

# Legal Capacity aka Competence

by Attorney Michael Hooker

There are a variety of situations where a person is deemed incapable of making decisions because of cognitive impairment. Some professionals use the word "capacity" while others refer to "competence." While some readers might believe that a person is either mentally competent or not, the issue is not that easy. There is actually a spectrum of decisions and/or actions that require varying degrees of competence.

Being incompetent to sign a Will does not necessarily equate with incompetence to sign a Health Care Proxy. A person must have "testamentary capacity" to sign a Will. Our appellate courts have held that a Testator must appreciate the nature of the document, have a general idea of what their estate comprises and should be aware of the natural objects of their bounty (ie: next of kin). I recently was asked to prepare a Will for a wealthy woman of questionable competence who wanted to give "a wee bit" to some relatives in Scotland. She didn't recognize that she was a millionaire and couldn't name many of her relatives. I shied away from that project.

Sadly she had waited too long to address her estate plan.

What about competence to manage your financial affairs? If you are not competent to manage your finances then a concerned family member would have to file for a Conservatorship in Probate Court. However, a Conservatorship can be avoided by an elder signing a Power of Attorney (financial delegation of authority) to his or her trusted child. If an elder can't manage his or her money, then how can they name someone to do it? Because it is cognitively easier to process the question "should I let my son Fred manage my money?" This mental exercise/decision is far easier than an 88 year old mentally compromised man trying to manage his stock accounts and finances to determine if he should engage in sophisticated asset protection planning.

Health Care Proxies involve a similar analysis. A person may be incompetent to make a medical decision such as dialysis treatment yet competent to name his or her daughter to make medical decisions for him or herself. Under Massachusetts law the authority under a Health Care Proxy starts only when the elder is determined to be incompetent to make decisions. A physician invokes or "triggers" the Proxy. A psychiatrist once advised me that he has had patients sign a Health Care Proxy (relatively easy cognitive task) and then immediately invoke the Proxy and look to the daughter for medical decision regarding the insertion of a feeding tube.

Massachusetts law presumes that all adults are mentally competent; note the word adult. Minors are generally presumed to be incompetent to sign legal documents, including contracts. A law school professor of mine posed this question many years ago: a 16 year old comes into your office and wants help voiding a contract he entered for the purchase of an expensive computer. Should you take him on as a client? Is he competent to sign a fee agreement with you?

As you can see, the issue around competence boils down to this: does the person understand his situation and can he weigh the pros and cons of a particular decision and its consequences?