**26.07 TESTAMENTARY CAPACITY**

The Contestant claims that the will is invalid because the Maker was not of sound mind when the will was signed. For the Contestant to win on this claim, you must decide that at least one of the following things is more likely true than not true:

(1) the Maker lacked the mental capacity to understand the nature and extent of [his] [her] property;

(2) the Maker lacked the mental capacity to understand that [he] [she] was signing a will that would dispose of [his] [her] property when [he] [she] died;

(3) the Maker lacked the mental capacity to identify the persons or entities to whom someone in the Maker's position would naturally consider leaving property.

[Evidence that the Maker [was] [old] [sick] [weak] [approaching death] [used] [was addicted to] [drugs or alcohol] [had a guardian] does not establish that the Maker lacked a sound mind. However, you may consider this evidence in determining whether the Maker lacked a sound mind.

If you decide that the Maker lacked the mental capacity to understand any one of the three things I have described, then you must return a verdict for the Contestant. Otherwise, you must find that the Maker was of sound mind when [he] [she] made the will and [return a verdict for the Proponent] [decide some additional things that I will explain to you.]

# Use Note

This instruction should be given when testamentary capacity is at issue.

# Comment

Much of the Alaska statutory law on wills in taken from the Uniform Probate Code (UPC). However, the UPC does not define sound mind (one of the requirements mentioned in Alaska Stat. 13.11.150) and one commentator has written: "[The UPC] leaves to local law the determination of mental capacity other than age. It is thus possible for the local court to determine its own test for mental capacity and for insane delusion." ALI-ABA Committee on Continuing Professional Education, 1 Uniform Probate Code Practice Manual 132 (2d ed. 1977).

Like many jurisdictions, the Alaska Supreme Court has adopted the three-prong test of testamentary capacity relating to mentality. In In re Estate of Kraft, 374 P.2d 413 (Alaska 1962), the court held that "the question is always whether . . . [the testator] had sufficient mental capacity to understand the nature and extent of his property, the natural or proper objects of his bounty, and the nature of his testamentary act." Id. at 415-16; accord Paskvan v. Mesich, 455 P.2d 229, 234 (Alaska 1969).

The appropriate parts of the third paragraph of this instruction should be used when there is evidence relating to a disability of the testator. Examples of disabilities are disease, alcoholism, and drug addiction, all of which may affect the testator's capacity. The existence of a guardian for the testator would also be weighed in the jury's determination. Paskvan v. Mesich, 455 P.2d 229, 238-39 (Alaska 1969). However, "disease, great weakness, the use of alcohol and drugs, and approaching death do not alone render a testator incompetent to make a will." In re Estate of Kraft, 374 P.2d 413, 415 (Alaska 1962).

Regarding the burden of persuasion, "the contestant of a will has the burden of showing lack of testamentary capacity." Paskvan v. Mesich, 455 P.2d 229, 239 (Alaska 1969); see also Alaska Stat. 13.16.170.