

DEEDS--ACTION TO SET ASIDE--LACK OF MENTAL CAPACITY.

The (state number) issue reads:

"Did (name grantor) lack sufficient mental capacity to [execute] [deliver] the (identify deed) to (name grantee)?"

On this issue the burden of proof is on the plaintiff.¹ This means that the plaintiff must prove, by the greater weight of the evidence, that (name grantor) did not possess sufficient mental capacity to [execute] [deliver] the (identify deed).²

A grantor must have sufficient mental capacity to understand what he is conveying, the person to whom he is conveying, the purpose for which the conveyance is being made, and the nature, scope and consequences of his act.³ A grantor may have sufficient mental capacity although he does not act wisely or discretely, or drive a

¹Persons are presumed to be competent unless there has been an adjudication of incompetency. *Davis v. Davis*, 223 N.C. 36, 25 S.E.2d 181 (1943). Thus, the burden of proving lack of mental capacity rests with the person taking that position. *Ridings v. Ridings*, 55 N.C. App. 630, 286 S.E.2d 614, disc. rev. denied, 305 N.C. 586, 292 S.E.2d 571 (1982). Where a person has been adjudicated incompetent, he is presumed to lack mental capacity. *Medical College of Va. Med. Div. v. Maynard*, 236 N.C. 506, 73 S.E.2d 315 (1952). This presumption may be rebutted by persons who were not privy to the incompetency proceedings. *Id.* Under such circumstances, the burden of proof falls to the proponent of the deed and should be added as an additional element to N.C.P.I.--Civil 850.00. (Deeds--Action to Establish Validity--Requirements.) (See note 1 thereto).

²Do not use this instruction where the deed of conveyance is executed and delivered by an authorized agent who has the requisite capacity, such as an attorney-in-fact under a durable power of attorney for a person who has lost capacity.

³*Hendricks v. Hendricks*, 273 N.C. 733, 735, 161 S.E.2d 97, 98 (1968); *Goins v. McCloud*, 231 N.C. 655, 658, 58 S.E.2d 634, 637 (1950); *Carland v. Allison*, 221 N.C. 120, 123, 19 S.E.2d 245, 247 (1942).

DEEDS--ACTION TO SET ASIDE--LACK OF MENTAL CAPACITY. (Continued).

good bargain.⁴ A grantor may also have sufficient mental capacity even if suffering from mental weakness or infirmity.⁵

Finally, as to the (*state number*) issue on which the plaintiff has the burden of proof, if you find by the greater weight of the evidence that (*name grantor*) lacked sufficient mental capacity to [execute] [deliver] the (*identify deed*) to (*name grantee*), then it would be your duty to answer this issue "Yes" in favor of the plaintiff.

If, on the other hand, you fail to so find, then it would be your duty to answer this issue "No" in favor of the defendant.

⁴*Davis v. Davis*, 223 N.C. 36, 25 S.E.2d 181 (1943).

⁵*Caudill v. Smith*, 117 N.C. App. 64, 70, 450 S.E.2d 8, 12 (1994).