

THE ISSUE OF INCOMPETENCY IN A SENIOR

When doing an estate plan that includes a will, trust and other power of attorney documents, I recommend that my clients have a disability panel to determine when a person can be ruled incompetent.

Traditionally, estate planners have recommended that competency be determined by one or two physicians. The problems with using doctors are numerous but include: 1) scheduling appointments, 2) patient examinations by the doctor, 3) federal HIPAA rules may limit or prohibit the doctor from providing the results of the exam to others, 4) it can be costly, and 5) it can take a lot of time for all parties. The advantage of a disability panel is that the panel can be trusted family members who can meet and agree that the loved one is incompetent thus avoiding all of the problems associated with using a physician.

Many of my clients in the past have been appointed to serve on a patient's Disability Panel, either as the patient's personal physician or as a specialist physician appointed by the other members fo the Panel. Others have had to make medical decisions for guardianship or conservatorship proceedings regarding a patient's competency or capacity to continue managing their personal and financial affairs. Still others have had to make the call on a patient's competency for other purposes. At no time are these medical decisions ever easy.

COMPETENCY

One of the toughest questions physicians and estate planning attorneys must address is whether a person is "competent."

First, this term should not be confused with the word "disabled." "Disabled does not pertain to legal competence. A person may be physically disabled because of an accident or medical condition, even including a stroke. But the fact that person can no longer use his or her hand, arm, or leg in a comfortable manner, and thereby sign documents, does not prevent the implementation of those documents.

The term "competence" pertains to mental abilities. Before defining the term, it is important to ask , "competent to do what?"

For example, some of us have difficulty even operating a computer and therefore are clearly not competent to become programmers. However, the fact that we lack the competency to be a computer programmer does not necessarily mean we are not competent to sign a legal document such as a deed, will, trust, or power of attorney.

CAPACITY

When addressing the legal effectiveness and enforceability of the execution of such documents, courts often use the term “capacity.” That is, at the moment the person signed, did he or she have the mental capability to understand the purpose and consequences of the document? Also, to the extent that the document affects the person’s assets, did he or she have a general understanding of the nature of those assets? Finally, where the document is a will or otherwise affects the current receipt of future inheritance of assets, did the person understand the identity and relationship of those he or she is including and any he or she is excluding?

One other requirement for capacity is that the person be a legal adult - at least 18 years of age. If not, most documents signed by a minor are ineffective or at least not enforceable against that minor.

MEMORY