Testamentary Capacity

Franklin C. Redmond, MD, FAPA

Wills are more prone to challenge on the issue of testamentary capacity because, as people live longer, they are more likely to have the kind of conditions that interfere with capacity and because the courts seem to be more apt to hear evidence and allow findings of lack of testamentary capacity than in the past. Therefore, it is incumbent on attorneys to protect the interests of their clients by addressing the issue of testamentary capacity in any case in which a will contest might be anticipated. Ideally, attorneys in such situations should have their clients counsel with a psychiatrist who is knowledgeable and experienced in matters of probate and will contests. Further, the attorney and the client must provide extensive data (of the kind which a jury might ultimately obtain) on which the psychiatrist can base his or her conclusions that the client is of "sound mind."

Wills are becoming highly vulnerable to challenge based on allegations of lack of testamentary capacity or undue influence. As the population lives longer, people are more apt to have the kind of medical condition that might impair testamentary capacity or render them vulnerable to undue influence.

Most states follow the law as evolved from the English common law in matters of wills and probate. The legal definitions for terms such as testamentary capacity are essentially the same from state to state. Also, most states have adopted Rules of Evidence based on the Federal Rules of Evidence. Although this discussion uses Texas cases as examples, the points made are valid for other jurisdictions as well.

Clearly, as a matter of Texas law, as well as practically all other states, persons who satisfy the requirements of testamentary capacity and who follow the procedural rules for making a will have the absolute right to dispose of their property in any way they see fit.[1] The requirement of testamentary capacity, however, is the *de facto* way in which society maintains some degree of review and can impose certain values of the society.[2] Therefore, as a matter of philosophy, most people would agree that persons have the right to leave their estate to whomever they please, but, as a matter of practice, there is an automatic question when they leave their estate other than to "next of kin."[3] Also, most people would agree that there should not be undue influence of another person on the testator.[4]

Some of the medical problems that might impair persons' testamentary capacity or render them vulnerable to undue influence include chronic and progressive disorders such as cancer (with

Dr. Redmond is clinical associate professor at the Medical School, University of Texas Health Science Center at San Antonio. Address reprint requests to Dr. Redmond at 4499 Medical Drive, Suite 290, San Antonio, TX 78229.

or without brain tumor), cardiovascular disease (with or without specific cerebral vascular disease, such as strokes, cerebral arteriosclerosis, heart failure, or heart irregularity), the so-called senile dementias (such as Alzhemier's disease), chronic disorders of organ systems (such as kidney failure, liver failure, or chronic lung disease), episodic disorders (such as infections, drug effects, or effects of trauma), and metabolic disorders (such as diabetes). Of course, there are primary psychiatric disorders that might also impair testamentary capacity, such as schizophrenia, paranoid disorders, depressive disorders with psychosis, and manic psychoses or any other delusional disorders. As one can see, the list of medical problems represents the disorders that account for most deaths in the older population. The fact that these disorders frequently exist over long periods of time increases the likelihood that they might be present at the time a person would reasonably want to make a will.[5]

As a practical matter, the validity of a will and the testamentary capacity of the testator only become an issue if there is a challenge to the will. There are many instances of wills being successfully probated that would not have withstood a challenge based on testamentary capacity. These, of course, are situations in which the beneficiaries or potential beneficiaries are agreeable to the dispositions in the will.

Another source of increased vulnerability of wills to challenge is the philosophy of the courts. Cases have demonstrated that the courts have a tendency to hear any evidence that might bear on the mental state of the testator,[6] both before and after the execution of the will.[7] New rules of evidence allow much more testimony to be admitted.[8-12] For example, expert opinion can be based on information that might not otherwise be admissible as evidence so long as it is the type of information that is usually relied on to formulate the expert opinion.[13]

A November 1983 Texas Supreme Court ruling[14] is illustrative of the current thinking of the court on this issue. The testator died in 1980, leaving a self-proved will devising his entire estate to his wife. His sons by a previous marriage contested the will, alleging that their father did not have testamentary capacity. Based on a jury finding that the testator lacked such capacity, the trial court rendered judgment that the will be denied probate. The Court of Appeals reversed, holding that the evidence established as a matter of law that he had testamentary capacity. The Supreme Court reversed the judgment of the Court of Appeals and affirmed that of the trial court.[15]

The evidence showed that the deceased had a history of physical problems, many of which stemmed from his being diabetic. In the year before his death he had some hospitalizations and tests that showed evidence of impaired blood flow in the brain. Notes of a neurological examination stated that "memory was sketchy and he seemed at times confused."[16]

He executed the will in question on July 7, 1980. Slightly over a month later, on August 12, he was admitted to the

hospital. Evidence indicated that he had suffered a stroke affecting his speech and memory. He died on August 17, 1980.

The record also contains evidence that he had testamentary capacity on the date that the will was executed. The attesting witness stated at the trial that he was lucid and knew what he was doing. Several persons who saw him at a party three days before the will was executed testified that he was alert, was able to carry on a conversation, and participated in a card game. A physician acquaintance testified that he had seen him around the same time and that he believed him to be competent and that the blockage in the carotid arteries would not necessarily cause mental decline.

According to the court's opinion, the question was whether the wife established as a matter of law that her husband had testamentary capacity on July 7, 1980. The burden of proving capacity was on her. The fact that the will was self-proved does not shift the burden because the contest was filed before the will was admitted to probate. The court states:

> Hence we must sustain the jury finding that Mr. Croucher did not have testamentary capacity unless Mrs. Croucher conclusively proved that he did.
>
> Mrs. Croucher clearly produced sufficient evidence to sustain a finding that Mr. Croucher had testamentary capacity. That evidence, if not contradicted, would be enough to establish the matter conclusively. We must determine, then, if James and Kenneth Croucher produced some evidence that their father was not competent to make a will.[17]

The court goes on to say:

> There is no direct evidence that Mr. Croucher lacked testamentary capacity on the day that he executed the will. Evidence of incompetency at other times can be used to establish incompetency on the day the will was executed if it demonstrates that the condition persists and has some probability of being the same condition which obtains at the time of the will's making. *Lee* v. *Lee*, 424 S.W.2d 609 (Tex. 1968) Thus the evidence adduced by the Croucher sons must pass two tests. First, was the evidence of the kind that would indicate lack of testamentary capacity? Second, if so, was that evidence probative of Mr. Croucher's capacity or lack thereof, on July 7, 1980, when the will was executed?[17]

The court found the answer to both of those questions to be affirmative. The court held that there was some evidence of lack of testamentary capacity and concluded that they could not say that the wife established as a matter of law that her husband had testamentary capacity at the time he executed his will.

A further point was made by the court in response to the complaint to the Court of Appeals that "there was no, or insufficient evidence of lack of testamentary capacity to support the jury finding." The opinion states:

> Those points of error are appropriate when the party without the burden of proof complains of a jury finding. When, however, the party having the burden of proof appeals from an adverse fact finding in the trial court, the point of error should be that the matter was established as a matter of law or that the jury's finding was against the great weight and preponderance of evidence. *O'Neal v. Mack Trucks, Inc.* 452 S.W.2d 112 (Tex. 1978). A complaint by the party with the burden of proof that there was no evidence to support the jury's finding invokes appellate jurisdiction to consider the contention that the opposite of the finding was established as a matter of law.[18]

The above case has two far-reaching implications. The first is that direct evidence of lack of testamentary capacity

on the day of execution of the will is not necessary and that evidence of incompetency at other times can be used to establish incompetency on the day the will was executed, if it demonstrates that conditions persist and has some probability of being the condition that obtained at the time of the will's making. The second is that the burden of proving testamentary capacity is on the proponent of the will where the contest was filed before the will was admitted to probate. That burden requires the court to sustain a jury's finding that the testator did not have testamentary capacity unless proponent conclusively proves that he did. Although these principles are not entirely new,[19] they clearly demonstrate how difficult the burden of proof can be on the proponent if there is any contradictory evidence.

The process of will making and the transfer of assets by mechanism of will have some unique features that cause confusion and are often paradoxical. One obvious and unique feature is that, when people make wills, they do not know that these wills are going to be their last, because these wills only become the last will if the testators die before making another valid will. Also, wills are different from other transactions. In the ordinary course of business a person is assumed to be competent for the purposes of carrying out that business unless there has been some direct question as to competency. For example, if a person were to make a contract, any attempt made to invalidate the contract by a claim of incompetency would require the contestant to prove the incompetency. On the other hand, that same individual might make a will on the same day as the contract, but after his or her death a question of competency would require the proponent of the will to prove the testator's competency on that given day.

In actual practice the people who are most often involved in making wills are more likely to apply a different standard of evaluating competency than the people who make the determination in a will contest. For most purposes, when a person goes to an attorney asking for help conducting legal business, the assumption of the attorney is that the client is competent to do the business about which he or she is inquiring. Similarly, most witnesses to wills are people who either have little or no direct knowledge of the testator or apply such superficial standards to the testator that the basic assumption is that the testator is competent unless given information to the contrary. However, in a will contest, the fact finder is likely given additional information such as medical records, testimony from expert witnesses, family, and other people close to the testator.

If someone is in fact competent, that competency is much easier to demonstrate when the person is alive than after his or her death. Further, after a person's death, questions are easily raised about his or her competence at a particular point in the past if certain medical conditions have been existing. Medical records and other material such as interviews with family almost always provide some basis for an expert opinion that questions the testamentary capacity of

the testator. At the same time there is usually insufficient information and documentation on which the expert witness can formulate an opinion that affirms the testator's testamentary capacity at the time of the will making.

The net effect of this state of affairs is that, if the testator has had any of the kinds of medical problems described above, the advantage shifts to the contestants on the issue of testamentary capacity, unless there is documentation that takes into account those medical conditions, specifically and in depth, as to their potential effect on the testator's testamentary capacity at the time of the will making.

The solution to the problem of clearly establishing testamentary capacity at the time of making a will is not a simple one. The following case illustrates some of the difficulties. The case *Lowry v. Saunders and Saunders*,[20] a will contest originally held in county court of Bexar County, Texas, illustrates some of the difficulties.

The testatrix was in her 90s and had no children of her own, and all of her siblings had passed away; thus all of her heirs were eight nephews, nieces, grandnephews, or grandnieces. The principals in the contest were the testatrix's grandniece and her nephew. The grandniece had applied to admit to probate a 1976 will and the nephew had applied to probate a 1979 will; each opposed the other's will.

On April 19, 1978, the testatrix executed a warranty deed whereby she conveyed her San Antonio home to her grandniece, while reserving for herself the full possession benefit, and use of the home for and during her lifetime.

On the same day, she contracted and agreed with the grandniece that she would not change the provisions of her will dated April 7, 1976, insofar as it applied to any and all dispositions made for the benefit of the grandniece. In July 1978, the testatrix filed a petition in the District Court of Bexar County, seeking to have the agreement and warranty deed executed in April 1978 set aside. After a jury trial, the trial court in May 1979 entered its judgment, based on the verdict of the jury, affirming and holding valid the contractual agreement and the warranty deed of April 1978. In June 1979, the testatrix executed the will sponsored by the nephew that eliminated the grandniece as a devisee and legatee. On January 9, 1980, the testatrix died in San Antonio. The following day the grandniece filed her application to probate testatrix's will dated April 7, 1976, and codicil dated April 19, 1977.

One week later, on January 17, 1980, the nephew filed his application to probate the will dated June 18, 1979. The nephew opposed the admission of the earlier will claiming that the will dated June 18, 1979, expressly revoked the earlier will and codicil. The grandniece opposed the 1979 will, contending that it was the product of undue influence by the nephew and that the testatrix lacked testamentary capacity to make this will.

Evidence from the earlier trial, which resulted in upholding the contractual agreement and warranty deed, showed that the testatrix had granted the grandniece the property because it was under-

stood that she was going to receive it eventually by virtue of the April 1976 will. Moreover, about that time the testatrix was in default and overdue on some bank notes and the grandniece provided her with $10,000 cash for payment of the outstanding notes and further agreed to provide an additional $5,000 in periodic future advancement as needed for the testatrix's care and maintenance.

The June 1979 will was prepared by the attorney who had been representing the testatrix for about three months at the time. He was the attorney who was handling the previously filed lawsuit to set aside the deed transferring her property. The attorney testified that he explained the will to the testatrix paragraph by paragraph to make sure that she understood the significance and effect of her action. He believed that she understood who the members of her family were and what their relationship was to her, as well as the nature and extent of her property. He further expressed the opinion that her memory and understanding were sufficient to enable her to make a valid will.

The attorney further testified that the testatrix fully intended to exclude the grandniece from her will because she was angry and upset about an earlier transaction with the grandniece in which she had lost all of her rights and ownership interest in her homestead, except for retained life estate.

Because a question of the testatrix's competency had arisen in the prior litigation and because of her advanced age, the attorney made arrangements for a psychiatrist to examine her before the will was prepared and executed.

The psychiatrist examined the testatrix in May 1979 for one hour and again on the date the will was executed. On this second occasion, the psychiatrist's affidavit was attached to the will of June 18, 1979. The affidavit reads in part, "I am a medical doctor duly licensed by the State of Texas specializing in psychiatry. I have this day examined the Testatrix, Bessie Cooke Cato, and have determined that she is of sufficient mental capacity to execute this will and she knows the extent and nature of her estate and those entitled to the bounty of same. She further understands the significance of this will and has stated to me that she is making same freely of her own free act of deed and without duress."[21]

The psychiatrist appeared and gave testimony in the trial. He testified that the testatrix understood the effect and significance of making a will, and that she defined the significance for him. According to him, she was able generally to name her relatives and the cities of their residences. He testified that she had been handling her own business and paying her own bills. He concluded that she was capable of writing her own will or signing one prepared by some one else at the times he examined her.

On cross-examination of the psychiatrist, and through rebuttal testimony, the grandniece was able to demonstrate that the testatrix was not knowledgeable about the nature and extent of her property at the time she saw the psychiatrist and the attorney. Later evidence revealed that many of the details and

claims of the testatrix to the psychiatrist were untrue.

The finding by the jury in this case that the testatrix lacked testamentary capacity, in spite of the testimony of a psychiatrist who examined her shortly before and apparently on the day of executing the will, demonstrates the difficulty in establishing testamentary capacity. Clearly, juries will not simply accept the testimony of an expert witness. Moreover, the jury in this case had more data on which to base an opinion of testamentary capacity than the psychiatrist had available to him at his examination. If the psychiatrist had had available to him the same data that the jury had, and if his opinion were still that the testatrix had testamentary capacity, he would have been in a position to formulate a much stronger opinion that would have had much more weight in the eyes of the jury.

The quality of the psychiatric opinion, as with any expert testimony, is dependent upon the quality of the data used to make that opinion. A brief evaluation with limited data is not particularly reliable.

Given the current position of the court, there are a number of things attorneys can do for their clients in the area of proving testamentary capacity. To protect the client's interest, the attorney must take special care to do everything possible to establish and document that the testator had testamentary capacity in any instance in which a will leaves out natural heirs or treats natural heirs unequally or in any circumstance in which there is any reason to believe that some party might be unhappy with the contents of the will. This is particularly important when the client has made a number of wills in the past and the current will makes substantial changes. It is important for the attorney to explain to the client that, although one may think it ridiculous that there would be any question as to one's testamentary capacity, any number of things might happen between the execution of the will and one's death that retrospectively could give evidence for a subsequent finding that one lacked testamentary capacity at that time.

Once having made the decision that the issue of testamentary capacity must be addressed, ideally the attorney should find a psychiatrist experienced and knowledgeable in matters of probate and will contests. Then, the attorney must furnish the psychiatrist with as much of the information as possible that will ultimately be made available to a jury if there is a contest. A psychiatrist who is knowledgeable and experienced in these matters can be invaluable in helping the attorney and the client to know what kind of information is needed and help them produce evidence and documentation. Without an in-depth evaluation, and with extensive collateral information being available, a psychiatric evaluation and opinion may turn out to be more damaging than helpful to prove testamentary capacity (as the above cases illustrates).[22]

In many cases, the attorney who is helping a client make a will may not be a specialist in probate law and may not be aware of some of the potential prob-

lems that might arise at probate. Therefore, the forensic psychiatrist may be the one who identifies the pertinent issues to be dealt with.

When asked to do a competency evaluation, psychiatrists should be immediately alerted that they are not dealing with a simple, ordinary making of a will. Two conclusions that arise with no more facts are that the question of a will challenge has arisen and that the estate will probably be substantial. The essential ingredients of a will contest are money and an unhappy potential heir. Therefore, if the attorney or the testator do not offer any explanation, the psychiatrist should ask questions to determine how best to be of help.

Certainly there will be occasions when a psychiatrist is requested to give a statement that a testator has capacity when in fact he does not have capacity. This fact may be suspected or known to the attorney or, perhaps more likely, to the family member or close friend who is engineering the will making. Tips that point in the direction of undue influence, questionable dealings, or outright fraud include the following: (1) The psychiatrist will be assured that a competency statement is routine due to the testator's age. (2) The appointment is made by someone other than the testator or his attorney. (3) The testator is brought to the appointment by someone who answers most of the questions for the testator and is reluctant to allow the testator to be interviewed alone. (4) Specifics about the will are not given or the testator seems unclear about specific items in the will. (5) There is a reluctance to give information about potential heirs and their relationships with the testator. By being alert to these tips, the psychiatrist will generally be able to avoid being "used" for questionable purposes.

With those testators (and their attorneys) who come to the forensic psychiatrist out of a legitimate desire to protect their will from challenge, the psychiatrist's role is to help them understand the necessity of obtaining "private" information. The psychiatrist needs to know who is likely to challenge the will and why. The psychiatrist needs to know whether the will being made makes substantial changes from previous wills (particularly in respect to changes in beneficiaries) and why.

There may be conflict and/or "secrets" in families about which the testator is reluctant to talk. The psychiatrist needs to inform the testator that if there ultimately is a will contest those "secrets" will likely come out in open court and the testator's "side" may not be clearly given.

The testator may be so angry with or "hurt" by a previously designated beneficiary as to want to "cut them out of the will." The testator may or may not want to make that fact known before his or her death. The psychiatrist should assure the testator that he or she has the right to disinherit someone but the psychiatrist needs information that could establish that the testator was in fact angry or hurt rather than delusional, as might be claimed in a will contest.

Another example is the testator who, for legitimate reasons, wants to leave his or her estate to a charitable institution

rather than to natural heirs, but does not want to tell them before his or her death. Again, the psychiatrist needs to know some of the thinking of the testator to respond to possible challenges of a will contest.

One of the ways to help testators understand why the psychiatrist needs to know so much personal information is to explain that a jury may ultimately have to decide whether the testator's actions were reasonable, that there will be people claiming that what the testators did was not reasonable, that the testators will not be there, and that there may be no one to speak on their behalf if they keep their thoughts private. In other words, the psychiatrist may potentially become a spokesperson for the testators in a future will contest, either directly as a witness or indirectly through a certified report.

Another area that must be explored by the forensic psychiatrist is the medical history. If the testator has had serious illness and/or hospitalizations, the psychiatrist may need to communicate with the testator's physician and/or review medical records. Medical records are frequently used in will contests and the psychiatrist definitely needs access to them while the testator is still alive. There are times when people have an illness or condition during which they may lack testamentary capacity, but recover sufficiently (even if temporarily) to have capacity.

If the likelihood of a will contest is high, the psychiatrist may need to ask questions to uncover other possible "evidence" that might turn up at a will contest, such as letters, contracts, or other documents that might speak to capacity or even intent. The psychiatrist may even feel the need to interview other people who may have input in a future determination of competency.

Situations may well arise in which the psychiatrist is stongly of the opinion that the person has capacity but is able to see how vulnerable that assertion may be to attack at a future time after the death of the testator. Again, capacity is much easier to establish (if it exists) with a living person rather than a deceased one.

References

1. Tex. Prob. Code. Ann. S 57 (Vernon 1980). The courts have consistently equated "being of sound mind" with having testamentary capacity.
2. Szasz TS: The concept of testamentary capacity. J Nerv Ment Dis 125:474–7, 1957
3. Usdin GL: The physician and testamentary capacity. Am J Psychiatry 114:249–56, 1957
4. Perr IN: Wills, testamentary capacity and undue influence. Bull Am Acad Psychiatry Law 9:15–22, 1981
5. Koson DF: Forensic psychiatric examinations: competency. J Forensic Sci 27:119–24, 1982
6. *Carr v. Radkey*, 393 SW 2d 806 (Tex. 1965): "It is our conclusion that the jury in cases such as these should be given all the relevant and competent testimony with regard to the mental condition of the testatrix"; see also *Douglass v. Winkle* (Tex. App.-Texarkana 1981) 623 SW 2d 764: "Rulings on admissions of evidence expressive of testatrix mental state, be it intent or feeling, should be left to sound discretion of trial judge."
7. *Lee v. Lee*, 424 SW 2d 609 (Tex. 1968): "The proper inquiry in a will contest on the ground of testamentary incapacity is the condition of the testator's mind on the day the will was executed. . . . However, only that evidence of incompetency at other times has probative force which demonstrates that that condition persists and has some probability of being the same condition which obtained at the time of the wills making." See also *Wilkinson*

v. Moore (Tex. Civ. App.-Houston 1st Dist. 1981) 623 SW 2d 662 error dismissed.

8. Tex. R. Evid. 702: Testimony by experts.
9. Tex. R. Evid. 703: Basis of opinion testimony.
10. Tex. R. Evid. 704: Opinion on ultimate issue: This rule follows the law stated in Carr (Supra) which held that it was an error to exclude an expert's testimony concerning the testator's ability (1) to understand her business, (2) to know the objects of her bounty, and (3) to know the nature of her estate, based on an objection that such testimony would "invade the province of the jury and constitute opinion on ultimate issues." This rule, however, does not change the rule regarding expert's and other witnesses' inability to give an opinion, which amounts to a "legal definition" or a "legal test."
11. Tex. R. Evid. 705: Disclosure of facts or data underlying expert opinion. It will no longer be necessary to ask an opinion from an expert based upon a hypothetical question.
12. Tex. R. Evid. 601(b): "Dead man's statute" (previously RCS Art 3716): The major change is that rather than prohibiting testifying as to any transaction with, or statement by the testator, this rule prohibits testifying as to any oral statement by the testator.
13. Tex. R. Evid. 703: This rule has overruled the case of *Moore v. Grantham*, 599 SW 2d 287, 289 (Tex. 1980), which held that an expert's opinion based solely on hearsay was inadmissible.
14. *Croucher v. Croucher* 660 SW 2d 55 (Tex. 1983)
15. Id
16. Id
17. Id
18. Id
19. *Seigler v. Seigler*, 391 S.W. 2nd 403 (Tex. 1965): The burden of proof of testamentary capacity is on the proponent.
20. *Lowery v. Saunders and Saunders*, 666 SW 2d 226 (Tex. App.-San Antonio, 1984, writ ref'd n.r.e)
21. Id
22. Id