Testamentary Capacity

A medico-legal perspective

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Increased Requests for Assessments of Testamentary Capacity

- Increase in challenges to testamentary capacity
- Demographics/Economics
- Prevalence of mental disorders in old age
- Complexity of modern families
- Significant influence of contemporaneous assessment in Will challenge
Testamentary Capacity

legal concept ↔ medical assessment
Judicial Opinion

- Expert A Opinion
- Expert B Opinion
- Other Witnesses & Evidence
- Legal Precedents & Principles
Capacity Assessment

- Understanding and appreciation
- Task-specific
- Situation-specific
- State not trait dependent
- Conflict and complexity
- Clear, consistent rationale
Cognitive Test

Ability to:

- **understand** factual knowledge
- **understand** options available
- **appreciate** potential outcomes
- **communicate a rationale for choices**
Red Flags

- Great age – prevalence of dementia
- Dramatic change from prior expressed views
- Death bed transaction
- Inconsistent or ‘Unnatural’ provisions
- Concerns from family
- Presence of mental or cognitive disorder
- Beware social graces
Testamentary Capacity

*Banks v Goodfellow (1870)*

- Will and its effects
- Nature and extent of property
- Appreciate and evaluate potential claims
- No ‘disorder of mind’ or delusions that influence disposition
Cognition, Emotions and Situation-Specific Capacity

High

Level of Cognition or Emotional Stability

Low

Capable

Incapable

Situation Complexity

Uncomplicated

Conflictual or Complex

Increased Complexity

Shulman (2005)
Ultimate Question:

Does the testator have the task-specific capacity to execute a Will in the context of a specific environment?
Doctrine of Undue Influence

- Allows low threshold for testamentary capacity
- ‘Coercion’ vs subversion of will
Vulnerability to Undue Influence

Level of Cognition or Emotional Stability

High

Low

Influence

Mild Suggestion

Coercion

Increasing Severity

Not Undue

Undue
Contemporaneous and Retrospective Assessment

- Prior Wills (legal documents)
- Medical records
  - discharge summaries
  - consultant letters
  - nursing notes
- Informant reports
Assessment of Testamentary Capacity

Retrospective vs. Contemporaneous

Challenges

Inability to:

• Probe rationale
• Directly assess cognition & mental status (including delusions)
• Assess consistency
Assessment of Testamentary Capacity

Retrospective vs. Contemporaneous

Opportunities of 20/20 hindsight

- Corroborative information
  - personal & medical
- Determine longitudinal clinical course
  ie. onset of dementia
- Clarify views on potential beneficiaries
Assessment of Testamentary Capacity

• Contemporaneous assessment is very difficult to challenge but…..
• A comprehensive retrospective assessment may be better than a poor contemporaneous one
Interpretation of Cognitive Tests

• MMSE
• MoCA
• Frontal testing (set shifting)
• Limitations of score
Brain Functions and Capacity

Understanding and Appreciation

- Orientation
- Memory
- Perceptions/reality testing
- Delusions
- Executive/frontal functions
Testamentary Capacity
(Executive Brain Function)

- An ability to manipulate information and connect beliefs and values to a testamentary disposition
- Appreciate conflict and complexity in context of their life situation
- Communication of a clear consistent rationale
Executive Brain Functions

• Impulse control
• Abstract thinking
• Planning
• Judgment
• Appreciation of consequences
Frontal Lobe Tasks

• Initiation tasks
  - verbal fluency: ‘F’, animals
• Abstraction
  - similarities
• Response-inhibition and set shifting
  - Go-no-Go
  - alternating hand movements (Luria)
  - trail making
The ‘Lucid Interval’?
Cognitive Fluctuations (CF) in Dementia

• “Spontaneous alterations in cognition, attention and arousal”
• Qualitative difference from delirium
• Limited data
• Impacts ADL and caregiver burden

Lee et al (2012)
Frequency of ‘CF’ in Various Dementias

- Alzheimer’s Disease (AD) ~ 20%
- Vascular Dementia 35-50 %
- Lewy Body Dementia (DLB) 90%

Lee et al (2012)
“Good Days & Bad Days”

- 12% reports in a Memory Clinic
- Caregiver reports 2° disturbing behaviour
- No objective measures

Rockwood et al (2014)
CF in Dementia

- Attention most affected
- Not executive functions
- Very short (seconds/ minutes)
- Fluctuations are minor in magnitude (2-4%)
Conclusion

• Cognitive fluctuations are small and very short in duration
• “Good Day” ≠ TC
• Lucid interval invalid in dementia
Case Examples
Multiple Wills

• 99 y/o testator widower
• Common law marriage for 60 years- no children
• Latterly made frequent Will changes to various nieces and nephews
• Control, manipulation of relatives to secure care
• Developed dementia with paranoid ideas that began to influence changes
• At what point incapable?
Undue Influence and Frontal Dementia

- 74 year old widow, no children
- Moved in with single sister
- Sister - reclusive, domineering, controlling
- Lived in horrible conditions, hoarding food and garbage
- Radical change in Will excluding husband’s family
- Evidence of frontal dementia with lack of insight, judgment and social awareness
“Radical Change with Early Dementia”

- 84 year old testatrix
- Dramatic change in Will 3 years PTD
- Eliminated daughter and family
- Left entire estate to new found nephew
- Developing dementia
- Anxiety, perceptual distortions, lack of appreciation of consequences (executive function)
Radical Change but Capable

- 89 year old testatrix
- Prior Will left estate equally to two sons
- Poor son became primary caregiver
- Wealthy son less involved
- Will changed to reward poor son
- Other son resented disposition and challenged Will
Summary

- Diagnosis ≠ Capacity
- Test Score ≠ Capacity
- Decision specific
- Situation specific
- Assess criteria
- Probe rationale
- Record!