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## TESTAMENTARY CAPACITY: IS THE ALCOHOLIC INCAPACITATED?

Sharon Glisson Bradley

The only Montana statutory requirements regarding capacity to make a will are that the testator be eighteen years of age and of sound mind.<sup>1</sup> This note addresses the effect of alcohol use upon mental competency and thereby testamentary capacity.

There is no precise standard for determining whether a testator has the mental capacity to execute a will. Rather, the courts have developed the following general elements to consider when determining capacity: (1) general knowledge of the kind and quantity of property owned; (2) awareness of the document being executed and its effect; (3) knowledge of planned disposition; and (4) knowledge and appreciation of the natural objects of the testator's bounty.<sup>2</sup> A testator must meet each requirement and be able to understand those requirements as they relate to each other.<sup>3</sup>

There is a general presumption that the testator of a properly executed and attested will<sup>4</sup> was mentally competent.<sup>5</sup> Some jurisdictions place the burden on the proponent of a will to prove testamentary capacity,<sup>6</sup> but Montana has placed the burden of proving lack of testamentary capacity on the contestant.<sup>7</sup> An interested person<sup>8</sup> who wishes to contest a will can do so for several reasons. Pertinent to this note are challenges to the validity of a will because of a lack of testamentary capacity due to the habitual or chronic use of alcohol.

Because intoxication is a temporary condition, a party con-

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1. MONT. CODE ANN. § 72-2-301 (1983).

2. Note, *Testamentary Capacity*, 3 LAW & PSYCH. REV. 107-08 (1977). See also *In re Cissel's Estate*, 104 Mont. 306, 314, 66 P.2d 779, 782 (1937); *In re Bielenberg's Estate*, 85 Mont. 521, 528, 284 P. 546, 548 (1930).

3. 11 AM. JUR. POF 162 (1961).

4. MONT. CODE ANN. § 72-2-302 (1983).

5. *Blackmer v. Blackmer*, 165 Mont. 69, 74, 525 P.2d 559, 562 (1974).

6. *In re Estate of Nelson*, 250 N.W.2d 286, 289 (S.D. 1977).

7. MONT. CODE ANN. § 72-3-310 (1983).

8. MONT. CODE ANN. § 72-1-103(21) (1983) provides:

"Interested person" includes heirs, devisees, children, spouses, creditors, beneficiaries, and any others having a property right in or claim against a trust estate or the estate of a decedent, ward, or protected person which may be affected by the proceeding. It also includes persons having priority for appointment as personal representative and other fiduciaries representing interested persons. The meaning as it relates to particular persons may vary from time to time and must be determined according to the particular purposes of and matter involved in any proceeding.

testing a will must present evidence making it apparent that the testator was so far under the influence of alcohol at the time of execution that he lacked the fundamental elements of testamentary capacity.<sup>9</sup>

An individual is incapacitated, for purposes of guardianship or conservatorship proceedings, if by reason of "chronic intoxication" he lacks sufficient understanding to make responsible decisions concerning himself.<sup>10</sup> As part of the Montana Uniform Probate Code, such a definition likely would be helpful in determining whether a testator suffered from testamentary incapacity by reason of excessive alcohol use. Evidence of excessive or chronic alcohol use generally is admissible on the issue of testamentary capacity.<sup>11</sup> Habitual intoxication, however, does not create a presumption of incapacitating drunkenness at the time of executing a will.<sup>12</sup> There must be a showing that, because of intoxication, the testator was disabled at the time he executed his will with respect to one or more of the elements of capacity.<sup>13</sup> Even a chronic alcoholic is considered to have capacity, when sober, to make a will.<sup>14</sup> The contestant challenging a will must show that, at the time of execution, the testator was suffering from some mental disorder arising out of his excessive use of alcohol, and that the disorder rendering him incapable of performing one or more of those mental functions necessary to make a will.<sup>15</sup>

If a contestant presents sufficient evidence of the testator's alcohol-induced mental incapacity, which was manifested shortly before and after the time of execution, such incapacity is presumed to have existed when the will was executed.<sup>16</sup> The proponent may counter with evidence that the will was executed during a lucid interval.<sup>17</sup>

A lucid interval is a period of sanity or competence between periods of insanity or incompetence.<sup>18</sup> Occurrence of a lucid inter-

9. *Estate of Nelson*, 250 N.W.2d at 289.

10. MONT. CODE ANN. § 72-5-101(1) (1983).

11. *In re Cashion's Estate*, 27 Cal. App. 2d 689, 691, 81 P.2d 628, 630 (1938). *See also* 79 AM. JUR. 2D *Wills* § 126 (1975).

12. *McGrail v. Schmitt*, 357 S.W.2d 111, 119 (Mo. 1962). *See also* 79 AM. JUR. 2D *Wills* § 112 (1975).

13. 79 AM. JUR. 2D *Wills* § 114 (1975); *Ravenscroft v. Stull*, 280 Ill. 406, 411, 117 N.E. 602, 603 (1917). *See also* 11 AM. JUR. POF 206 (1961).

14. 11 AM. JUR. POF 207. *See also* 79 AM. JUR. *Wills* § 112 (1975).

15. *Elkinton v. Brick*, 44 N.J. Eq. 154, 15 A. 391 (1888).

16. 11 AM. JUR. POF 213 (1961). *See Alexander v. Estate of Callahan*, 132 So. 2d 42, 43 (Fla. 1961).

17. 79 AM. JUR. 2D *Wills* § 112 (1975).

18. *See, e.g., In re Estate of Cook*, 231 Or. 133, 136, 372 P.2d 520, 522 (1962).

val raises a presumption that a mentally incompetent testator was sufficiently uninfluenced by his disease that the legal consequences of incompetency are inapplicable.<sup>19</sup> A will executed by even a chronic alcoholic may be found valid if the proponent can present sufficient evidence of execution during a lucid interval.<sup>20</sup> Evidence necessary to prove the lucid interval may be classified in terms of: (1) the testator's conduct; (2) his organic condition; (3) the type of disposition; and (4) opinions of others.<sup>21</sup> An unnatural, unjust, or unfair disposition is not determinative of incapacity<sup>22</sup> but it would be admissible as evidence of the testator's mental state.<sup>23</sup> A disposition which is in conformity with the testator's previous declarations may be cogent proof of capacity. On the other hand, a disposition in opposition to prior expressions, unless explained, may supply additional evidence of incapacity.<sup>24</sup>

The opinions of nonexperts regarding mental competency must be based on actual observation.<sup>25</sup> The observations may have been made shortly before or after execution of the will but need not be made at the time of execution, as a witness is not required to be present in order to give an opinion regarding general mental competency.<sup>26</sup>

In determining testamentary capacity the court must examine all surrounding circumstances,<sup>27</sup> including the education and experience of the testator. Habitual alcohol use may lead to such conditions as delirium, in which thinking and perception are disordered.<sup>28</sup> Delirium can produce reactions ranging from mental sluggishness to bewilderment and bafflement.<sup>29</sup> Delirium reduces the capacity for abstract thinking and impairs the ability to maintain concentration.<sup>30</sup>

In order to invalidate a will, it is necessary to prove that a testator's use of alcohol or alcoholism rendered him incapable of understanding the nature and consequences of his acts at the time

19. 18 AM. JUR. POF 2D § 1 (1979). See also 1 W. BOWE & D. PARKER, PAGE ON WILLS §12.36 (1960).

20. *Akers v. Morton*, 499 F.2d 44, 46 (9th Cir. 1974).

21. Note, *Testamentary Capacity in a Nutshell: A Psychiatric Reevaluation*, 18 STAN. L. REV. 1119 (1966).

22. *In re Cissel's Estate*, 104 Mont. at 315, 66 P.2d at 782.

23. *Estate of Dillenburg*, 136 Mont. 542, 547, 349 P.2d 573, 574 (1960).

24. *Id.* at 547, 349 P.2d at 575.

25. *Ergang v. Anderson*, 378 Ill. 312, 315-16, 38 N.E.2d 26, 28 (1941).

26. *Dillenburg*, 136 Mont. at 546, 349 P.2d at 575.

27. *Dillman v. McDaniel*, 222 Ill. 276, 290, 78 N.E. 591, 596 (1906).

28. 11 AM. JUR. POF 182.

29. *Id.*

30. *Id.*

he executed his will. Although courts rarely invalidate a will on the basis of the testator's alcohol-induced testamentary incapacity, an attorney drafting a will should be careful to ensure the alert mental state of a client who drinks excessively or is an alcoholic. An attorney drafting a will for a person suspected of being a heavy alcohol user might consider one or more of the following safeguards to assist in avoiding a challenge to the will based on alcohol-induced testamentary incapacity: (1) tactfully asking the testator to undergo a medical examination to aid in establishing testamentary capacity; (2) arranging for a video tape to be made of the execution of the will; (3) including in the will itself the reasons for excluding any party or making any significant changes from previous wills; and (4) having the execution witnessed by persons who know the testator but who have no interest in the will.

The contestant's burden of proving alcohol-induced testamentary incapacity is substantial, and rarely met. Nevertheless, ensuring a testator's capacity at the time the will is executed could help to avoid subsequent litigation which otherwise would unnecessarily delay disposition of the estate.