DETERMINING TESTAMENTARY CAPACITY

Author and director William "Tim" Burton is quoted as saying, *"They say that one person's insanity is another person's reality.*" Recently, Wade Ash has been involved in several interesting cases involving testators suffering from cognitive impairment when they prepared their Will or Trust. Even persons who are declared mentally incompetent, incapacitated or suffering from various types of mental illness or addiction, may still have sufficient capacity to prepare a Will or Trust. A testator may even lack testamentary capacity, but still have "lucid intervals" enabling them to prepare a Will.

There are several basic requirements concerning the execution of a Will or Trust. One of the most important requirements is that the testator have testamentary capacity when he executes his Will or Trust. Testamentary capacity generally means that the testator acted with his or her own free will and without being subjected to improper undue influence. Testamentary capacity is found when the testator is of "sound mind." [1] Forensic psychologist Dr. Max Wachtel has weighed in on what is a "sound mind": "The basic presumption is that a will is considered valid and was signed by someone 'of sound mind' if it meets all of the other statutory requirements. There are ways of limiting the ability for people to contest a Will after the testator's death, and they typically include having an evaluation done by a psychologist prior to signing a Will to document an opinion that the person is of sound mind – attorneys typically suggest their client do this if the testator is elderly and doing something controversial in the Will like writing out a natural heir." [2]

In a recent case, the testator, prior to the execution of his Will, was adjudicated by the Court as an "incapacitated person." Because of a diagnosis of dementia, the Court found the testator was incapable of making appropriate decisions regarding his care, as well as the management of his finances. The testator's son was appointed as his father's Guardian and Conservator. At the time of the testator's death, the testator's daughter challenged her father's Will. The daughter argued that her father's Will was void because he had been adjudicated as incapacitated. The Court, however, found that the testator's Will was valid and that the determination of incapacity did not necessarily mean the testator lacked testamentary capacity. The Judge stated in his findings upholding the Will, "*You know we all have our good days and bad days when we sign documents.*" Colorado case law explicitly states that a finding of incapacity which warrants the appointment of Guardian and/or Conservator does not equate to a determination of lack of testamentary capacity. In other words, a person who has a Guardian and Conservator appointed to assist him or her in decisions regarding care and finances does not necessary preclude that person from creating a Will or Trust.

The law generally provides that when a Contestant proves at trial that the testator lacked testamentary capacity at the time of the execution of his Will or Trust, the burden of proof shifts to the Proponent to prove that the Will or Trust was executed by the testator during a "lucid interval." The term "lucid interval" does not mean just a moment of awareness, it is a period of time during which the testator returned to a state of comprehension and possessed actual testamentary capacity. The concept of a "lucid interval" has existed since the beginning of time when the idea of an oral or written instruction as to the disposition of one's property was recognized. In modern times, the definition of "lucid interval" has been described as a temporary period of rationality or neurological normality such that a person has sufficient intelligence, judgment and a will to enter into a contractual relation or perform other legal acts without disqualification by reason of disease.

Historically, Courts have held that "habitual insanity" renders the testator incapable of executing a Will or Trust, or entering into a contract, because of the inability to become lucid. However, any disease or condition described as causing "recurrent sanity" means that there could be "lucid intervals" during which the testator was capable of executing Wills, Trusts or contracts. This often begs the question as to precisely what constitutes habitual insanity versus recurrent sanity.

In a recent case, the testator, prior to his death, was diagnosed by his psychiatrist with schizophrenia. The psychiatrist's report stated that prior to the execution of his Will, despite the diagnosis of schizophrenia, the testator was oriented to person, place and time. He knew who he was, where he was, the date and the day of the week. The testator's appearance was normal, well groomed, well dressed, his speech and articulation were good, and he was easy to understand He appeared to be pleasant and in a happy mood during the evaluation. However, during the two hour exam, the psychiatrist found that the testator's thoughts were tangential, illogical and sometimes nonsensical. It was difficult to determine if the testator understood the questions asked, because many of his responses didn't make sense. The testator often jumped from topic to topic and started telling a story in the middle with no background or explanation. Ultimately, the psychiatrist determined that the testator's thought process and content was so severally impaired that the testator lacked testamentary capacity.

In another recent case, an elderly gentleman was diagnosed with dementia and was adjudicated as an incapacitated person needing a Guardian and Conservator. It was determined by the Court that the incapacitated person also needed the protection of a Guardian and Conservator because he was highly susceptible to undue influence and financial exploitation. Prior to the appointment of the Guardian and Conservator, the elderly gentleman transferred $3 Million of his commercial real estate to his niece, who was a horse trainer. At trial, forensic evidence was submitted indicating that the niece was slipping Ketamine into her uncle's morning milk shakes causing him extreme confusion. Ketamine is a dis-associative anesthetic which is frequently used on animals as a tranquilizer. Ketamine can cause amnesia, hallucinations and depression. It can also distort reality. The Court set aside the Deeds despite testimony from the notary at the title company that the incapacitated person was alert and oriented as to person, place and time.

In a landmark case, the Colorado Supreme Court, in upholding the Denver Probate Court's Order, addressed the standards for testamentary capacity, as well as whether the decedent's Will was executed while he was suffering from an insane delusion. The forensic evidence established that the decedent, at the time he prepared his handwritten Will, was drinking heavily and was under the influence of cocaine. He was also suffering from paranoid delusional thoughts that he was being watched by the FBI. His handwritten Will left his multi-million dollar estate to his girlfriend. After the decedent signed his Will, he shot his dog and then shot himself. The decedent's parents challenged the Will on the basis of lack of testamentary capacity and claimed that their son was suffering from an insane delusion. The trial court upheld the Will finding that the decedent had testamentary capacity, despite the fact that he was under the influence of drugs and alcohol and was suffering from paranoid delusional thoughts. The Judge stated in her Opinion that the decedent's delusional thoughts, that the FBI was bugging his house and watching him, did not impact his handwritten Will.

Forensic psychologist Dr. Max Wachtel also addressed what is an "insane delusion". He stated: "This delusion is a persistent belief "which has no existence in fact and which is adhered to against all evidence." The delusion must also materially affect the dispositions listed in the will. For example, if a father thinks his wife cheated on him with extraterrestrials and his children are the product of that cheating, it would be an insane delusion if he were to use that "fact" to write the children out of the will. On the other hand, if the father believes his children are aliens but he loves them anyway, thus leaving them in the will, that would not count as an insane delusion under *Breeden*. That would just be a regular delusion that has no material effect on the dispositions in the father's will." [3]

Most Colorado probate litigators believe that this case has set the bar so low that it is virtually impossible for a Contestant in Colorado to prove lack of testamentary capacity. Indeed, since the Colorado Supreme Court ruling in this case, this author is unaware of any published Colorado state court cases finding that a testator lacked testamentary capacity.

One thing that is clear from the reported Colorado cases is that testamentary capacity is not static, it can come and go depending upon a variety of neurological, biological and environmental factors. While it is true that elderly persons diagnosed with dementia or Alzheimer's may be more alert and responsive during certain periods of the day, they may generally lack the ability to perform higher levels of abstract thought. Capacity to execute a Will or Trust is generally not considered by mental health experts as requiring a higher level of abstract thought. A person suffering from a depression, delirium, psychosis, schizophrenia and other mental illness may experience "lucid intervals." Moreover, even when a testator may have a permanent mental illness, his Will may contain logical and sensible provisions suggesting it was executed by the testator during a "lucid interval" and the Will was not impacted by insane delusions. People habitually under the influence of drugs and/or alcohol may also be capable of executing a Will or Trust during a "lucid interval," as their induced impairment is only a temporary condition which is resolved by sobriety.

There are many approaches to neurological assessment and testing. Evaluations of testamentary capacity most often arise with elderly testators. In many cases, these individuals may have physical limitations such as poor eyesight or hearing which may limit assessment. Fortunately, it is generally understood by geriatric psychologists that extensive neuropsychological testing may not be necessary to determine testamentary capacity. Evaluations determining testamentary capacity need not be complex, and it may be sufficient for the evaluator to simply identify the testator's cognitive strengths and weaknesses which may or may not impede the ability of the testator to prepare his Will.

1. Colorado Jury Instruction (CJI 30:22) cites to *Hanks v. McNeil Coal Corp*., 114 Colo. 578, 168 P.2d 256 (1946); which held that contractual capacity and testamentary capacity are the same. The *Hanks* case has been upheld by the Colorado Supreme Court in *Breeden v. Stone*, 992 P.2d 1167 (Colo. 2000) and the Colorado Court of Appeals in *In Re Estate of Romero*, 126 P.3d 228 (Colo. App. 2005) cert. denied 2006 WL 349702 (Colo. 2006). Under Colorado law, it is currently unsettled as to the requisite capacity of a Settlor to create an irrevocable trust. Restatement (Third) of Property: Wills Other Donative Transfers § 8.1 (Tentative Draft No. 3, 2001).

2. https://www.maxwachtel.com/blog-1/testamentary-capacity

3. https://www.maxwachtel.com/blog-1/testamentary-capacity