

## **MENTAL CAPACITY ISSUES IN ESTATE PLANNING LITIGATION**

The United States Census Bureau projects that by 2050, the 65 and older population will nearly double that of 2012. Along with this increasing older population comes an increase in the potential for estate litigation based on mental capacity issues.

These types of claims often arise where the testator suffers from a mental or physical condition, such as Alzheimer's disease or Parkinson's disease, that could compromise a testator's ability to have an understanding necessary to execute a valid will or trust or which may make him or her susceptible to being influenced by another person while making decisions about his or her estate. Advanced age, an inability to handle financial affairs, and the testator's personality may be other relevant factors when a challenge to a person's mental capacity arises.

In Wisconsin, any person 18 years or older and of sound mind may make, amend, or revoke a will or trust. Testamentary capacity is presumed, but interested parties, including disinherited heirs, may assert that a will or trust does not reflect the true wishes of the testator. The two main ways to challenge testamentary capacity are through claims that the testator lacked legal capacity or that someone exercised "undue influence" over the testator.

The test for legal capacity in Wisconsin is quite specific and requires that a testator have the mental ability to understand the nature and extent of his or her property and his or her relationship to the beneficiaries. A testator must also be able to appreciate the scope and general effect of the provisions of his or her will or trust in relation to the beneficiaries. The testator needs to be able to contemplate these elements together for a sufficient period of time, without prompting, to form a rational judgment in relation to them, the result of which is expressed in the will or trust.

Generally, the testator must have a reasonable understanding of the terms of the will or trust, though a complete understanding of legal terms is not necessary.

A claim of undue influence is essentially one of diminished testamentary capacity, and a person challenging a will or trust may prove it by satisfying the following elements:

1. Susceptibility of the testator to undue influence;

2. Opportunity to influence the testator;
3. Disposition to influence the testator; and
4. Coveted or desired result.

As you can see, estate and probate cases involving mental capacity issues are highly fact specific. A precise application of these factors will depend on the circumstances of each case. Court decisions will depend largely on particular circumstances, which makes choosing an experienced estate planning litigation attorney to develop your case crucial.

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