

Doctors Notes for Will Signings: Should You Get One?

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I recommend that before an ill or very elderly person signs a will (or trust), that the estate planning attorney obtain a note from a doctor as to the person's mental capacity. Doing so will help create a record that will make it more challenging to contest the will (or trust) on the basis that the person lacked testamentary capacity (i.e., the requisite mental capacity in order to execute a will or trust).

I've litigated over 100 estate disputes, and more often than not, the doctors notes that I see are poorly drafted and do not help much. My goal in this blog post is to explain how to obtain a well-written doctor's note that will help a will or trust withstand a challenge on the basis of lack of testamentary capacity.

Timing of the Note

First, the doctor's note should be as close in time to the will signing as possible. That's because peoples' physical and mental conditions can vary widely over the course of days or even hours. An elderly person can be foggy and confused in the morning, alert in the afternoon, and drowsy and foggy again in the evening. Moreover, the timing of the administration of medications (including morphine) can significantly impact whether a person is confused or clear-minded.

Ideally, a doctor will evaluate the person right before the person signs the will. As in, mere minutes before the person signs the will. From a logistics standpoint, a doctor making a home visit, or a visit to the attorney's office, would be ideal. If that's not possible, the will signing could take place at the doctor's office. Or, as a fallback option, the person could be driven straight from the doctor's office to the attorney's office for the will signing. The point is that the less time that goes by, the harder it will be for a will challenger to argue that the doctor's note didn't reflect the person's condition at the time that he signed the will.

Contents of the Note

Second, the attorney should actively ensure that the doctor's note addresses the legal elements needed for testamentary capacity. In Virginia (as in most states), that entails the testator (the person signing the will) knowing (1) his family, (2) the nature of his property (what he owns), (3) that he's making a will, and (4) how the will disposes of his property. Legally speaking, this is not a high standard. It's a lower standard than that needed to enter into a contract. In fact, the Virginia Supreme Court has ruled that the following persons are not automatically deemed to lack the testamentary capacity to make a will: a person afflicted with a mental disorder, a person on furlough from a mental institution, and a person suffering from brain damage.

I've seen notes that don't address these matters, and only vaguely say that the person doesn't suffer from confusion. I've seen notes that presume that the standard to make a will is the same as that needed "to manage his affairs" (it's not). In short, the vast majority of doctors don't know what the standard is to make a will. If a doctor provides a note that doesn't adequately address the standard, it could be unhelpful or even counterproductive (if it assumes the wrong standard).

So, what should you do to ensure that a doctor provides a proper note? I recommend that you provide the doctor with a set of pre-written questions that you want him to address. The following is a suggested format:

Name of Medical Provider: _____

Today's Date: _____

I examined _____ at ____ [insert time] _____

I did the following as part of my examination: _____

During the examination, the patient was: _____ [alert, oriented to persons and place, etc.] _____

As part of my examination, I inquired with the patient as to whether he knew who his family members were. He satisfactorily addressed that inquiry. The following are my observations as to why I believe that he satisfactorily addressed that inquiry: _____

As part of my examination, I inquired with the patient as to whether he knows what his property consists of (what he owns). He satisfactorily addressed that inquiry. The following are my observations as to why I believe that he satisfactorily addressed that inquiry: _____

As part of my examination, I inquired with the patient as to whether he understood that he was about to make a will. He satisfactorily addressed that inquiry. The following are my observations as to why I believe that he satisfactorily addressed that inquiry: _____

As part of my examination, I inquired with the patient as to whether he understood how the will that he was about to make disposes of his property. He satisfactorily addressed that inquiry. The following are my observations as to why I believe that he satisfactorily addressed that inquiry: _____

As you can see, this sample note covers all of the elements needed for testamentary capacity. It steers the doctor towards what he needs to say. Likewise, it steers him away from extraneous materials and comments that he doesn't need to say and that could only confuse the inquiry (note that it doesn't ask the doctor for his opinion on whether the patient is competent to manage his financial affairs, or enter into contracts, as neither of those are requirements for testamentary capacity).

In sum, with a modest amount of advanced planning relating to obtaining a suitable doctor's note, one can significantly increase the odds that a testator will be found to have had adequate testamentary capacity to execute a will or trust.