



## Edward Thomas: Tips on determining testamentary capacity

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By Edward D. Thomas

The requirements for making a will in Indiana are two-fold: The individual must be (1) of sound mind, and (2) 18 years of age or older. Ind. Code § 29-1-5-1. In actions to contest and set aside the probate of a will, the grounds usually asserted are some combination of unsoundness of mind, fraud, duress, undue influence or that the will was unduly executed. *See* Ind. Code § 29-1-7-17. One of the more difficult challenges in a will contest is establishing that the testator lacked testamentary capacity. In general, a will executed while the testator is of unsound mind is invalid. However, contrary to popular belief, factors such as old age, physical failings or even failing memory alone are insufficient to establish a lack of testamentary capacity.



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Indiana courts presume that every person is of sound mind to execute a will until the contrary is shown. *Gast v. Hall*, 858 N.E.2d 154, 165 (Ind. App. 2006). To rebut this presumption, a party must show that the testator lacks mental capacity at the time of executing his will to know: (1) the extent and value of his property; (2) those who are the natural objects of his bounty; and (3) their deserts, with respect to their treatment of and conduct toward him. *Hays v. Harmon*, 809 N.E.2d 460, 464 (Ind. Ct. App. 2004), *trans denied*.

The key to successfully challenging a will essentially focuses on a two-part inquiry. First, unsoundness of mind sufficient to render a will invalid must exist at the time of the execution of the will. *See Deery v. Hall*, 175 N.E.141 (Ind. App. 1931). Second, it must be established that the unsoundness of mind impacted the testator's ability to know his property and know to whom he wishes to devise this property. Thus, to be incapable of executing a will because of unsoundness of mind, a person must have such a degree of mental unsoundness that he or she does not reach the standard of competency generally recognized by law.

While the law does not seek to define the exact quality of mind and memory a testator must possess to authorize him or her to make a will, it does require the testator to know and understand the business in which he or she is engaged, the extent of his or her estate, and the persons who would be the natural objects of his or her bounty. Indiana courts simply require the testator to be able to keep these in mind long enough to form a rational judgment in relation to them. *Kaiser v. Happel*, 36 N.E.2d 784 (Ind. 1941).

The capacity to make a will is not measured by the testator's actual knowledge or understanding of the

extent and nature of the property devised, but by his or her capacity to understand the extent of his or her estate and the objects of his or her bounty. While a total loss of memory, or the fact that it has become seriously impaired, may render a person incompetent to make a will, not every slight or partial loss of memory will do so. *Whiteman v. Whiteman*, 53 N.E. 225 (Ind. 1899).

On the issue of testamentary capacity, evidence of the testator's appearance, conduct, statements, declarations or conversations, both before and after the execution of the will, may be admissible if it is material and occurred in close proximity to the execution of the will. This type of evidence is admissible solely for the purpose of establishing the condition of the testator's mind, but not as proof of the truth of the facts stated. The exact time which may be covered by the period before or after the testamentary act to show the testator's mental condition when making the will lies within the sound discretion of the trial court. Thus, the issue of admissibility of evidence is critical to this determination.

Generally, competent evidence of every fact which sheds light on the issue of testamentary capacity is admissible. On the other hand, incompetent, irrelevant or immaterial evidence is generally held inadmissible. Although a testator's capacity to make a will is to be determined by his or her condition at the time of its execution, evidence of the testator's mental condition either before or after execution may, depending on the circumstances of each case, be material and admissible. *Griffith v. Thrall*, 29 N.E.2d 345 (Ind. App. 1940). However, this is true only for the purpose of showing the condition of the testator's mind at the time the will was executed. *Estate of Verdi ex rel. Verdi v. Toland*, 733 N.E.2d 25 (Ind. Ct. App. 2000). Where it is established, however, that at the specific time of the execution of the will the testator was mentally sound, his or her mental condition at some other time is of no consequence. *Peters v. Knight*, 8 N.E.2d 401 (Ind. App. 1937).

Indiana courts have specifically admitted evidence as to various matters on the issue of testamentary capacity, such as: (1) hereditary insanity among the testator's relatives; (2) testator's insane delusions and peculiar beliefs or opinions; (3) testator's physical condition; (4) statements in the testator's will that he had advanced specific sums to named persons were erroneous; (5) testator's habits and reputation; and (6) the reasonableness of the provisions of a will.

When testamentary capacity is an issue, or if there is a concern that there may be a challenge based on capacity in the future, it is appropriate for the estate planning attorney to ask a series of questions of the testator before execution of the will. These questions should elicit the testator's knowledge of the extent of their estate, including the names and ages of heirs and beneficiaries. The attorney should also discuss the effects of the will and ensure the testator generally understands the effects of signing the testamentary document. While there is no guarantee that one's will cannot be successfully challenged, following these suggestions will aid the testator's personal representative and attorney to defend a subsequent will contest.

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