

# PROBATE CORNER

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## ARTICLE: The Elusive Definition Of Capacity

How do you define capacity? The answer is: It depends on the situation. Is your client executing a Will or Trust? Is there a pending guardianship proceeding? Is your client incapable of making her own health care decisions? Is your client signing a contract or making a gift? The definition of capacity is different for each situation.

**WILLS:** Sec.732.501, Fla. Stat. reads that “[a]ny person who is of sound mind and who is either 18 or more years of age or an emancipated minor may make a will.” To be of “sound mind”, a testator must have the ability to mentally understand in a general way (1) the nature and extent of the property to be disposed of, (2) the testator's relation to those who would naturally claim a substantial benefit from his will, and (3) a general understanding of the practical effect of the will as executed. A testator may still have testamentary capacity to execute a valid will even though he may frequently be intoxicated, use narcotics, have an enfeebled mind, failing memory, or vacillating judgment. Moreover, an insane individual or one who exhibits “queer conduct” may execute a valid will as long as it is done during a lucid interval. Indeed, it is only critical that the testator possess testamentary capacity at the time of the execution of the will. *See Raimi v. Furlong*, 702 So. 2d 1273 (Fla. 3rd DCA 1997); *Hendershaw v. Estate of Hendershaw*, 763 So. 2d 482 (Fla. 4th DCA 2000).

**TRUSTS:** Pursuant to §736.0402(1)(a), Fla. Stat., a trust is created only if the settlor has capacity to create a trust. “The capacity required to create, amend, revoke, or add property to a revocable trust, or to direct the actions of the trustee of a revocable trust, is the same as that required to make a will.” Refer to §736.0601, Fla. Stat.

**GUARDIANSHIPS:** Sec.744.102(12), Fla. Stat. reads: (12) “Incapacitated person” means a person who has been judicially determined to lack the capacity to manage at least some of the property or to meet at least some of the essential health and safety requirements of the person. (a) To “manage property” means to take those actions necessary to obtain, administer, and dispose of real and personal property, intangible property, business property, benefits, and income. (b) To “meet essential requirements for health or safety” means to take those actions necessary to provide the health care, food, shelter, clothing, personal hygiene, or other care without which serious and imminent physical injury or illness is more likely than not to occur.

## **ADVANCED DIRECTIVES (CAPACITY TO MAKE HEALTH CARE DECISIONS):**

Pursuant to §765.204, Fla. Stat., a person is presumed to be capable of making health care decisions for herself unless she is determined to be incapacitated. If a person’s capacity

to make health care decisions for herself or provide informed consent is in question, the attending physician shall evaluate her capacity.

The term "incapacity" or "incompetent" means the patient is physically or mentally unable to communicate a willful and knowing health care decision. Refer to §765.101(8), Fla. Stat. Additionally, the term "informed consent" means consent voluntarily given by a person after a sufficient explanation and disclosure of the subject matter involved to enable that person to have a general understanding of the treatment or procedure and the medically acceptable alternatives, including the substantial risks and hazards inherent in the proposed treatment or procedures, and to make a knowing health care decision without coercion or undue influence. Refer to §765.101(9), Fla. Stat.

**CONTRACTS/GIFTS:** The standard to determine competency to execute a contract or to make a gift is whether the individual is able to comprehend the *nature and effect* of the transaction. See Travis v. Travis, 81 Fla. 309 (Fla.1921); Saliba v. James, 143 Fla. 404 (Fla. 1940); Lane v. Talloni, 626 So. 2d 316 (Fla. 5<sup>th</sup> DCA 1993); Gracey v. Lawrence, 442 So. 2d 305 (Fla. 5<sup>th</sup> DCA 1983).

**ATTORNEYS/JUDGES:** You have 5 second to count the number of F's in the following text:

FINISHED FILES ARE THE  
RESULT OF YEARS OF SCIENTIFIC  
STUDY COMBINED WITH THE  
EXPERIENCE OF YEARS

How many F's did you count?

If you counted less than 6, you're INCAPACITATED !