

# Harvell and Collins, P.A., Quarterly Report

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It is our pleasure to send you the June Edition of our **NEWSLETTER** for the year 2007.

This **NEWSLETTER** will concentrate on various legal concepts and we would suggest that you keep it with your important files to refer to from time to time.

For those of you who have not received our **NEWSLETTER** in the past and are new clients, our **NEWSLETTER** attempts to keep you informed of any new developments in local, state, and federal law that might affect your personal life or your business. The **NEWSLETTER** will advise you on these developments and, when appropriate, make suggestions that will help you deal effectively with these changes. Also, the **NEWSLETTER** will serve as a way to communicate with you. As always, if you would like to have us address a particular matter, please feel free to call or write, and we will address that issue in a future **NEWSLETTER**.

We always try to expand the scope of our services and sharpen our skills in the areas of practice that we provide. We would like to take this opportunity to remind you of the services provided by this law firm.

## *Capacity Requirements*

Proper execution of a legal instrument requires that the person signing it have sufficient mental “capacity” to understand the implications of the document. While most people speak of legal “capacity” or “competence” as a rigid black line, it may in fact be quite variable depending on the person’s abilities and the function for which capacity is required.

One side of the capacity equation involves the client’s abilities, which may change from day to day (or even hour to hour) depending on the course of illness, fatigue and/or effects of medication. On the other hand, a greater understanding may be required by the signer for some activities than for others. For example, North Carolina courts state that the degree of capacity for execution of contracts and wills is the same; however, the case law also suggests that a court may more closely scrutinize a person’s capacity when entering into a contract.

Testamentary capacity, or that required to enter into a will, requires the testator to understand and carry in mind, in a general way, (1) the nature and extent of his property; (2) the persons who are the natural objects of his bounty; and (3) the nature and effect of the disposition he is making. There is a presumption under the law that the testator has sufficient capacity to make a will. Therefore, anyone seeking to challenge the validity of the will based upon lack of testamentary capacity bears the burden of showing lack of capacity by a preponderance of the evidence. A preponderance of the evidence means a showing of the greater weight of the evidence or, for instance, fifty-one (51%) percent.

In making contracts, the law of North Carolina requires that a person understand the nature, scope and effect of the act in which he is engaged. It does not require that he be able to act wisely, discreetly, or necessarily drive a good bargain; it requires only that he possess such faculties that he understand what he is doing and is making his contract with such understanding. To the extent that one makes a contract without capacity, that contract is voidable. The party seeking to rescind the contract bears the burden of establishing by the preponderance of the evidence that the contracting party lacked the requisite capacity.

As a practical matter, in assessing a client's capacity to execute a legal document, attorneys generally ask themselves whether anyone will challenge the transaction. If a client of questionable capacity executes a will giving her entire estate to her husband, and then to her children if her husband does not survive her, it is unlikely that the transaction will be challenged. However, if she executes a will giving her entire estate to one child with nothing passing to the other children, the attorney must be more certain of being able to prove the client's capacity.

While the standards may seem clear, applying them to different clients is sometimes difficult. The fact that a client does not know the year or the name of the President of the United States does not necessarily mean she does not have adequate capacity. The determination mixes medical, psychological and legal judgments. It must be made by the attorney (or a judge, in the case of guardianship) based upon information gleaned by the attorney in interactions with the client and from sources such as family members, social workers, and/or medical personnel. Doctors and psychiatrists cannot themselves make such determinations as to whether an individual possesses adequate legal capacity, but they can provide a professional assessment to assist an attorney in making this decision.

As a third party is necessary to assess legal capacity to be certain formal legal requirements are met, it can be risky to prepare and execute legal documents on your own without the assistance or representation of an attorney.

**“Let’s Talk Legal”**  
**Radio Station: WTKF - 107.3 FM**

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As many of you know, Harvell and Collins, P.A., presents a talk radio program each and every Tuesday at 7:30 a.m. The purpose of the live radio program is to present to the listening audience legal information and allow the listeners to call in and ask questions. We have thus far discussed the following topics:

- Estate Planning
- Elder Law and Medicaid Planning
- Litigation in all Courts
- Estate Administration
- Real Estate Transactions
- Corporate and Business Transactions
- Family Law and Domestic Relations

If you have suggestions for a topic to be discussed, or if you have a question, give us a call. Or, call in during the show at 1-800-818-2255. Please join us on Tuesday mornings, bright and early on the talk station at WTKF - 107.3 FM.

We are now archiving our weekly radio program on the website so that our clients may listen once again to the programs by visiting our website at [www.harvellandcollins.com](http://www.harvellandcollins.com).

### ***Make Sure Your Plan Beneficiary Choices Are Up To Date***

Many people periodically update their wills and other estate planning documents, but do not remember to update who will receive distributions from their retirement plans, IRAs, 401(k)s, annuities and life insurance.

It is important to remember that these assets do not pass according to your last will and testament and are what we lawyers call “non-probate assets”. These assets pass according to contract or designated beneficiary. As you review and update your estate plan, this review should include confirming your beneficiary designations to make sure they are not outdated. The following are some tips for naming a beneficiary:

- It is important to name a beneficiary. Do not assume that your retirement plan will be distributed according to your will. If you do not name a beneficiary, the distribution of benefits may be controlled by state or federal law or according to your particular retirement plan. Some plans automatically distribute money to a spouse or children. While others may leave it to the retirement plan’s holder’s estate, this could have negative tax consequences. The only way to control where the money goes is to name a beneficiary.
- You may want to designate a trust as your beneficiary. If your estate is more than the current estate tax exclusion (\$2 million for 2007 and 2008) and a large portion of it consists of retirement plans, it may be advisable to direct that the plans be payable to a trust rather than to the surviving spouse. The trust must be properly drafted to avoid tax consequences, so consult with an attorney before doing this. If you want your money to go into a trust for your children, be sure to designate the trust as the beneficiary. If you name your children, the money will go directly to them.
- If you have major life changes, be sure to keep your beneficiary designations up to date. If you get married or have children, you may want to change your beneficiary.

Also, if your spouse was your beneficiary and you get divorced, your former spouse might still be the beneficiary. Divorce does not automatically remove an ex-spouse as a beneficiary. If you wish to remove a former spouse as your beneficiary from the plan, you will need to fill out a new beneficiary designation form.

- Even if you do not have major life changes, you should review your beneficiary designation periodically. Your beneficiary may not be who you remember it to be or may be outdated. For example, if you named a charity as beneficiary, you will want to confirm that the charity still exists. A change of beneficiary form can often be downloaded from the website of the firm holding the assets.

***“The Right Advice at the Right Time”***  
***Visit us at [www.harvollandcollins.com](http://www.harvollandcollins.com)***

If you have not done so already, we encourage you to visit our website. The website serves as yet another way to render superior service to our clients. There is a wealth of information disclosed on the website, including important links to useful government agencies that will assist our clients in obtaining valuable information.

“About the Firm” presents the history and purpose of the law firm. “Staff Profile” introduces our lawyers and legal assistants. Contact information is provided for all employees. The website provides an extensive list of services offered by Harvell and Collins, P.A.

Please visit us at [www.harvollandcollins.com](http://www.harvollandcollins.com). We look forward to comments from our clients regarding our website.

***Shopping for Real Estate and Title Insurance***

Shopping for real estate is just like shopping for anything else: You want the product to be free of defects. While it is easy to examine an article of clothing to make sure there are no rips or stains, it is harder to notice if there is a defect with a piece of property you are buying.

Title insurance is a way for owners and lenders to protect themselves against unknown defects in land. While most types of insurance are proactive, or assumption of risk, and protect against future harms, title insurance is retroactive and is a risk elimination form of insurance. Coverage starts on the day the policy is issued, and works backwards in time to protect an owner against prior defects in the title.

There are two (2) types of title insurance:

- Owner’s Insurance. When purchasing property with cash, owner’s insurance is not

required. However, it is strongly encouraged that an owner purchase insurance to protect against unforeseen circumstances. Just like health insurance is imperative to have in case of an unforeseen emergency, title insurance is imperative to protect against past defects that might arise. Owner's insurance protects the owner up to the amount of the purchase price.

- Lender's Insurance. Most purchasers of land take out a mortgage to pay the purchase price. When an owner gives a deed of trust to a lender, the owner offers the property as collateral. A lender wants that collateral protected, and every lender will require insurance up to the amount of the loan. As the loan is paid off, the lender's insurance amount decreases, until it is eventually gone.

When you purchase land, you are generally given a Warranty Deed, which warrants that you, as the purchaser, will be receiving marketable title to the land, free and clear from liens and encumbrances. Before title insurance is issued, a search is done of the property, locating all mortgages, easements, taxes, estates, and other encumbrances that might produce a "cloud" (title defect) which affects title to the property.

One common example of a cloud of title that arises in North Carolina deals with a married couple who has transferred land. Suppose a husband holds title to property in his name alone. He may think that he can sell the property and sign only his name on the Warranty Deed. However, under North Carolina law, a spouse has a marital interest in all real property owned during the marriage. The wife would have to sign the Warranty Deed as to her marital interest. If she has not done this, she can later stake a claim to that piece of property, and the new owner would be out of luck. This is where title insurance comes into play. A title examination performed before the closing would have found this title defect. At that time, the defect could have been cleared, by having the wife sign a Warranty Deed, and the new owner would have marketable title. If for some reason this defect was not discovered before title insurance was issued, the title company would defend the new owner against any previous owner's claims to the property, up to the amount of the policy.

While an owner's policy can theoretically last forever, as long as the property is owned by the same person or that person's heirs, a lender's policy will have to be issued each time a piece of land is refinanced, even if the owner is refinancing with the same lender. Although the same owner has continuously owned the property, it is possible for a lien to have attached during that time of which the owner is unaware. Some common examples are a mechanics lien from a contractor, or a judgment due to unpaid taxes or homeowners association fees. The lender will want to protect its interest in the property just as much as the owner wants to protect his interest.

Title insurance is one of the best investments that a homeowner can make. A claim of ownership against a current owner's property causes unwanted headaches and stress, which can easily be avoided with a proper title examination and insurance coverage. Skipping this essential step in the purchasing or refinancing process could cause an unaware owner to lose his land without an available remedy. Always feel free to ask your closing attorney about any questions you have regarding your purchase of title insurance.

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**Postscript**

*This writing is intended to generally familiarize you with various legal issues. The scope of this document is necessarily limited, and consultation with your attorney or tax advisor should always precede taking any action.*