

# Competency in Estate Planning

*The Legal Standard, Estate Litigation Issues, and Do's and Don'ts*

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## Who Are We?

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## Outline

- Defining Competency
- When Must One Be Competent?
- Presumption of Mental Soundness
  - Rebutting the Presumption
- Case Law Examples
- Undue Influence & Competency
- Do's and Don'ts
- Q & A

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## Defining Competency

Competence: the degree of mental soundness or capacity necessary to make decisions about a specific issue or to carry out a specific act

- Legal finding

Capacity: an individual's ability to make an informed decision

- Medical finding

*Indiana Law refers to competency as "mental capacity" and "soundness of mind"*

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## When Must One Be Competent?

When an individual wishes to establish a Last Will and Testament or a Revocable Living Trust, that person must have the requisite mental capacity **at the time of execution**

- Capacity at a time before or after execution is irrelevant
  - BUT—the court can make special determinations in regard to one's mental capacity in the event that the testator was medicated at the time of execution

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## Presumption of Mental Soundness

Every person attempting to execute a Will or Trust is presumed to be mentally sound until the contrary is shown

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## Rebutting the Presumption of Mental Soundness

To rebut the presumption of mental soundness at the time of execution, the challenger must show that the testator/settlor did not know:

1. The extent and value of his/her property
2. Those who are the natural objects of his/her bounty
3. Their deserts, with respect to their treatment and conduct toward him/her  
(i.e. why it is that you are doing what you are doing)

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## *McCallister v. McCallister* (Ind. Ct. App. 2018)

- An elderly woman amended her trust to make 1 of her 5 children the sole trustee of the trust and  $\frac{1}{2}$  beneficial owner of her home
  - The child named trustee had lived with her and provided care for her in her final days
- The other siblings challenged the amendments
  - They claimed, among other things, that their mother lacked the requisite capacity to make the amendments
- The court found that the mother evidenced testamentary capacity, as she chose to reward the son that cared for her during times of need

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## ***Hayes v. Hayes* (Ind. Ct. App. 2014)**

- Son farmed a 200 acre farm with dad
- Dad died in 1993
- Son loaned mom \$179,539; took back a note and mortgage
- In 2005, mom gave son an option to buy farm for \$2,500/acre less any amount still owed on note
  - The offer was exercisable until September 1, 2014 with a 10 year right to extend
- Son exercised the option in 2010—but the farmland had appreciated and was now worth \$8,000-10,000/acre
- Daughters sued claiming that the option was unfair and that mom lacked competency to make such a deal
- The court found that mom was competent at the time of execution, and that the daughters provided no evidence of diminished capacity
  - Further, the court stated that just because the option may not have been a wise business deal, the necessary elements of a contract were met, so there were no grounds for invalidation

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## ***Hays v. Harmon* (Ind. Ct. App. 2004)**

- Testator died leaving a will that bequeathed \$100,000 to his only son, \$500 to the Masonic Lodge, and the rest (approx. \$1,000,000) to a charitable trust
- The son challenged the will claiming that the testator lacked testamentary capacity
  - Son claimed that father had “periods of time where he zoned out” and would sometimes “act in a paranoid manner for up to an hour a day”
- The court held that the son was unable to provide evidence that the father lacked competency at the **actual time of execution**, and was thus unable to refute the presumption of mental soundness
  - Therefore, the will was valid

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## ***Kutchinski v. Strazzante* (Ind. Ct. App. 2013)**

- Settlor was in poor health
  - Taking Tramadol, Hydrocodone, Xanax, thyroid/blood pressure medications, and morphine
- Settlor amended her trust to exclude one of her children
  - Settlor died 11 days later
- The excluded child challenged the amendment claiming that the settlor lacked the mental capacity to make an amendment
  - The child provided a pharmacist's affidavit where the professional opined that it was more probable than not that the settlor was not coherent enough to make rational estate planning decisions due to the medications
- The court held that there was a genuine issue as to the effects of the medication on the settlor's capacity and remanded the case for further proceedings

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## **Undue Influence**

Definition: the exercise of **sufficient control** over a **susceptible person** to destroy his free agency and constrain him to do what he **would not have done if such control had not been exercised**

“When a confidential relationship as a matter of law exists and the fiduciary benefits from a questioned transaction, there is a presumption of undue influence, and the burden shifts to the fiduciary to rebut the presumption.” *Carlson v. Warren*, 878 N.E.2d 844, 852 (Ind. Ct. App. 2007)

To rebut this presumption, the fiduciary will need to prove:

1. That he acted in good faith
2. He did not take advantage of the position of trust
3. The transaction was fair and equitable

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## Do's and Don'ts: The Do's

- Plan ahead
- Develop an estate plan
  - Regularly meet with your attorney and accountant to update and maintain your plan
- Hold family meetings (if your family dynamic allows)
  - Share your vision of the family legacy with children, parents, etc...
- Document, Document, Document!
- Add a No-Contest Clause
- Pre-Mortem Judicial Validation—Will it come to Indiana?

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## Do's and Don'ts: The Don'ts

- DON'T WAIT!
  - Develop your estate plan NOW
  - There is no such thing as being “too young” to worry about your estate planning affairs
    - **The best way to avoid competency issues/disputes is to get a foundational estate plan in place well before questions of diminished capacity become a factor**
      - Make amendments/changes as life happens
- Don't neglect the signs of diminishing capacity
  - If you or a loved one are experiencing:
    - Frequent lapses in memory
    - Challenges in understanding directions
    - Inability to do simple math
    - Frequent misplacement of everyday objects
    - Etc...
  - See a physician for a competency evaluation!

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# Questions?