

TWO THINGS CERTAIN®

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Do I have the capacity to create a Will?

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In 1913 an average man could expect to live to the ripe old age of 51, while a woman could expect to live to the age of 55. Thankfully life expectancies today have improved; a man can expect to live to the age of 76 and a woman can expect to live to the age of 81. However, as our life expectancies have increased, so has dementia. Statistics show dementia affects about 1% of the U.S. population between the ages 60-65 and ranges between 30-50% in the population older than 85. With the population living longer, there is a much higher likelihood that dementia will affect our families and prompt a need to make incapacity decisions for our loved ones. It's always prudent to have an estate plan in place BEFORE something bad happens, but the onset of dementia brings about important questions regarding the requisite capacity to create a plan.

In Virginia the test for legal capacity dates back to the 1852 case of *Greer v. Greer*. This case established that someone can create a will so long as they meet the following criteria: understanding the people who will inherit their estate, understanding the extent of their property which they have to dispose of at their death, they have the intent to dispose of that property at their death and they have the knowledge they are executing a document to carry out those wishes. A will is valid so long as the testator (creator of the will) met the capacity requirements at the time of the signing. It should be noted that in Virginia revocable living trusts require the same capacity requirements as that of a will.

As an example, if an individual was in a vegetative state for an extended period of time, then miraculously came out of the state and met all the capacity criteria while signing their will, the presumption is that the will is valid. This would even be true if said individual slipped back into a vegetative state right after signing. Further case law has shown that neither a testator's state of health (severe illness), nor impaired intellect, will invalidate a will so long as the appropriate *Greer* criteria has been met. The court's presumption is that a will has been created by an individual of sound mind, and the burden to prove otherwise has to be established by the individual alleging the will is invalid.

Allegations of a lack of capacity to create an estate plan routinely are brought in conjunction with allegations of undue influence. The court previously required all of the following criteria be met for a presumption of undue influence: the testator must be old (weakness of mind), they must have expressed intentions as to the disposition of their assets contrary to the current

disposition, and the current beneficiary must stand in a relationship of confidence or dependence to the testator. In more recent court cases the court has relaxed the requirement of all three criteria and has taken to focus on the overall circumstances involving the testator's weakness of mind combined with suspicious circumstances. The court may also presume undue influence occurred where simply the beneficiary is in a confidential relationship with the testator. Overall, the court still recognizes that people are able to change their mind regarding the disposition of their estate at any time they want. In many cases the testimony of the estate planning attorney or the attending physician will be heavily considered to establish clear and convincing evidence of the undue influence.

Estate planning capacity requirements show us that afflictions like a stroke or a diagnosis of dementia do not, on their own, prevent the creation of a proper estate plan. If the estate plan is contested, the court will always take an in depth look at the overall circumstances, rather than just focus on the diagnosis. We have often been asked, "When is the right time in my life to create an estate plan?" We all hope that our estate plans will not need to be implemented for many years; however, we can all agree that if we have the ability to plan, we should do so now while we have the capacity to make our own choices as we never know what the future will bring.



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About the Author:

Spencer Baxter is an experienced problem solver who helps individuals and businesses achieve and protect their goals of prosperity, stability and growth through appropriate planning. Spencer takes great pride in making sure that his work for clients is always reliable, correct, and on time.

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