

Guiding Principles in Testamentary Capacity Assessment

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Introduction

For a will to be valid and enforced by a probate court, the testator (a person executing a will) must have the proper capacity to execute a will, the requisite testamentary intent, and must have executed the will in conformance with the jurisdiction's formalities (Shulman, Cohen, & Hull, 2005).

Challenges

A will does not become valid until the testator's death. Challenges to a will sometimes occur; in approximately 72% of the cases there was a radical change from a previous will (Shulman, Cohen, & Hull, 2005).

- In about 56% of challenged wills, the allegation is that there was undue influence on the testator (Shulman, Cohen, Kirsh, Hull, & Champine, 2007).

- A person must be of sound mind to execute a valid will (Read & Bailey, 2015). "Sound mind" is also referred to as testamentary capacity (Hirsch, 2017). The testamentary capacity is measured at the time of the execution of the will (Read & Bailey, 2015). Probate court gives a presumption that a person has testamentary capacity at the time of execution (Keeton, 2015). The burden of proof as to testamentary capacity is on the person who puts forward the will for consideration by the probate court. The evidentiary standard is a preponderance of the evidence, which means that more than 50% of the evidence points to a person's testamentary capacity (Hirsch, 2017).

Clinical Implications

- Testators with dementia can expect to have their will challenged in approximately 40% of cases (Shulman et al., 2015). Testators can have mild Alzheimer's disease as long as the documents are executed in a coherent state and do not exhibit delusional thinking (Gorman, 1996). The coherent state is often referred to by its legal term as a lucid interval (Shulman et al., 2015).

- Testators with delusions produced by a mental disorder: the delusion must have a direct impact on the content of the will to lead to a successful challenge of the will (Kennedy, 2012).

- Testators with a history of alcoholism: testators need to be without acute intoxication during the execution of the will (Kennedy, 2012).

Standard

The standard for testamentary capacity has largely been based on "tests" in case law, with minimal clinical or statutory direction provided (Brenkel et al., 2018). The gold standard in applicable case law is that of *Banks v. Goodfellow* which was determined in 1870 (Brenkel et al., 2018). Mart and Alban (2011) restated the *Goodfellow* criteria for cognitive impairment which have been commonly adopted throughout the United States as follows:

1. Does the testator understand the nature of the act of making a will?
2. Does the testator understand his or her property?
3. Does the testator know the natural objects of his or her bounty?
4. Does the testator understand how the will disposes of his or her property? (Brenkel et al., 2018).

Framework for Evaluation of Competencies

1. Functional - Psychologist evaluates the ability the testator to understand the legal procedure of creation of a will.
2. Causal - Psychologist considers any underlying sources for incompetency.
3. Interactive - Psychologist examines the person-context interaction of the testator (e.g., what is being demanded of the testator in executing a will).
4. Judgmental - Court decides whether the functional deficits of the testator eliminates the testator's ability to meet the *Goodfellow* criteria.
5. Dispositional - Psychologist makes suggested steps and recommendations to bring a testator to competency to execute a will (Grisso, Borum, Edens, Moye, & Otto, 2005).

Framework for Evaluation of Undue Influence

1. Predisposing factors - Psychologists need to trace the testator's history relevant to testamentary capacity.
2. Vulnerability enhancers, - Psychologists need to examine the testator's increased dependence and functional abilities over time.
3. Execution variables. - Psychologists need to evaluate any increase of pressure in the testator's environment (Turkat, 2003).

Questions to Consider in Evaluations

Theme 1: Understanding the nature of the testamentary act

The testator must have the "task-specific capacity" to execute a will in the context of his "situation-specific environment" (Shulman et al., 2007).

The task-specific capacity focuses on two components to evaluate the client's understanding of the testamentary act.

Theme 2: Understanding the nature of the individual's property

The understanding of the property does not mean knowing the exact value of property. Rather, it means the testator can understand the concept of valuation. For example, the TCAT checks for the testator's knowledge of financial parameters such as the value of assets and the testator's understanding of bills (Papageorgiou et al., 2017).

Theme 3: Understanding the testator's relations to living descendants

The clinician evaluation will rely on evidence to answer these questions from friends, acquaintances, and family members to determine the testator's ability to communicate a choice (Peisah & Shulman, 2012).

The presence of undue influence is a question of fact for the probate court, but a clinician can present circumstantial evidence to help the jury decide (Madoff, 1996).

Conclusions

A testator can have an evaluation of testamentary capacity when the person executes the will. When a clinical assessment is complete at the execution of the will, the testator's attorney's role is to evaluate the clinical assessment and make a judgment on the use of the clinical assessment in probate court after the testator passes away (ABA & APA, 2008).

Does the task-specific capacity match the functional ability of the testator (Melton et al., 2017)?

Was there a minimal threshold of functioning in order to understand the nature and purpose of preparing a will (Melton et al., 2017)?

Does the testator presents with an unrealistic view of their possessions (Melton et al., 2018)?

Are the social relationships of testators impaired due to a mental disorder or their inability to appraise relationships in the context of the past (Papageorgiou et al., 2017)?

Is there any evidence or information on any assistance in drafting of the will by other people and was there unnatural disposition of property (Madoff, 1996)?

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