



Wills – Testamentary Capacity and Undue Influence

CHRISTOPHER BERRY (Farmington Hills, Michigan)



Many of the wills challenged in court are challenged on either the basis of a lack of testamentary capacity or on the basis of undue influence.

Not just anyone is able to execute a will. To execute a will, you must have “testamentary capacity.” Check your state law for your state’s definition. Typically, however, there will be an age requirement — generally 18 years old, along with a mental requirement of a “sound mind.”

Satisfying the age requirement is cut and dry. To make a will, you must be the required age. The portion of testamentary capacity that is often more problematic is the mental requirement.

Typically, to have testamentary capacity, the testator — the one creating the will — must be able to comprehend the nature and extent of his or her property, the ability to know the natural objects of his or her bounty, and to determine and understand the disposition of property which he or she desires to make.

If a testator executes a will and it is subsequently challenged, the testator does not have the burden to prove testamentary capacity. That burden falls on whoever is challenging the will. They have to prove the lack of testamentary capacity at the time the will was drawn. More often than not, they challenge the will on the grounds that the testator did not have a “sound mind.”

You often see wills challenged for lack of testamentary capacity when dealing with the elderly or disabled. For example, a senior individual suffering from Alzheimer’s disease, a middle-aged man who has suffered a head injury, or a woman who suffers from Schizophrenia all could have their wills challenged due to lacking a “sound mind.”

While the burden is not on the testator to prove testamentary capacity, there are keys to make it more difficult for a will to be challenged on this basis. First, illiteracy or lack of education has little to no bearing on the “sound mind” requirement. Nor does the lack of wisdom or fairness in the disposition of the property provisions of the will. Weakness of mind and forgetfulness, are likewise, insufficient of themselves to invalidate a will due to lack of

testamentary capacity. Furthermore, just because a person may suffer from a mental disease or disability does not automatically mean he or she lacks a “sound mind” in terms of testamentary capacity. If the testator has lucid moments, and witnesses can attest to those lucid moments, that is enough testamentary capacity for the person to create a valid will.

For example, a testator suffering from dementia may have many bad days in a row. Then one day, he or she is very lucid, aware of his or her surroundings, property, what he or she wants to do with the property, and the effect of his or her decisions. The testator signs and executes a will that day. Then he or she falls back into dementia and passes away a week later. The will the testator executed is valid because at the time the will was drawn, he or she had a “sound mind” and testamentary capacity. If the testator had created a will on another day, it may not have been valid.

One strategy you can use to aid your argument that a testator has testamentary capacity is quiz the testator on current events while reviewing and signing the documents while witnesses are around. For example, if you are having the testator sign the will and are able to carry on a conversation about yesterday’s baseball game or any other current events, that can be used as evidence of a lucid, “sound mind.” If someone subsequently decides to challenge the will on testamentary capacity and “sound mind” grounds, you have established, with the aid of witnesses, evidence of the “sound mind” requirement during the signing and execution of the document.

Along with testamentary capacity, undue influence is a second common reason wills are challenged. Undue influence occurs when the testator has testamentary capacity, but that capacity is subjected to and controlled by another individual who has manipulative, selfish intentions.

For example, a testator in a nursing home creates a will benefiting his children. However, a nurse discovers that the testator is very wealthy and begins to take steps to keep the children away from the testator, while at the same time becoming the testator’s confidant. Over a period of time, the nurse continues an entire course of conduct designed to overpower the testator’s mind and manipulate the testator to hate the children. Eventually, the testator executes a new will naming the nurse as beneficiary. This new will may be challenged because of undue influence.

However, just because there is influence, does not mean there is “undue influence,” and that a will can be successfully challenged. For example, a testator has two sons and creates a will to benefit both equally. Over the next five years, one son spends more time taking care of the testator. Along with this, the caregiving son pleads for more of the testator’s estate. The testator then creates a new will benefiting the son who helped out more and, shortly thereafter, passes away. This scenario most likely would not rise to the level necessary to challenge on the basis of undue influence because there is not the level of manipulation and domination required by most state laws.

Undue influence must amount to force and coercion that overcomes and destroys the free agency of the testator. In our examples, the nurse was forcing the testator’s children away, while in the second example, the son who was helping out was not

forcing or manipulating. He was making his wishes known, but there was not the level of deceit present as there was with the nurse.

As you are creating a will, you need to keep in mind the two concepts of testamentary capacity and undue influence and take steps to ensure your documents do not erroneously get challenged on these grounds.

Witzke Berry, PLLC, help our clients create, implement, and maintain their estate plans designed to capture the past and secure the future for both our clients and their beneficiaries.