

Common Pitfalls in the Evaluation of Testamentary Capacity

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The examination for testamentary capacity poses several unique challenges to the forensic evaluator, especially when performed, as is often the case, postmortem. Forensic experience reveals that a series of common pitfalls awaits the unwary witness. This brief review identifies the more common pitfalls and suggests how to avoid them.

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Where there's a will, there's a lawsuit.—Ann Landers

The forensic examination for competence to author a will, or testamentary capacity, resembles and differs from other forensic assessments in particular ways.^{1–5} Like many forensic evaluations, it requires evaluating a person in relation to statutory or common law criteria. Unlike competence to stand trial, also a criteria-driven assessment, testamentary capacity poses certain unusual features of its own. The criminal defendant can be examined directly for competence, but the deceased testator cannot. However, another testator, living and desirous of lawsuit-proofing the will, may request a premortem evaluation before making changes. Such an examination resembles other direct competence determinations of subjects.

Like a child custody evaluation, a challenge or contest of a will is often performed in the heat of intense emotional conflicts among the various parties. The simple legal criteria do not capture the often complex family dynamics that attend such matters: who is more loved; who has suffered or tolerated more; who has given or already received more; who is deserving, and who is not; who must be avenged; and who is entitled, and who is merely greedy. As may occur during the guardianship determination,⁶ long-buried family fears, hates, and sorrows may be unearthed by the legal process.

Unlike the most challenging and complex forensic evaluation, the determination of criminal responsi-

bility, the criteria for possessing testamentary capacity are conceived of as lying at a low level, perhaps the lowest level, of demands on the subject. This low level may reflect concerns deriving from English law about preserving property through appropriate inheritance.^{4,7} Frolik specifically notes:

An examination of case law reveals how liberally the courts interpret these requirements [i.e., the three criteria described below] and how frequently a testator with conspicuously diminished capacity is nevertheless found to have possessed testamentary capacity [citation omitted] [Ref. 4, p 257].

The full discussion of testamentary capacity is beyond the scope of this article and may be found elsewhere (e.g., Refs. 1–5, 7). The present discussion focuses on the expert witness's role in giving testimony on this complex issue, identifies the pitfalls that may be encountered, and suggests how to avoid them.

Criteria

Though varying somewhat by jurisdiction, the language of the criteria for testamentary capacity usually follows this general outline. At the time of the execution of the will (which may include a lucid interval in a chronic disorder), the testator need know only:

the nature and extent of the assets and property of the estate;

the natural heirs of his/her bounty (including actual persons such as relatives and friends, charities, organizations, and religious bodies, among others), whether any heir actually receives a bequest or receives nothing;

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the significance of a will as governing the distribution of property after the testator's death.⁷

In some contexts, there is a fourth element that adds a deliberative aspect to "knowledge":

the testator should have a rational plan for distribution of property after death.⁸

Note that, as in other capacity determinations, the testator enjoys the presumption of competence until proven otherwise. Experience proves, however, that even with these modest requirements, expert witnesses may encounter pitfalls that weaken or vitiate the expert's relevant testimony in the determination of testamentary capacity. The most common problems are: failure to presume competence; failure to allow for novel or unexpected bequests; failure to obtain accurate lists of assets; reliance on diagnosis or structural brain changes, rather than functional criteria; confusing impairments on standardized tests with failure to meet the relevant criteria; and misapplying the question of delusions.

Challenges to the Criteria

The most common challenges to a will involve, first, what are referred to as "insane delusions" that directly impinge on the elements of the criteria.⁷ Experts may fail to grasp that general delusions in other areas are not relevant.

A second challenge derives from "undue influence" where another person employs some relational leverage to obtain an unfair advantage over the "natural heirs."⁴ The stereotyped version of this event describes the nurse who, using her position of control and intimacy at the bedside of the dying millionaire, arranges to have the will made out in her favor instead of the relatives'. Undue influence has been defined by one court as: ". . . the opportunity of the beneficiary of the influenced bequest to mold the mind of the testator to suit his or her purposes" (Ref. 9, p 853).

Undue influence is a particularly challenging assessment for the expert, especially in distinguishing it from "due influence"—that is, the natural favoritism or special devotion to particular heirs that is seen in all families. Clues to the possibility of undue influence may derive from unusual amounts of control, coercion, and exclusion, as when an individual keeps other family members away from the testator; tells tales about other heirs to alienate them from the tes-

tator; and controls personal access, mail, and phone calls from relatives to the testator.

Finally, the fact that a testator may have been vulnerable to undue influence does not mean automatically, as experts may erroneously claim, that undue influence was exercised at the time.

Case example. The daughter of a testator with dementia was very active in his care during his infirmity before his death. She bought groceries and drove him on various errands, including to the attorney's office to revise his will. She was left a sizeable amount of the estate. After his death, slighted heirs sued on the basis, *inter alia*, of undue influence. Expert testimony asserted that the testator was vulnerable to undue influence because of his illness. However, since the daughter allowed free access, visitation, phone calls and letters to the testator from the other family members, and since the executing attorney had observed no influence by the daughter, the fact of the exercise of undue influence could not be proven. In addition, the fact that she was the testator's recognized family favorite might be seen as "due influence."

Premortem Examinations

The premortem examination permits live exploration with the testator of the components of the relevant criteria. Two common errors in this procedure are failure to presume competence and failure to obtain independent information, perhaps from the testator's attorney or accountant, of the actual extent of the assets.

Regarding the presumption of competence, experts may approach the individual with a bias based on the testator's age, the diagnosis, the retaining attorney's confident presentation of that side of the case, or the mere fact that an examination is being sought. Under the presumption of competence, the will should stand, barring clear evidence of incapacity. The expert, moreover, must be prepared to say "I do not know," when the data themselves, even carefully compiled, do not yield an opinion to a reasonable degree of medical certainty.

If the testator's claims of ownership are clearly delusional (e.g., "I hereby bequeath the Brooklyn Bridge to my beloved nephew"), an exact accounting may be less necessary. Note that the accounting need not be exact to the penny, but it should bear a realistic relation to the objective data supplied.

Case example. An expert was called to examine a 105-year-old man in a nursing home who was planning to add a new heir to his bequests and who anticipated challenges from other heirs for this "novel and unexpected bequest." Despite his age, he knew his assets and his heirs and gave a reasonable basis for his decision. The expert gave the opin-

ion that the testator was both presumed, and tested as, competent.

Postmortem Testamentary Capacity Examinations

The postmortem examination clearly presents the need to rely almost totally on collateral data that may not have been directed to the requisite criteria nor have been relevant to them; that may issue from highly biased and far-from-disinterested observers; and that may require inference, extrapolation, and cross-confirmation instead of the direct observation that is possible premortem. Such collateral data may be misapplied by the inexperienced expert in the following ways.

Diagnosis Rather Than Functional Capacity

Testamentary capacity is fundamentally a matter of functional ability and is thus largely independent of diagnosis alone; regardless of diagnosis, if the evidence indicates that the testator met criteria, the requirements of this capacity have been met.

Case example. A woman with chronic schizophrenia functioned in part as a “bag lady” but had obvious financial acumen. After her death, her apartment was found to contain multiple paper bags of feces together with multiple paper bags of money. She had recently identified and listed her assets (several rental houses) with a caseworker and had prepared her will with an attorney. The expert for the heir challenging the will opined that, because she had schizophrenia, she must lack testamentary capacity.

Here, the expert focused on the diagnosis as determinative, rather than looking to see whether, as appeared to be the case, the testatrix met functional criteria.

Case example. In a will contest, the testator had had signs of dementia, small-vessel brain disease, and depression before his death. During the hearing, the expert testifying on behalf of the heirs challenging the will brought in as evidence multiple journal articles about percentages of persons with depression, dementia, and small-vessel disease who suffer various impairments. Much attention was given to neurologic and imaging studies that identified small vessel disease.

In this case, the expert focused largely on structural damage to the brain without attending to the functional nature of this capacity assessment. Of course, statistical reports in the professional literature, which may be otherwise valuable, do not assist the factfinder in making a specific determination about the testator as a unique individual.

Misapplying Cognitive Testing

Case example. A testator had undergone neurologic and mental status examinations that revealed some impairment around the time of writing the will. The expert for the heirs challenging the will stressed these findings, though they did not bear or shed light on the capacity criteria.

These findings might also address vulnerability to undue influence, though that was not an issue in this case.

Misapplying the Issue of Delusions

Case example. In her later life, a wealthy woman developed strong views about the unsuitability of her only son’s wife. These views included the idea that her daughter-in-law was inadequately feeding, and even poisoning, her son. These views appeared to extend well beyond a mother’s general doubts about the adequacy of her son’s wife, to the point of delusions (insane delusions). Based apparently on these feelings, she left her son a modest amount in her will and gave the rest to a local university. The son challenged the will. The son’s expert testified that the testatrix was delusional and thus lacked testamentary capacity.

The son was left some money (though apparently less than he thought he deserved), a fact that demonstrates the testatrix’s awareness of him as an heir. Her delusion about the daughter-in-law did not impinge on her knowing that he was her son, nor on her understanding of a bequest. Though manifesting “insane delusions,” the testatrix was unimpaired in the relevant criteria.

Testators anticipating will challenges often leave a dollar each to disliked heirs rather than nothing, since “nothing” may be claimed as proof that the testator did not know the natural heirs of his or her bounty.

Case example. This last point is illustrated by another aspect of the woman with schizophrenia in the earlier example. The testatrix had one sister. However, on one hospital admission form, she had denied having any family. The sister, left out of the estate (which had been given to a helpful politician), challenged the will by pointing out this medical form entry as an example of a testatrix’s not knowing an heir. However, correspondence between the sisters was found that indicated that the testatrix knew the sister and confided in her.

The ability to punish and seek revenge on heirs for various reasons, justly and unjustly, is considered one of the great opportunities provided by a testament. In part for this reason, wide latitude should be given to the testator’s competent choices or even competent whims.

Conclusions

Testamentary capacity and undue influence are legitimate forensic questions for data gathering and

opinion formation. Attention to the relevant data and maintaining clarity about the relevant criteria and their application, through avoiding the pitfalls described herein, are central to the appropriate performance of those assessments.

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