documents?

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Christine M. Tenore Contributed photo

The age demographics of our society are shifting older, with many individuals living productive and healthy lives into their 90s. How can we tell whether our aging loved ones have problems with legal decision-making?

Since legal life planning and estate planning documents are cornerstones of planning, who can sign the legal documents? The simple answer: anyone competent and over age 18. But what exactly does “competent” mean?

It depends on the type of document to be signed.

“Competent” generally is defined as having the necessary ability, knowledge or skill to do something successfully. Black’s Law Dictionary defines “competency” as “mental ability to understand problems and make decisions.”

These definitions are broad and might not necessarily be useful in questionable circumstances. So how does competency dovetail with the legal standards of diminished capacity?

Obviously, a determination of capacity begins with observation of the individual. “Red flags” include memory loss, communication problems, lack of mental flexibility, unexpected calculation problems and, among others, disorientation.

However, an individual may not exhibit these behaviors and still not have the capacity to execute legal documents. Conversely, a person may exhibit some of these behaviors and still have the capacity to execute certain documents.

The ability to execute a last will and testament carries the lowest standard of capacity for the legal documents in question. The signer must recognize immediate family members, be able to understand the nature and some extent of his/her property and be able to articulate the eventual distribution of the property to individuals. The individual may not know what day it is or who the president is, but still have the capacity to sign a will.

The capacity to sign a contract requires a higher standard of understanding. The individual must have the ability to understand the nature and effect of the act and the business being transacted. Most courts rule that the capacity to sign a power of attorney is the same as that for the ability to sign a contract. Noteworthy: a “durable power of attorney” survives incompetency and remains in full force if there is a decline in mental capacity. A review of your current documents might be in order to ensure that your agents have the ability to continue acting, even after you are unable to.

The individual executing health care directives – living will, appointment of health care representative and pre-designation of conservator – is held to standards defined by individual states. Generally, an individual must be able to understand the significant benefits, risks and alternatives of health care and be able to communicate a health care decision. The test of capacity to execute these directives generally is parallel to that of contractual capacity. However, the

determination of contractual capacity is not well defined depending on the nature, complexity and consequences of the act at issue. Other factors are often considered, as well.

In all of the life and estate planning documents, individuals should carefully appoint a representative whom they trust and who will ensure that the principal's wishes will be cared out. As important is the appointment of successor agents to act in case the original appointee is unwilling or unable to act.

Life and estate planning documents are the key to ensuring that an individual's wishes regarding who he/she want to have act on their behalf for health and financial decisions if unable to communicate and for the distribution of a person's assets after passing. Everyone should have these documents in place – from 18-year-olds to those in the twilight of life. Don't wait.

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