Current IPA Task Forces

- BPSD task force
- Early onset dementia (EOD)
- Government affairs task force
- Late-life anxiety
- Mental health economics task force
- Mental health services in residential facilities task force
- Mood disorders task force
- Service delivery task force
- **Testamentary capacity and undue influence task force**
- Vascular cognitive impairment (burden) task force

International Psychogeriatric Association (IPA)

- Specific, task-oriented groups of the IPA
- Focus on the implementation of specific tasks and projects and can be of limited duration dependent upon the need for its
- The Chair and members of each task force must be IPA members in good standing

IPA Task Force
**Testamentary capacity and undue influence**
Co-chairs: Sanford Finkel (US)
Ken Shulman (Canada)

- The Testamentary Capacity Task Force was convened to explore these international differences, and to educate mental health professionals on the issues that relate to determination of testamentary capacity
- Laws governing wills differ internationally and the role of mental health professionals in guiding courts also differs internationally
IPA TF: TC and undue influence meetings

- 2007 – IPA Congress, Osaka
- 2008 – IPA meeting, Dublin
- 2009 - AAGP meeting, Honolulu
- 2009 – IPA Congress, Montreal

IPA TF participants

By discipline
- Psychiatrists: 20
- Geriatricians: 1
- Neuropsychologists: 1*
- Lawyers: 1*

By Country
- USA: 6
- Canada: 3
- UK: 2
- Australia: 2
- New Zealand: 1
- Brazil: 1
- Romania: 1
- Portugal: 1
- Switzerland: 1
- Israel: 1
- China: 1
- Japan: 2

IPA TF subcommittees

- Trans-national and cross-cultural perspectives (Horacio Firmino)
- Clinical risk factors for undue influence (Carmelle Peisah)
- Guidelines and methodology for contemporaneous review (Kenneth Shulman)

Guidelines and methodology for retrospective review (Barry Reisberg)
- Ethics
- Delirium

Barry REISBERG → RETROGENESIS

Daniel MARSON → TESTAMENTARY CAPACITY ASSESSMENT INSTRUMENT
Contemporaneous assessment of testamentary capacity

Introduction

- The paper focuses on the contemporaneous assessment of TC by an “expert clinician”
- “Contemporaneous” of “lifetime” assessment refers to the assessment of a testator/testatrix while alive and in close temporal proximity to the execution / signing of the will
Introduction (III)
An expert opinion may be sought because of:
1. Suspicious circumstances - a significant change from previously expressed wishes or an inconsistency in the distribution of assets by a testator executing multiple wills
2. Preliminary evidence of a concurrent mental, neurologic or serious medical disorder
3. Anticipation of a possible challenge to the will by an aggrieved potential beneficiary/ies
4. Very advanced age

Introduction (cont’d)
Champine (2006) highlighted the powerful influence of a “lifetime” or contemporaneous assessment which almost always carries the day in will disputes

Rules of engagement (1)
Expert clinicians are encouraged to establish clear ground rules for the assessment:
1. Determine whether they have sufficient expertise to provide an assessment including adequate knowledge of relevant medico-legal literature related to TC
2. Clarify who is requesting the assessment, the lawyer or the client
3. Clearly identify retainer and hourly fees defined by the usual and customary fees of the local jurisdiction
4. Clarify who is responsible for the payment of fees (lawyer vs client)
5. Agree on clear expectations regarding possible actions resulting from the preliminary review, e.g. a verbal or written report

Rules of engagement (II)
The following material (where available) should be reviewed by the assessor prior to the clinical assessment of the testator:
- Prior will(s)
- The specific will in question or multiple wills in question
- A list of the testator’s assets from a corroborative source
- Medical records and reports
- Residential care notes
- Community care notes
Rules of engagement (III)

- At the outset of the assessment the expert assessor should establish the testator’s understanding of the:
  - nature of the assessment
  - its potential consequences
- And
  - obtain his/her consent to proceed
  - there is no consensus as to whether this should be signed or verbal only

Rules of engagement (IV)

- In addition to the assessment of the testator directly, it is preferable to interview an objective observer (relative or friend) keeping in mind that there are often conflicts of interest involved in such relationship
- The interview of the observer should take place independent of the clinical assessment of the testator and vice versa

Clinical assessment for testamentary capacity (I)

The clinical assessment should include
- The usual features of a medical and psychiatric history
- Mental status and cognitive examination
- As well as the specific issues relevant to testamentary capacity

Clinical assessment of TC (II)

- Ideally the assessment should establish a provisional diagnosis or diagnoses for the purpose of suggesting the opinion of the expert
- Ultimately, the clinical examination should be linked to the testator’s capacity to meet the specific elements of TC
- Often, a single interview is adequate. However an important advantage of contemporaneous assessment is the ability to conduct more than one interview in order to establish the consistency of the testator’s wishes, rationale and level of cognitive function
- This is relevant in clinical conditions that fluctuate or individuals who have made multiple changes in their wills
Clinical assessment of TC (III)

**History**
- family
- personal
- medical
- psychiatric

1. **History**
   - designed to support a provisional clinical diagnosis and personality profile

2. **History**
   - Identify prior values and beliefs as they relate to estate distribution

3. **History**
   - Should include a review of the testator’s recollection of prior wills

Clinical assessment of TC (IV)

**Mental status and cognitive examination**

Follow the usual features of a mental status examination
- Appearance
- Speech
- Behavior
- Mood
- Thought process
- Thought content (detailed description, evidence of delusions or hallucinations, paranoid ideation)
- Insight into identified mental or cognitive disorder
- Assessment for sensory or language impairment
- More formal testing

Clinical assessment of TC (V)

**Mental status and cognitive examination**

More formal testing may include
- Cognitive screening instruments such as:
  * MMSE
  * CDT
  * frontal/executive
    - verbal fluency
    - abstraction
    - 3-step Luria test
    - go-no-go test
    - FAB
    - as well as other validated screening tests

A detailed neuropsychological assessment is not essential but can be helpful in correlating deficits in cognition to the disposition of the will

Clinical assessment of TC (VI)

**Mental status and cognitive examination**

More formal testing
- The expert assessor should ensure that these tests are culture specific whenever possible
- Age
- education
- premorbid intelligence
- language

potential confounders
- The neuropsychological findings are not in and of themselves definitive
- The findings on cognitive examination should support the expert’s opinion based on the specific criteria
Expert opinion and report (I)

- While the expert assessor is being asked to render an “opinion” it is a clinical as opposed to a legal opinion.
- The expert’s opinion is one component of the body of evidence to be considered by the court.
- The court is the ultimate arbiter of the question: “did the testator have the task-specific capacity to execute a will in the context of a situation-specific environment?”

Expert opinion and report (II)

- The judge must weigh the factors including:
  - Other expert opinions
  - Evidence from other observers
  - Precedent case laws
  - Other judicial principles
  - Etc.

  Not necessarily interviewed by the clinical expert.

Expert opinion and report (III)

- The expert assessor can provide the court with evidence of a mental disorder or cognitive impairment.
- The task-specific nature of TC suggest that the existence of a mental or cognitive disorder should be considered a “suspicious circumstance” and should not, ipso facto, lead the expert assessor to the conclusion of incapacity.
- The diagnosis helps to support the clinical findings of the expert which must be linked to the legal criteria for TC.

Expert opinion and report (IV)

- The expert assessor should qualify his/her opinion as being based on the available facts and should clearly identify the assumptions upon which that opinion is based.
- The implication is that the clinical opinion may change if the facts or assumptions relied upon by the clinician-expert are proven to be incorrect.
- The courts are sensitive to any indication that the expert has assumed an advocacy role on behalf of the client.
- Clinical experts must maintain an objective perspective and understand that any written opinion will be challenged under cross-examination or by the judge.