**Capacity: What is it and How Does it Affect Me?**

By: Brandon Peck and Elena Roper

Hypothetical. Mindy, 65, and George, 81, have been living together for over 15 years, but have never married. George divorced his first wife, Sandra, to be with Mindy. George has three children from his first marriage who are still upset about the divorce and, therefore, see their father infrequently. George has long expressed interest in updating his estate plan because his current will does not include Mindy. George also wants Mindy to make any necessary medical and financial decisions for him in the future. Lately, Mindy has noticed George becomes easily confused about where he is and what he is doing and has started forgetting who people are. Doctors have suggested George is most likely developing dementia. Does George have the required mental capacity to execute new legal documents?

Understanding Capacity. To execute estate planning documents, such as a will, a person must possess the requisite mental capacity. Testamentary capacity is defined by the law as “sufficient mental ability to know and remember who the natural objects of one’s bounty are, to comprehend the kind and character of one’s property, and to make dispositions of one’s property according to some plan formed in the mind.” In laymen’s terms, testamentary capacity requires a person to be of sound mind and memory. They must be able to know what a legal document means, and the implications of that document should they sign it. More precisely, decisional capacity requires:

1. The ability to understand and appreciate the nature and consequences of a decision.
2. The ability to reach and communicate an informed decision.
3. And the ability to weigh the risks versus the benefits.

Capacity is also needed for a person to appoint a trusted friend or family member to make medical and financial decisions for them in the future.

While capacity is not an all or nothing condition, attorneys must make assessments regarding a client’s capacity to execute legal documents. Therefore, it is important to execute legal planning documents while you still have the mental capacity to do so. In George’s case, an attorney may judge that he does not have the required mental capacity to execute new legal documents due to his inability to remember who people are and his doctors’ belief he is developing dementia. This leaves Mindy unable to inherit from George or make medical and financial decisions for him. Most likely, a court would appoint George’s children to make those decisions.

Hiring an Attorney. To avoid a situation like George’s, it is important to hire a competent elder law attorney that can help secure you and your family’s future. An attorney can help you navigate complex issues which may arise during the estate planning process, such as interpreting different federal and/or state laws and protecting family assets while keeping you eligible for government benefits.

Not all attorneys are the same, and just like you wouldn’t hire a plumber to rewire your house, you shouldn’t hire a criminal attorney for estate planning services. To find an elder law attorney that fits your needs, ask friends and family for a referral and seek guidance from local community groups. Once you have found an attorney, make sure to verify their background by reviewing the law firm’s website and inquiring about experience. The selection of the proper attorney is very important in securing your family’s legacy.

Had George sought the services of an elder law attorney sooner, they would have assisted him in executing a new estate plan that ensured Mindy’s future and advised him on what documents to execute to give Mindy authority over his medical and financial decisions.

What to do Next? Now that you know how important it is to seek out the services of an experienced elder law attorney while you still have the capacity to execute legal documents, what should you have them do?

1. Estate Planning. Regardless of the zeros in the bank account, everyone needs an estate plan. A will allows you to dictate how your property will be distributed after death and address questions such as guardianship of children, charitable donations, funeral and burial wishes, and naming an executor to manage the estate. Alternatively, a revocable trust can be utilized to distribute property during your lifetime and help your family avoid the probate process altogether, post-death. Elder law attorneys can help you execute either kind of document no matter how simple or complex.
2. Powers of Attorney. Two of the most important documents you should execute while you still have capacity are powers of attorney for healthcare and property. Without these documents in place, you and your family will lose control over your future as a court will have to step in to determine your best interests should you lose capacity.
   1. POA for Healthcare. Use this document to appoint a trusted friend or family member to be your “agent” who will make medical decisions on your behalf should you lose capacity. The Power of Attorney document clarifies your wishes should you become unable to speak for yourself. This includes crucial decisions related to medical treatment, end-of-life care, and organ donation.
   2. POA for Property. Use this document to appoint an “agent” to manage finances and property should you lose capacity. This could include paying bills, managing bank accounts, and caring for the home.

To safeguard the future of you and your family tomorrow, it is imperative that you execute the proper legal planning documents while you still have capacity today. The care and expertise that only an elder law attorney can provide can help you do just that.