

COMPETENCY: AN ISSUE FOR THE 21ST CENTURY

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Alzheimer's disease and other dementias affect an increasing number of Americans. The Alzheimer's Association has estimated that the number of Americans with Alzheimer's disease could triple by the year 2050. South Carolina reflects national trends showing a significant increase in Alzheimer's Disease and other dementias, and there is even a case for the point of view that South Carolina is experiencing an even greater increase in its elderly population and these diseases than the nation as a whole.

Perhaps the key legal issue regarding Alzheimer's disease and other dementias is the issue of capacity. The proper execution of a legal instrument requires that the individual have sufficient mental capacity to understand the implications of the legal instrument. "Capacity" or "competency" is not a rigid black line and can vary considerable depending on the purpose for which capacity would be needed.

Powers of Attorney. The black letter law regarding the standard of competency to execute a power of attorney has been cited in court decisions as "in order to execute or revoke a valid power of attorney, the principal must possess contractual capacity...contractual capacity is generally defined as a person's ability to understand, in a meaningful way, at the time the contract is executed, the nature, scope, and effect of the contract."

Testamentary Capacity. In general, capacity to make a will is considered to be a very low standard of capacity, and a familiar definition of testamentary capacity is a test of whether the individual had the capacity to make a will is whether they knew (1) their estate, (2) the objects of their affections, and (3) to whom they wished to give their property.

Informed Consent. Informed consent is the type of consent normally required in connection with medical treatment. Arguably, it is one of the highest standards of capacity, since it requires understanding of proposed medical treatments, which in many cases is a very complicated matter. South Carolina courts have defined informed consent as follows: “Under the doctrine of informed consent, it is generally held that a physician who performs a diagnostic, therapeutic, or surgical procedure has a duty to disclose to a patient of sound mind, in the absence of an emergency that warrants immediate medical treatment, (1) the diagnosis, (2) the general nature of the contemplated procedure, (3) the material risks involved in the procedure, (4) the probability of success associated with the procedure, (5) the prognosis if the procedure is not carried out, and (6) the existence of any alternatives to the procedure”.

Incapacitated Persons. South Carolina Guardianship and Conservatorship statutes are based on the concept of an “incapacitated person”. Since “incapacity” is not the same as “incompetence”, this has created a great deal of misunderstanding about the effect of appointment of a guardian or conservator. For example, an individual could be an “incapacitated person” without being mentally incompetent (such as a person with physical disabilities, which might not affect a person’s mental condition, and by some mental conditions which can come and go).

Trends. It is hard to be sure what trends recent court cases illustrate regarding Alzheimer’s and other dementias, but a more modern view is that a person might be more competent at times than others, or perhaps competent for some actions and not for other actions. It’s probably also true that we have a better medical understanding of all kinds of dementias and this knowledge will help courts more accurately assess a person’s competency. Lastly, it’s probably also true that a medical evaluation is almost indispensable to an accurate evaluation of competency, and the more detailed and the more expert the evaluation is, the more reliable the competency opinion will be.

As a practical matter, for an attorney assessing a client's capacity, the standards and definitions may be clear, but applying that to a client's situation is not always as clear. Just because someone doesn't know the name of the President or what the date is does not necessarily mean they cannot execute a will or power of attorney. The determination requires a mix of medical, psychological and legal judgements and is based on information gathered by a variety of sources, including medical personnel.

What should you expect? First, welcome an effort to assess your competency. It's an effort to protect you and your family. Second, expect to have a medical evaluation of your mental status. This gives far more reliable results than anything else. Lastly, if you have a diagnosis of Alzheimer's disease or another dementia, do your planning as soon as possible.

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