Proof of Testamentary Incapacity - What Does It Take to Show Someone Is Incapable of Creating a Will
Just as when one enters into a contract, one cannot create a Will unless one has the mental capacity to do so. Normally, someone challenging a Will must demonstrate that the person lacked that capacity or that the person was subject to undue influence. Please see our article on Will Contests.
This article will simply set out in one place the applicable statutory definition of testamentary incapacity and a sampling of cases applying the relevant test where the evidence was found insufficient to support a finding of incapacity and cases where the evidence was found sufficient to support a finding of incapacity.
Above all, it is important to note that whether one has testamentary capacity is a question of fact to be determined, if necessary, by a full trial. The statute below gives the criteria and the cases below indicate instances of determinations by juries that were upheld as valid by the appellate courts. They are samples and whether a particular fact situation would support or deny such a claim requires full analysis and good legal and medical advice.

STATUTORY DEFINITION OF TESTAMENTARY INCAPACITY

Cal Prob Code § 6100.5 (2006)

§ 6100.5. Persons not mentally competent to make a will

(a) An individual is not mentally competent to make a will if at the time of making the will either of the following is true:

(1) The individual does not have sufficient mental capacity to be able to (A) understand the nature of the testamentary act, (B) understand and recollect the nature and situation of the individual's property, or (C) remember and understand the individual's relations to living descendants, spouse, and parents, and those whose interests are affected by the will.

(2) The individual suffers from a mental disorder with symptoms including delusions or hallucinations, which delusions or hallucinations result in the individual's devising property in a way which, except for the existence of the delusions or hallucinations, the individual would not have done.
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EVIDENCE SUFFICIENT TO SHOW INCAPACITY

Estate of Martin (1969) 270 Cal.App.2d

Incapacity upheld where the jury's determination that general unsoundness of mind extending over the period during which the October 10, 1963 will was executed was supported by the following evidence.

· Long time friend testified that from 1962 on testator was childlike, senile and confused as exhibited by, among other things, the inability to recognize people close to him, even his wife, or confuse them with others; accused hospital orderlies of boiling him in water; told witnesses that colored people were killing each other in his living room and having affairs in the adjoining bedroom; he kept a rock in a cottage cheese container; hoarded empty medicine bottles, claimed he was president of Union Oil Company; claimed he had an estate far greater than he had; he continually proposed marriage to women he hardly knew.

· His accountant testified that in 1963 testator could not supply any information about his property or financial condition; could not recall what had happened to his stock or social security in recent years.

· Testator's nephew testified that from March to October 1963 decedent's mind deteriorated completely. Testator confused him with his father and accused him of killing testator's mother and could not remember the nephew's visits from day to day. In August 1963 the nephew found testator on his porch partially clothe claiming he ad just ordered a Greyhound bus to take him to Reno.

· Testator's physician from January, 1963 testified to testator's bizarre behavior and his diagnosis that testator suffered from arteriosclerosis senile dementia.

· Well qualified expert testified as to the symptoms and effects of senile dementia which comported with the behavior testified to by percipient witnesses and further testified that based on his review of testator's medical records, testator suffered from arteriosclerosis senile dementia.

Estate of Lockwood (1967) 254 Cal.App.2d 309

Testatrix, 89 years old, was admitted to the hospital on February 20, 1964 with a panoply serious, chronic and terminal illnesses and diseases. Testatrix executed a codicil to her will, executed in 1958, on February 28, 1964 and died on March 3, 1964.

Two attending physicians who saw testatrix between the 21st and 29th testified that she was at all times alert. The subscribing witness to the codicil testified that testatrix was mentally alert at the time of execution, knew what she was doing and answered questions logically and understandably.

Three attending nurses and a variety of visitors however testified that during the same period, testatrix was often semi-comatose or in a stupor and always confused, disoriented, unable to communicate or recognize anyone.

A psychiatrist testified form medical records, including autopsy reports, that testatrix suffered form a hardening of the arteries in the brain and was suffering from mental as well as physical impairment. Although the doctor admitted that periods of lucidity might be possible, he opined such was not likely given the arteriosclerosis and fever and infection that prevailed at the time she executed the codicil.

Jury was entitled to find from such conflicting evidence that testatrix, weakened by age, serious illness and disease, lacked testamentary capacity, both before and after she executed the codicil, and to infer there from that testatrix lacked such capacity at the time the codicil was executed.

Estate of Bliss (1962) 199 Cal.App.2d 630

Testator, age 83, executed a new will in March, 1959, leaving his entire estate to his male nurse, revoking an earlier will which left his estate evenly divided to his nieces and nephew. The court found the following evidence of incapacity to be "serious and exceedingly substantial".

Testator entered a sanitarium in Nov. 1958 diagnosed with, among other things, chronic brain syndrome and structural brain damage that would affect his behavior, personality, intelligence and coordination.

Testator's own attorney had twice in February of 1959 refused to make a will for testator based on what the attorney perceived to testator's lack of mental capacity.

Testator's treating physician, who saw him regularly during the entire time he was in the sanitarium, characterized him as senile, confused and disoriented and stated that testator's awareness was limited to the presence of other individuals and his immediate physical urges.

The court put much emphasis on the nursing notes for the relevant period observing, "During February, March and April the bedside notes of Cedar Lodge Sanitarium make numerous references to decedent's condition. There are 83 references to the fact that he was confused and disoriented; 21 references that he was lethargic or stuporous; 30 references to the fact that he was talking incoherently, irrational, unable to speak clearly, unable to speak, mumbling, and slurred of speech; 23 references to the fact that he was apparently comatose or semi comatose, showed signs of cyanosis, eyes open and staring, tremor in hands and arms, feeble, condition poor, condition guarded. The total of the above references is 157."

Estate of Wolf (1959) 174 Cal. App 2d 144

The court found the following evidence "abundant" support for a finding that testatrix lacked capacity at the time she prepared her holographic will.

The testimony of testatrix's treating physician, who was a gerontologist, that testatrix had been suffering from arteriosclerosis and had been mentally incompetent for some years before executing the will in question.

Her physician treated testatrix on several days in the same month she executed the will in question, including the day before the instrument was executed and testified that during that period testatrix lacked sufficient capacity to dispose of her property according to any rational plan.

Testatrix's adjudication one month after executing the will as incompetent so as to justify the appointment of a guardian, while not dispositive testamentary capacity, constituted substantial evidence on which a finding of testamentary incapacity might rest.

EVIDENCE INSUFFICIENT TO SHOW INCAPACITY

Estate of Goetz (1967) 253 Cal.App.2d 107

Testimony of 3 doctors, including testatrix's personal physician, that testatrix suffered from chronic brain syndrome caused by senile dementia and thereby lacked testamentary capacity, as well as unspecified evidence as to testatrix's forgetfulness, erratic behavior and possible delusions was overcome by:

· The testimony of six acquaintances whose testimony as to testatrix's soundness of mind during the two years surrounding execution of the will "was not shaken under cross examination

· The testimony of the attorney who prepared the will that testatrix was able to name and provide the addresses of all her heirs at law, knew how her property was held with her husband and was able to articulate why she wanted her husband and daughter excluded form the will

· Letters written by testatrix to her daughter around the time of the making of the will that were "chatty, intelligent and well put together" and exhibited orientation as to time and place.

Estate of Fritschi (1963)60 Cal.2d 367

Will contestants failed to establish testamentary incapacity where unspecified medical testimony describing testator's minor irrational displays, personality quirks, disturbed attitude toward his children and the general weaknesses of a man afflicted with a terminal illness, and inconclusive evidence of the effect on testator of various medication administered prior to signing the will did not reach the ability of testator to understand the nature of his act and was contradicted by:

· The testimony of both witnesses to the will that testator was of sound mind when he executed the will and was able to joke about exploratory surgery the next day

· The testimony of the attorney that he read the entire will aloud to testator who followed along with a separate copy of the will and assented to each paragraph after it was read.

· The testimony of a business associate who visited testator immediately after the signing of the will and visited for 20-25 minutes during which testator "talked sense"

Estate of Ross (1962) 204 Cal.App,2d 82

Extensive evidence of contestants that testatrix attempted suicide on many occasions before and after the will was made, that she committed suicide, that she was addicted to the use of barbiturates, had epileptic fits, took psychiatric treatments for years, may have suffered brain damage from the overdose of barbiturates in May 1957,prior to the execution of the will in October, 1957, that she was despondent and erratic, that she was under the influence of barbiturates on the day before the will was made, that she lacked good judgment, made stupid investments and complained about various things was insufficient to

establish that she did not have the requisite capacity at the time she made the will, particularly where the declaration of testatrix's attorney and his notes of his meeting with her established that she knew the nature and situation of her property, understood the act of making a will and knew the objects of her natural bounty.

Estate of Sanderson (1959) 171 Cal.App.2d 651

The testimony of other residents of testator's rest home that testator was destructive in gardening at the home, was rude, easily angered, impatient, moody, unable to keep shuffleboard score and had no mind to carry on a conversation did not establish testamentary incapacity at the time the will was executed particularly in light the following contrary evidence:

· Testimony of attorney and subscribing witnesses that at the time the will was prepared testator was able to discuss who is relatives were and what property he had, and articulated that he was excluding his brother from the will because " he was well fixed"

· Testimony of testators attending physician that testator had the ability to understand the nature of the testamentary act

· Testimony of deputy district attorney acquainted with testator that testator had testamentary capacity

· Testimony of the credit manager that she had coherent business conversations with testator

BRIEF SUMMARIES OF MORE CASES DISCUSSING ELEMENTS OF PROOF OF INCAPACITY

Evidence Sufficient to Show Incapacity
Finding of unsoundness of mind or undue influence or both is justified, where evidence establishes that will is unnatural and that beneficiary conspired with others to take advantage of testator's weakened condition. In re Estate of Gill (1936) 14 Cal App 2d 526, 58 P2d 734.
Mental unsoundness of testatrix was sustained by evidence showing such progressive mental degeneration following stroke of paralysis suffered about a year prior to execution of will that month after will was executed testatrix was adjudged incompetent, and where physicians who examined her a month later testified that process of mental deterioration was too gradual to see within 2 months' period, that she did not then know anything, not even how many grown children she had, and that she was mere automaton following suggestion of anyone. Estate of Reiss (1942) 50 Cal App 2d 398, 123 P2d 68.
Finding was justified that testatrix was weak in mind and body at time of execution of will, in view of many incidents of her abnormal conduct, her attempts at suicide and finally death by suicide, opinion of witnesses as to her mental condition, disinheriting of her daughter and granddaughter in favor of her second husband to whom she had been married less than 6 months, and finally opinion of doctor who examined her. Estate of Teel (1944) 25 Cal 2d 520, 154 P2d 384.
Evidence sustained finding that testatrix, a woman in her 80's, was not of sound and disposing mind and memory at time of execution of codicil to will, where number of intimate acquaintances testified that she was mentally incompetent, reasons given for such opinion being that she was feeble, forgetful, childish, rambling in conversation, ragged, dirty and unkempt in person. Estate of Johnson (1948) 85 Cal App 2d 760, 193 P2d 782.
The evidence sustained a finding of testamentary incompetency, where there was testimony of four attending physicians that the position of a cancer responsible for the testator's death was such as to cause a progressive and finally complete loss of mentality which, once lost, could not be regained, and that from the condition of the testator when they saw him last, he would have been incompetent two days before the proposed will was executed. Estate of Becker (1950) 98 Cal App 2d 574, 220 P2d 766.
Evidence showing that decedent, from time he entered hospital until his death was in terminal stages of cancer, which had paralyzed his vocal cords to such an extent that it had become increasingly difficult for him to speak or make himself understood, and that his intimate friends and close relatives observed marked physical and mental changes during his hospitalization such as inability intelligently to carry on conversation, lack of interest in his surroundings and in those who visited him, failure to recognize his close relatives, and inability normally to engage in even a simple business transaction, justified conclusion that

decedent was of unsound mind at time of execution of his last will. Estate of Frank (1951) 102 Cal App 2d 126, 226 P2d 767.
Judgment denying probate of will on ground that testator was not of sound mind when he executed it is sustained by evidence, that, shortly before executing will, he had many delusions, was feeble minded, did not know extent of his property, believed he had farm which he did not own, and had been adjudged an incompetent person. Estate of Luhr (1956, 4th Dist) 138 Cal App 2d 265, 291 P2d 555.
Evidence supported finding that testatrix was incompetent to make will where it appeared, among other things, that she was very sick and not in full possession of her faculties, and that she was mentally disabled for at least twelve hours before her death. Estate of Bourquin (1958, 4th Dist) 161 Cal App 2d 289, 326 P2d 604.
Finding as to testator's lack of testamentary capacity is sustained by doctor's testimony that testator was not capable of recalling nature and extent of estate, natural objects of his bounty, and of understanding nature of testamentary act at time he was still under his medical care, where such doctor was intimately familiar with testator's mental capacity and his testimony was based on personal observation over number of years preceding his death. Estate of Wolf (1959, 2nd Dist) 174 Cal App 2d 144, 344 P2d 37.
Where there was evidence from which court could reasonably infer that decedent suffered mental deterioration in increasing degree from long continued excessive use of intoxicating liquor, was in drunken stupor at time witnesses signed document, had been laboring under insane delusion that his daughter was stealing his money, and two weeks later had no recollection of having made will, these inferences, coupled with his lack of any idea, two weeks later, of what disposition to make of his property, followed by suicide in another ten days, furnished adequate support for finding that he was not of sound mind at time of execution of purported will. Estate of Kell (1961, 1st Dist) 190 Cal App 2d 286, 11 Cal Rptr 913.
Finding that testator was of unsound mind when he executed his will was sustained by evidence that, among other things, he was, at that time, unaware of extent of his properties, and mentally incapable of transacting any business. Estate of Bliss (1962, 2nd Dist) 199 Cal App 2d 630, 18 Cal Rptr 821.
In will contest, there was substantial evidence of lack of testamentary capacity on part of testator, where among other things, testator had been declared incompetent by superior court half hour before he executed will; where testator had combination of serious ailments and was kept alive by intravenous feeding; and where testator's physician had left written orders 15 days before will was executed advising no signing of legal papers by patient. Estate of Fossa (1962, 1st Dist) 210 Cal App 2d 464, 26 Cal Rptr 687.
Evidence that testator was subject to sustained delusions of persecution by his son, of beatings administered, of money stolen, and of plan and purpose to divest him of his property, together with testimony of testator's own personal physician and psychiatrist that they were of opinion that testator was incompetent mentally to make will, was sufficient to support trial court's decision that when will was made, testator was afflicted with senile dementia and was not competent to make will. Estate of Turpin (1963, 3rd Dist) 222 Cal App 2d 57, 34 Cal Rptr 812.
Evidence of testator's lack of testamentary capacity was sufficient, as matter of law, to sustain verdict for will contestant where it was shown that testator's mental deterioration extended over long period with several detentions in mental institutions, that he acted on unfounded belief that his son was trying to have him permanently committed to gain control of his estate, that doctors who treated him believed he was of unsound mind as did insurance agent who prepared will and relatives who witnessed it, and that agent who prepared will and relatives who witnessed it did so only to quiet and please him. Estate of Nigro (1966, 2nd Dist) 243 Cal App 2d 152, 52 Cal Rptr 128.
In a will contest, evidence of forgetfulness, erratic, unstable, and emotional behavior, and of suspicion, probably delusional at times on the part of the testatrix, does not establish lack of testamentary capacity unless accompanied by a showing that it had direct influence on the testamentary act. Estate of Goetz (1967, 1st Dist) 253 Cal App 2d 107, 61 Cal Rptr 181.
The evidence in a will contest supported the jury's finding that the testatrix was not mentally competent four days before her death when she executed a codicil to her will, where at age 89 she was suffering from several serious physical maladies, where there was testimony, albeit conflicting, that on days immediately preceding and immediately following the date of the codicil the testatrix was incoherent, semi comatose, and unable to recognize intimate friends, and where one witness testified that on the day of the codicil the testatrix showed no recognition, understanding, or awareness of her surroundings, justifying the conclusion that the decedent, weakened by age, illness and disease, lacked testamentary capacity both before and after she executed the codicil to her will, and the inference that such lack of capacity existed at the very

moment the codicil was executed. Estate of Lockwood (1967, 1st Dist) 254 Cal App 2d 309, 62 Cal Rptr 230.
In a will contest, there was substantial evidence to support the jury's verdict and the judgment of the trial court denying probate, where the testator suffered from unfounded delusions that his nephew (who was his sole heir at law and the sole beneficiary and executor of a prior will) had killed testator's mother and was planning to put testator in a mental institution in order to get all of his money, and that the beneficiaries of the contested will would see to it that this would not happen and would otherwise take care of testator, where such delusions caused testator to become bitter toward his nephew, where a psychiatrist gave his expert opinion that the deceased was, at the time of making the contested will, suffering from a mental condition which produced delusions and loss of memory for events of the present, and where there was abundant testimony by testator's close friends and associates that he was suffering from general unsoundness of mind extending over the period during which the contested will was executed. Estate of Martin (1969, 1st Dist) 270 Cal App 2d 506, 75 Cal Rptr 911.

Evidence Insufficient to Show Incapacity

Evidence supported finding that testator was competent, though he was ill, and under treatment involving use of sedatives, when he executed codicil. Seiler Estate (1917) 176 C 771, 170 P 1138.
Nonsuit was warranted where evidence was inadequate to show testamentary incapacity. In re Estate of Fraser (1918) 177 Cal 266, 170 P 601.
Evidence justified finding that testator was not suffering such degree of mental incapacity as would prevent him from making valid will. In re Estate of Phillips (1927) 202 Cal 490, 261 P 709.
Testimony offered to establish general mental incompetency of testatrix was insufficient, where no witness gave opinion that she was of unsound mind or incompetent at any time, and, though testatrix was elderly woman and had suffered stroke previous to her death, and some witnesses testified that she was feeble and not very keen mentally, and that she was not exactly in her right mind at all times, reasons given for these answers were wholly insufficient to show unsoundness of mind, and there was entire absence of any substantial evidence of general mental incompetency. In re Estate of Peterson (1936) 13 Cal App 2d 709, 57 P2d 584.
Findings were sustained by evidence that husband was not incompetent and did not act under insane delusion in placing property in joint tenancy with his wife. Sanders v Crabtree (1941) 44 Cal App 2d 602, 112 P2d 923.
Evidence was insufficient to show testator's incompetency to execute will where it merely showed that deceased had been pronounced mentally incompetent nearly 2 years after will was executed, and that, until shortly prior to that time, he had been active businessman who suffered no mental or physical disturbances which appreciably affected his ability to carry on his work and to deal with his property, though at times he was nervous and excitable and, after his wife's death appeared to be much grief-stricken and depressed. Estate of Buthmann (1942) 55 Cal App 2d 585, 131 P2d 7.
In a will contest, the court properly granted a nonsuit on the issue of the testator's incompetency, where evidence as to his pain and critical condition when he signed the will failed to disclose any irrationality or unconsciousness of his surroundings at that time, and where the executed will was essentially the same as one prepared at his request. Estate of Greenhill (1950) 99 Cal App 2d 155, 221 P2d 310.
A finding that testatrix possessed testamentary capacity is sustained by the testimony of a heart specialist that although he was of the opinion she lacked such capacity on the day of her admission to the hospital, she might have "retrenchment improvement at some time;" by testimony of her attending physician that she answered questions rationally on the day the will was executed; by testimony of her surviving brother that she insisted that he prepare the will and after reading it expressed her satisfaction therewith before signing it, and by testimony of the subscribing witnesses that they found her rational, that she thanked them in a loud, clear voice for signing, and that she signed her full name without assistance or prompting. Estate of Gill (1952) 111 Cal App 2d 486, 244 P2d 724.
It is proper to grant a new trial on the ground of insufficiency of evidence to sustain the jury's findings that decedent was of unsound mind and operating under undue influence at the time of executing her will, where the evidence discloses that she executed the will in the presence of her attorney and his office secretary, both of whom testified that decedent was then of sound and disposing mind and not acting under fraud or undue influence of any person or persons. Estate of Elliot (1952) 114 Cal App 2d 747, 250 P2d 684.

Finding that testatrix did not lack testamentary capacity to make will is sustained by testimony of witnesses that she was able to manage her property and transact business affairs, that she was of sound mind and disposing memory, and that she knew extent of her property and nature and effect of her testamentary acts. Estate of Volen (1953) 121 Cal App 2d 161, 262 P2d 658.

Evidence is insufficient to establish testamentary incapacity where contestant's affidavits fail to reveal any fact from which it could be inferred that testator did not understand nature of act or was not cognizant of the nature and situation of his property or his relation to those having claims on his bounty, and where opinions as to unsoundness of mind are based on facts which show neither morbid delusion nor total incapacity. Estate of Goddard (1958, 2nd Dist) 164 Cal App 2d 152, 330 P2d 399.

Mute evidence of testator's competency is borne out where will mentioned both contestant and proponent, correctly indicating their relationships to author, accurately recited approximate amount and location of cash constituting estate, indicated intent to revoke former will, and expressed intent to dispose of property in such terms as rather clearly indicated appreciation of testamentary nature of act. Estate of Glass (1958, 2nd Dist) 165 Cal App 2d 380, 331 P2d 1045.

Lack of testamentary capacity is not proved by merely showing a few isolated acts, foibles, idiosyncrasies, moral or mental irregularities or departures from normal, unless they bear directly on and have influence on testamentary act. Estate of Woehr (1958, 2nd Dist) 166 Cal App 2d 4, 332 P2d 818.

Assertion that evidence established as matter of law decedent's inability to recollect or understand nature and situation of his property and to remember persons having claim on his bounty is dispelled by testimony of contestant's witness that decedent knew of his relationship to grandchildren, that his son and proponent were his children, that he know of existence of certain, if not all, of his property and that proponent and his son were managing same. Estate of Woehr (1958, 2nd Dist) 166 Cal App 2d 4, 332 P2d 818.

Testimony of residents with deceased at rest home that he was destructive in pruning bushes and trees, that he could not keep shuffle board score, that he could not carry on continuous coherent conversation, that he grew into rage over nothing, that his room was untidy or like pig pen, that he became irritated because witness would not accept his religion, that he said he was going to start new religion, and the like, was insufficient to show deceased was lacking in qualities of mind necessary to make competent in testamentary capacity. Estate of Sanderson (1959, 4th Dist) 171 Cal App 2d 651, 341 P2d 358.

Where none of witnesses in will contest testified as to events at time will was executed or as to testator's mental condition at that time, but their testimony was to effect that he knew and understood condition of his property, remembered his brother who was his nearest relative but affirmatively decided his brother did not need help, that he had been member and attendant of Catholic Church for considerable time previous to death, and that he had no other known close relatives, there was nothing unnatural in his bequest to Catholic organizations and evidence was insufficient to sustain finding he was not competent to make will on date he executed it. Estate of Sanderson (1959, 4th Dist) 171 Cal App 2d 651, 341 P2d 358.

In will contest on ground that testatrix had been incompetent to make will, evidence was insufficient to justify setting aside probate of will where, though it was shown by contestants that testatrix had committed suicide, that she had attempted suicide 11 times, that she had had epileptic seizures, that she had used alcohol and barbiturates excessively, and that she had had psychiatric care, proponents showed that her knowledge of extent of her property when will was made was borne out by her holdings at time of her death, that her attorneys and witnesses to her will believed her to have had testamentary capacity, and that contestants and others had contracted with her and had not questioned her competency to enter into contract. Estate of Ross (1962, 2nd Dist) 204 Cal App 2d 82, 22 Cal Rptr 135.

Presumption of testator's sanity was not overcome by evidence which simply set out physical weakness of man afflicted with fatal illness, describing minor irrational displays and certain personality quirks, and showed that certain drugs administered to testator would "tend" to make individual more sleepy or groggy than usual sedative does and would "tend" to decrease person's ability to think clearly, but that effect on person's mental abilities would depend on individual; particularly was such evidence insufficient in light of uncontradicted testimony of those present and following execution of will that testator was of sound and disposing mind at time he signed it, that he followed reading of will and expressed assent after each paragraph and that he "talked sense" immediately after execution of will. Estate of Fritschi (1963) 60 Cal 2d 367, 33 Cal Rptr 264, 384 P2d 656.

Showing adjudication of testator as mentally ill person, dangerous to himself, and in need of care and restraint, without offer of testimony of symptoms that went into court's determination does not establish mental degeneration denoting utter incapacity to know and understand that which law prescribes as

essential to making will or existence of specific insane delusion affecting making of will. Estate of Nelson (1964, 1st Dist) 227 Cal App 2d 42, 38 Cal Rptr 459.

CONCLUSION: WHAT DOES IT ALL MEAN AND HOW TO EVEN AVOID THE FIGHT

A doctor once put it to us quite well: people often die in bits and pieces. They lose the use of their knees or legs or back and as the years go by, lose the use of more and more of the body they once took for granted. At some point, organs may start to go, from kidneys to heart, from lungs…to the brain. And when the brain starts to go it can go very slowly, in fits and starts and that's when the problems arise.

The courts want to give people the power to leave their assets to the people they wish to and the burden of proof of incompetency is high. All things being equal, if the Court is doubtful as to whether a person is incompetent, the court will normally uphold the will.

Yet will contests are common and the subsequent turmoil and heartbreak within families is a typical scene in the courts. The simple fact is that many people in the last years of their lives often use their assets to attempt to exert power over their children and relatives who they fear will otherwise abandon them, often making promises and threats that disrupt the relationship. Equally common, caregivers, friends, and one or two of the family who once did not spend much time with a dying relative or client suddenly appear daily and perhaps hope to obtain an increase in inheritance. Or others fear they will. All this leads to the fights described above.

How to avoid this? The easiest way, and a way too little used, is for the attorney creating a new Will or altering an old one to carefully go through a checklist of questions before a video camera with the testator, including asking numerous questions that will show competence and that no undue influence is being used. We have done this regularly and our experience is that when possible contestants see the video tape they are relieved and no fight ensues.

And before you decide to fight get good advice. First, quite often there is a special clause in the Will that will disinherit you if you contest. (See our article on Will contests.) Further, Trusts are held to completely different criteria than a Will and quite often people assume that the competency level required for a Will is the same as for a Trust. It is not, and good legal advice is critical before one takes that important step of deciding to contest a Will.