How Do I Know If My Loved One Has The Ability to Sign Estate Planning Documents?

Not infrequently, we are contacted by a family member of someone who is or has been ill or who suffers with dementia. We are asked whether it is "too late" to do estate planning. It is important to note that, under our laws, the right to control how and to whom our estates will be distributed after death is sacredly guarded. In order to execute a will, someone need only be at least eighteen years of age and of "sound mind." Being of sound mind does not require that a person be in perfect health. A diagnosis of mental illness, memory loss or dementia does not automatically deprive a person of this essential right. Lawyers talk about this ability as "capacity:" the *capacity* to execute a will. Interestingly, one requires less capacity to execute a will than for any other legal document.

Although every case is different, the capacity to execute a will usually depends on three factors: (1) whether the individual understands the significance of the document; (2) whether he or she knows the nature and extent of their assets; and (3) whether they know the natural objects of their bounty. This means that, to sign a will, we must understand that we are signing a legal document which will dictate who will receive our assets after we die and we must know to whom we are leaving our assets. We must also have a general idea of what we own in order to understand the significance of the gifts we intend to make. It is not required that we know the balances in each of our accounts, but we should have an idea of the value of our assets. Inaccuracies in this regard do not mean that one lacks capacity, general knowledge is all that is required. Knowing, for instance, that my home is a house and that I own it is key. Knowing its market value is not. Our "natural objects" are usually considered next of kin: a spouse, if married, children, if any, or whomever is the next closest relation. If I am not leaving assets to kin, why? Do I know who they are? Do I have reasons for omitting them and, if I have the intention of disinheriting one, can I describe my reasons for doing so?

The person making a will, called the "Testator," is only required to be aware of these factors at the time of the execution of the document. As long as the Testator experiences a lucid moment, he or she can execute the will during such a moment. This is so even if the testator would be unable to recall the names of his or her children or the value of assets at a later time. Even a court's determination that a person is incapacitated and needs a guardian does not automatically mean that such a person lacks the capacity to execute a will. At Berwitz & DiTata we are respectful of our clients' limitations, if any, and also of their autonomy. We try to work with them when they are most alert and capable of expressing their wishes.

When one is making gifts or executing other documents, such as a revocable or irrevocable trust or power of attorney, different levels of capacity are required. At a minimum, the signer must have an understanding of the significance and consequences of their actions. We can work with clients and their families to assess whether, in our professional judgment, an individual is capable of signing a particular document. We base this upon our experience, knowledge and understanding of the law. We also provide advice as to the options in the event that a loved one does not have the requisite capacity to complete the task at hand.

If you have questions regarding capacity to execute estate planning documents or concerns regarding a particular person's capacity in this regard, call Berwitz & DiTata for an appointment. We would be pleased to discuss these matters further.