MENTAL CAPACITY/TESTAMENTARY CAPACITY

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INTRODUCTION

One would like to ensure that his property goes to the genuine recipients who could utilize it in a proper way after his demise. For this purpose, there has been a provision of disposing off one's property after death by making a Will. A Will is an important document which enables the individual/living person to rightfully leave his assets to whoever he chooses to, after his death. It is a legal declaration of a person's intention which he desires to be performed after his death. There often arise complications when a person dies without making a Will.

After the death of a person, his property devolves in two ways:

(i) According to the respective laws of the land when no Will is made – i.e. intestate
(ii) By way of Will – i.e. testamentary

Law of Succession

The laws of inheritance are diverse and complicated. The rules of distribution of property in case a person dies without making a Will are defined by every law of succession. These rules provide for a class of persons and percentage of property that will be inherited by such persons. When a person dies a sudden death without making a Will, there is possibility of unintended injustice to some potential beneficiaries. For example, wife and the mother of the deceased get equal shares as legal heirs despite the fact that wife never shared cordial relations with her deceased husband and he would not have given equal share had he made a Will.

India has a well developed system of succession laws that governs a person's property after his death. Indian Succession Act 1925 applies expressly to Wills and Codicils made by Hindus, Buddhists, Sikhs, Jains, Jews, Parsis and Christians. The Muslim Personal Law is applicable to Muslims. They are not governed by Indian Succession Act, 1925.

Following are the Acts operating in India:

- The Indian Succession Act 1925
- The Hindu Succession Act (amendment) 2005)
- The Muslim Personal Laws
- The Indian Registration Act 1908

Apart from these Acts, various states of India have their own amendments of Hindu Succession Act 1956, according to the local customs.

According to law of inheritance and succession, if a Hindu male passes away

- Hindu female shares equally with the male i.e. a son and daughter will succeed with equal shares.
- The wife as well as the mother also gets the equal share

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- There is nothing to prevent a Hindu male from bequeathing his entire property to a stranger if he so desires.

Muslim male cannot will away more than 1/3 of estate and 2/3 of the property must be divided among the family members in the shares as laid down in the law.
- A Muslim wife cannot be dispossessed.
- Even though she shares with other wives (if more than one wife).
- The widow gets a definite share.
- The male heirs, sons get twice the share of daughters.

A male who makes a Will is called testator and a female testatrix. A testator (or testatrix) is a person who is executing a Will. When Will is created, the property is disposed according to the Will. The declaration should be relating to the testator's property and the testator should intend to dispose off his property after his death. All properties, movable or immovable, of which testator is the owner and which are transferable can be disposed of by a Will. Formerly, a Hindu coparcener governed by the Mitakshara law could not dispose of his undivided share in the coparcenary property he is, now entitled to do so under Section 30 of the Hindu Succession Act 1956. Testator can also bequeath properties, incomes and interest that may be acquired by him after the execution of Will.

According to Section 2(h) of the Indian Succession Act 1925, a Will is defined as follows:
"A Will is a legal declaration of the intention of the testator, with respect to his property which he desires to be carried into effect after his death." Important postulates of the Will are as follows:
- A Will is a legal declaration. It must be signed and attested as required.
- The declaration should relate to disposition of the person making the Will.
- A Will becomes enforceable only after the death of the testator. It has no effect during the life-time of the testator.
- It is revocable and the testator can change the Will at any time during his life-time.

Persons capable and competent to make a Will
- According to Section 59 of Indian Succession Act 1925,
  - Any person of sound mind can make a Will
  - A person who has reached the age of majority can make a Will. However, as per Section 60 of the Act, a father whatever his age may be, may by Will may appoint a guardian or guardians for his child during minority.
  - A married woman may make a Will of her property which she could alienate by her own act during her life-time.
- The following persons cannot make a Will:
  - Lunatic, insane persons
  - Minor i.e. below 18 years of age.
  - Corporate bodies by their very nature are incapable of making a Will, though they may benefit under the Will of an individual partner.

Other persons who can make a Will:
- Persons who are deaf or dumb or blind are not thereby, incapable in making a Will, if they are of sound mind
- Persons, who are ordinarily insane, may make a Will during an interval while they are of sound mind.
- No person can make a Will while he is in such a state of mind, whether arising from intoxication or from illness or from any other cause, so that he does not know what he is doing.

Codicil

A codicil is a supplement to a Will when a testator intends to make any minor alterations in his Will e.g.

change in the number of trustees. According to the Section 2(b) of the Indian Succession Act 1925, codicil means an instrument made in relation to a Will and explaining, altering or adding to its disposition and shall be deemed to form the part of the Will. Accordingly, a codicil has to be executed and attested just as a Will (Section 64, Indian Succession Act 1925).

A codicil may be endorsed on the original Will itself, or it may be a separate document. Its nature is not substantive but adjective. A codicil may stand even though the Will to which it is supplementary is revoked. However, a codicil can not be an independent document. When alterations are considerable, a fresh Will revoking the earlier Will should be executed.

Essentials of Will making

Essentials of Will making

- It is a legal document
- Person to be competent to make a will.
- Signature of the testator on the Will
- Attestation by two or more witnesses.
- No particular form of Will prescribed by law
- Registration not compulsory
- Safe custody of Will.
- Secrecy of the Will
- It is effective only after the death of the testator.
- Execution of the Will.

(i) Legal document

Will is a legal document in conformity with the provisions of Indian

- Succession Act 1925.
- It is in writing. Will made by a Hindu, Buddhist, Jain, Sikh, Parsi, Jew or a Christian must be in writing. However, a privileged Will by a member of armed forces in an expedition, or engaged in actual warfare and mariner at sea can be oral Will. Muslims are permitted to make a oral Will by Muslim personal law
- By a person competent to do it.

(ii) Competency of the person to make the will

- Every person of sound mind and not a minor can execute a will. Any movable or immovable property can be disposed off by a will by its owner. Under Mitakshara law, a Hindu coparcener could not dispose off his undivided property by will, even if other coparceners consented for it, he is, now entitled to do so under Section 30 of the Hindu Succession Act 1956. Under Muslim law every adult Muslim of sound mind can make a will. Legatee can be any person capable of holding property, and bequest can be made to non-muslim institutions and charitable purposes, unborn persons etc.
- Persons who are deaf, dumb or blind are not incapable of making a will, if they know what they do by it.
- A person who is ordinarily insane may make a will if his psychopathology does not influence his decision making or at times when he has sound mind.
- No person can make a will, while he is in such a state of mind, whether arising from intoxication or from illness or from any other cause that he does not know what he is doing.
- The declaration takes effect only after death of the testator and it is revocable any time before the death of the testator.

(iii) Signature of the testator on the Will

- The testator shall sign or shall affix his mark to the Will, or some other person shall sign it in his presence and by his direction.
- The signature or the mark of the testator or the signature of the person signing shall appear clearly and should be legible. It should appear in the manner that is appropriate and makes the Will legal. It should be dated.
- The Will must be initialed by the testator at the end of every page and next to any correction and alteration.

(iv) Attestation

- The Will shall be attested by two or more witnesses, each of whom has seen the testator sign or affix his mark to the Will or has seen other person sign the will, in the presence and by the direction of the testator, or has received from the testator.
- Each of the witnesses shall sign the Will in the presence of the testator.
- The attesting witness or his/her spouse must not be beneficiary otherwise Will in their favour will be invalid (Section 67 of Indian Succession Act 1925).

(v) Form of Will

- There is no particular form of Will prescribed by law.
- Forms in vogue in England have been followed in India for the last several decades and they may be adopted.
- The language of the Will should be easily understandable and the wording should be such that the intention of the testator can be known therefrom (Section 74)
- A Will can be made on any plain paper of durable quality, no stamp paper is needed.

(vi) Registration

- Under Section 18 of the registration Act, the registration of a Will is not compulsory.
- A Will must be proved duly and validly executed, As required by the Indian Succession Act.
- A Will is registered with registrar/sub-registrar with a nominal registration fee.
- The testator must be personally present at the registrar's office along with witnesses.
- The endorsement of the registrar is sufficient to prove the execution of the Will
- Will need not be made on stamp paper and there is no formal prescribed form of a Will.
- A Will can be registered by the testator during his life-time or by the executor or legatee after the testator's death.

(vii) Safe custody of Will

- The Will may be deposited in some safe custody, such as with a banker, or a solicitor
- After registration it can be kept with the registrar's office in a sealed cover bearing the name of the testator and that of his agent

(viii) Secrecy of Will

- Once the Will is made, it should be kept secret and not to disclose to the beneficiaries
- Testator, after making the Will should inform about it to some persons in whom he has confidence and trust. In case, husband making a Will may inform his wife.

(ix) Takes effect after the death of the testator

(x) Execution of the Will

- On the death of the testator, an executor of the Will or an heir of the deceased testator can apply for probate.
- The court will ask the other heirs of the deceased if they have any objection to the Will.
- It there are no objections, the court will grant probate.
- A probate is a copy of a Will, certified by the court. A probate is to be treated as conclusive evidence of the genuineness of the Will.

- In case any objections are raised by any of the heirs, a citation has to be served, calling upon them to consent.
- This has to be displayed prominently in the court.
- Thereafter, if no objection is received, the probate will be granted.
- It is only after this that the Will comes into effect.

Capacity of an individual to make a Will is testamentary capacity. Testamentary capacity is a construct rooted in both the legal and medical domains thus inviting a collaborative approach to its definition and assessment (Shulmanet al 2007).

TESTAMENTARY CAPACITY: DEFINITION

Testamentary capacity refers to person's full sense and mental sanity to have confirmed and signed the Will after understanding what his assets comprised and what he is doing by making a Will. He understands in full mental capacity who he is naming the assets to and how are they related to him and what repercussions it may have later. Testamentary capacity is the legal status of being capable of executing a Will.

Testamentary capacity is defined in common law and U.S., Canada and English jurisdictions, addresses its task-specific nature as opposed to the global status of the mental illness. It means that a person suffering from mental disorder can make a Will provided he is capable of required competency for making a Will. In *Banks v. Goodfellow*, a commonly cited English case, John Banks, the testator clearly suffered from a chronic and serious mental disorder but was deemed capable with respect to the execution of his Will because his delusions did not affect the distribution of his assets. This judgment remains the test in most common law jurisdictions today.

The *Banks v. Goodfellow* Criteria

- Understanding of the nature of the act (Will making) and its effects
- Knowledge of the nature and extent of one's assets.
- Knowledge of persons who have a reasonable claim to be beneficiaries.
- Understanding of the impact of the distribution of the assets of the estate.
- A confirmation that the testator is free of any delusions that influence the disposition of the assets.
- Ability to express wishes clearly and consistently in an orderly plan of disposition.

In US jurisdictions, the definition of testamentary capacity is similar except that the doctrine of insane delusion is distinct from general testamentary capacity. Thus it is possible for a testator to possess general testamentary capacity and yet suffer from an insane delusion that invalidates the Will.

According to Indian Succession Act 1925, a person is said to have testamentary capacity only if he is in a sound disposing state of mind. It is essential that the testator should have sufficient capacity to comprehend perfectly the conditions of his property, his relations to the persons who were or should or might have been object of his bequest and the scope or the bearing of the provisions of his Will.

IMPORTANT ELEMENTS IN TESTAMENTARY CAPACITY

Important elements in testamentary capacity

- It is a voluntary act on the part of the testator
- Testator should have a sound disposing mind.
- Testator should know what he is doing by making a Will.

- Testator should have sufficient capacity to know the extent of his/her property.
- Testator should be aware of potential beneficiaries.
- Testator should be aware of the consequences of his/her decision.
- Testator should be free from undue influence/fraud/coercion.
- Testator must know the contents of the Will.

(i) It is a voluntary act on the part of the testator

- There is no compulsion or force on the testator to make the Will
- It is his own decision to dispose off his property

(ii) The testator should have a sound disposing mind

- The testator should not be suffering from any mental disorder which could possibly interfere in his decision making
- He should not be in a state of intoxication due to alcohol, drugs or disease
- Testamentary capacity is task-specific, a person suffering from mental illness can make a will provided his psychopathology is not interfering in his decision making
- Testamentary capacity is also situation-specific. Clinician should explore the circumstances under which the testator is making the Will.

(iii) The testator should know what he is doing by making a Will

- The testator should be in full senses to appreciate the nature of the act an.

(iv) The testator should have sufficient capacity to know the extent of his property

- The testator should know the nature and extent of his assets which he is going to distribute
- He should also know the approximate value of his property

(v) The testator should be aware of the potential beneficiary

- The testator should have the knowledge about the legal heirs of his property
- He should also know the potential beneficiaries whom he is likely to distribute his property and the relationship with them
- He should be able to rationalize his decision.

(vi) The testator should be aware of the consequences of his decision

- Testator should be aware of the possible consequences of the distribution of his assets.

(vii) The testator should be free from undue influence//fraud/coercion

- Under Section 61 of Indian Succession Act 1925, a Will or any part of a Will, the making of which has been caused by fraud or coercion or by such importunity as takes away the free agency of the testator is void.
- However sound mind the testator may be having, if it has been the subject of undue influence, the soundness of mind will not help the will to be declared valid.

(viii) The testator must have the knowledge of the contents of the Will

- It is the inevitable effect of the sound mind to know the contents of his Will.
- If the testator does not know the contents of his Will it can not be said to be a valid Will.
- However such knowledge and approval of the testator may be presumed on the proof of signature of the testator.

FACTORS AFFECTING TESTAMENTARY CAPACITY

There are several factors that can impact someone's capacity to create a Will that accurately reflects his or her true wishes. These factors include:

(i) Physical factors
(ii) Psychiatric disorders
(iii) Undue influence

The conditions discussed below may affect cognition, perception, which in turn may have effect on

individual's ability to understand relevant facts related to testamentary capacity. These conditions affect the person's appreciation of consequences of specific actions or his interpretation of situation-specific factors.

Physical factors

Factors which lead to brain dysfunction either due to certain diseases, trauma or medication may have impact on the client's ability to think clearly. Physical factors include a wide range of medical disorders, including head trauma, systemic diseases i.e. metabolic, endocrinal, infectious and other disorders that affect brain functioning and mental state. Certain drugs may have effect on cognition and perception and hence may interfere in decision making.

Alcohol

Alcohol abuse can have both acute and chronic effects on cognition, judgment and behaviour. In the acute phase of alcohol consumption even the small amounts of alcohol may affect perception, judgment and impulsiveness. These mental changes could affect testator's decision regarding the execution of a Will. The effects of chronic alcohol abuse are similar.

Psychiatric disorders

Dementia

Dementias such as Alzheimer's disease, Lewy body dementia, and vascular cognitive impairment are characterized by diffuse cognitive deficits. In cases of obvious and severe cognitive impairment, there will be little need for subtle interpretations of brain function, and the lawyers or the courts can assess the impact of the impairment without the help of experts. However, in many disputed cases, the level of cognitive impairment is relatively mild or subtle. Some individuals with dementia maintain their social graces and appear perfectly normal to a lay person. Therefore, probing and documentation of the rationale disposition, particularly in suspicious circumstances, are especially important to demonstrate that the individual is capable. In dementia, executive impairment is particularly important, as it can affect insight, perception and judgment and impulse control. Mild forms of memory impairment can be associated with suspiciousness or even paranoid delusions as testators attempt to compensate for their memory deficits. In retrospective assessments, evidence for progression of dementia after the last Will was executed can help to support hypotheses about impaired thinking, perception, or judgment at the time of the execution of the Will. While there is some evidence that courts have developed principles relevant to dementias, a deeper and wider knowledge base among jurists surely will enhance law's ability to adjudicate Will contents (Gorman 1996)

Mood disorders

Mood disorders, including depression and bipolar disorder, may produce cognitive distortions (delusions), compromise judgment, and cause irritability or impulsiveness. These acute and sub-acute changes may affect testamentary capacity and vulnerability to undue influence. Usually these changes in mental state can be identified during a specific episode, but in some cases they can become chronic.

Delusions

Paranoid delusions may be secondary to a number of clinical syndromes, including schizophrenia, delusional disorders, and other forms of neurological disease, such as dementia, delirium, acquired brain injury, and other brain lesions. According to the Banks v. Goodfellow criteria, the testator must be free of any delusions that directly affect the distribution of the estate. Changes made in the Will on the basis of false belief make the Will invalid. Even if such beliefs do not reach delusional intensity, they can make the testator vulnerable to undue influence. Careful questioning and probing by the

assessor will help to elicit the impact of these beliefs on the distribution of assets.

Undue Influence

Historically, the notion of undue influence emphasized the concept of coercion, whereas subversion of Will seems a more appropriate term for testamentary capacity. Subversion allows for a continuum of influence depending on the extent of the cognitive impairment. The lower the cognitive capacity of an individual, the lesser influence would be required to determine that the individual was incapable or unduly influenced. On the other hand, an individual with no cognitive impairment would have to be subjected to a severe level of influence to the point of coercion or containment before that influence would be considered undue. Undue influence has been defined by one of the courts as: " …the opportunity of the beneficiary of the influenced bequest to mould the mind of the testator to suit his or her purpose." Hyatt v. Wrote, 1937) Undue influence is a strictly legal concept; the onus of proof is on those claiming undue influence Frolik (2001) and Spar and Garb (1992) have delineated the indications which are as follows

Indications of Undue Influence (*Frolik 2001 and Spar and Garb 1992*)

- A confidential relationship existed between testator and the influencer that created an opportunity for the latter to control the testamentary act.
- The influencer used the relationship to secure a change in the distribution of the testator's estate.
- There were unnatural provisions in the will
- The change in distribution did not reflect the true wishes of the testator.
- The testator was vulnerable to being influenced either because of a neurological or psychiatric disorder or because of specific emotional circumstances.
- The beneficiary actively participated in or initiated the procurement of the Will
- There was undue benefit to the beneficiary.

The doctrine of undue influence allows the courts to maintain a relatively low threshold for testamentary capacity and hence to preserve the principle of autonomy and individual freedom with respect to the distribution of one's assets (Frolik 2001). In such a situation, a testator with moderate cognitive impairment could still be considered to have testamentary capacity. However, if the circumstances are more complex or there is a suggestion of undue influence, the legal threshold becomes higher and calls for more careful probing of rationale at the time of the execution of the Will. Regan and Gordon (1997) suggest behavioural clues to undue influence,

Behavioural clues to undue influence

- The individual who asks for the examination states the evaluation is merely "routine" owing to the testator's age
- Someone other than the testator (or his lawyer) makes the appointment for the evaluation
- The person transporting the testator to the appointment is reluctant to permit him to be interviewed privately
- Details about the Will are absent, or the testator appears vague about specific items in the Will.
- The testator is hesitant about providing information about the potential heir and his relationship to that person.

Section 61 of the Indian Succession Act 1925 says that, a will is avoided when it is affected by

coercion or fraud because the person otherwise capable does not have a free mind. At times it is difficult to differentiate between the undue influence on the part of the potential beneficiary and expression of gratitude and desire on the part of testator. If an eldely testator becomes infatuated with a young woman who is suggestive or providing sexual favours to entice his interest, and he then revises his Will in her favour – it is not likely to be undue influence. If a nurse serving an ailing testator asks for some incentive to serve him better – is undue influence. However, the influence of wife over her husband may not be undue influence. When a wife persuades the testator husband to execute a Will in supersession of a former Will less favourable to her, but the influence she exercised was not such as to deprive the testator of the exercise of his judgment and voliotion, the conduct of wife would not amount to undue influence (Nabhi 1999)

SYMPTOMS OF TESTAMENTARY INCAPACITY

Symptoms of testamentary incapacity
• Difficulties in attention and information processing
• Language difficulties
• Memory difficulties
• Impairment of higher executive funcytions
• Persecutory delusions
• Delusions of poverty

There have been certain symptoms which make an individual incapable of making a Will. Hayley Bannet suggests that the following symptoms are the potential signs of incapacity

- Difficulties in attention and information processing
- Language difficulties
- Memory difficulties
- Impairment of higher executive functions
- Persecutory delusions about a family member causing the testator to exclude the person from the Will.
- Delusions of poverty – the testator does not realize the worth of his own or of his estate which may influence his decision making and distribution of property.

A person displaying these symptoms at the time of giving instructions to prepare the Will or signing of the Will may be suffering from some form of mental incapacity.

LAW AND TESTAMENTARY CAPACITY

Testamentary capacity like other capacities is both task-specific and situation-specific. The law does not require that a person, in order to be capable of making a will, must be possessed of his mental powers at their best and unimpaired in any degree by old age or disease. What is required for the validity of Will is that the testator should have been able, at the time of making it, to comprehend the nature and the effect of disposition, should have sufficient memory and intelligence to form a proper judgment regarding it, and should have freely decided to make it. Whether or not a testator had the required capacity has naturally to be ascertained with reference to the disposition in question. Testamentary capacity has to be judged not by an absolute standard but as relative to a particular testamentary act (Krishna Kumar Sinha v. Kayasha Pathak, 1966).

A person of unsound mind can make a Will during lucid interval. A mentally disordered person can also make a Will through his guardian. Delusions may not affect validity of Will. Superstitious terrors may be sufficient to set aside a Will where they deprive a person of exercise of his free judgment. A

Will made by a person of full capacity is not revoked by the fact that he has subsequently become incapable of making a Will.

The law of making a Will is contained in the para VI of Indian Succession Act, 1925. All the provisions of part VI do not apply to Hindus, Buddhists, Sikhs and Jains. The Will made by a Muslim is governed by Muslim Personal Law.

ASSESSMENT OF TESTAMENTARY CAPACITY

At the time of drafting the Will, lawyers make an initial assessment of testamentary capacity but may call upon experts to assist in specific circumstances. Experts may include neuro-psychiatrists, geriatric psychiatrists, neuro-psychologists and others. Expert's role involves confirmation of testamentary capacity when cognitive and mental state is concerned. Expert may also be asked to assess the potential role of undue influence. He may also be asked to give retrospective opinion regarding capacity or undue influence after the death of the testator when the Will is challenged. A careful review of the available medical records and interview with the testator when alive are important inputs to form an opinion.

The assessment of environment (situation-specific factors) is important in the ultimate determination of capacity and impact of the influence. When there is suspicion of undue influence, the assessor must inquire into specific areas and higher levels of cognition by probing testator's rationale for decision as well as testator's appreciation of his circumstances and the impact of the distribution of his assets.

Doctors are often asked for an opinion whether a person has or did not have the mental capacity to make a will. This question is important and relevant in the context of Will making, as only persons of sound mind, memory and understanding are able to make a valid Will. The testamentary capacity of a testator is not always apparent to a non-medically trained legal professional, and hence the need for an expert opinion on the testamentary capacity of a testator.

Evaluation of testamentary capacity

When a solicitor requests a doctor to make assessment of testamentary capacity of his client, the doctor must insist for a letter of instruction from the solicitor confirming that the client has consented to examination and disclosure of results. The solicitor should also provide the doctor at the outset with verifiable information about client's family and assets and confirm in writing the legal test for capacity. The doctor should not assess the client in hurry; enough time should be given for assessment. Consent of the testator is essential before proceeding for evaluation of testamentary capacity. Assessment of a testator's testamentary capacity in a single interview is not sufficient. An assessment will be more accurate if it occurs over a period of time rather than one interview.

Process for assessing testamentary capacity (*Jacoby and Steer 2007*)

- Get a letter from the solicitor detailing legal tests
- Set aside enough time for evaluation.
- Assess (in the standard way) whether the client has dementia
  - Thorough physical and neurological examination
  - Psychiatric examination, presence of delusions, hallucination, thought disorder, mood state, cognitive functions and their effect on decision making
- Record the answers verbatim
- Check facts such as extent of assets, with the solicitor
- Ask about and review previous Wills

- Ask why potential beneficiaries are included or excluded.
- Check that client understands each of the Banks v. Goodfellow points
- If in doubt about mental capacity seek second opinion

The testator should be examined over at least two separate consultations. There are two distinct times in Will-making process where a lawyer might insist on a doctor's assessment. Usually, these times are:

- prior to the lawyer taking the instructions from the testator, and
- prior to the execution of the completed Will.

The second consultation should be ideally on the day testator executes the Will. These two times are crucial, however in circumstances in which testator has declined mentally since giving instructions, it may be sufficient that he had capacity at the time he gave instructions. One should keep four criteria in mind used for determining whether a person has testamentary capacity:

(i) The testator understands that he is giving instructions for the disposal of his property after his death.

(ii) The testator can recollect the extent and character of his property and dispose it off with understanding and reason;

(iii) The testator can recall and understand the claim of potential heirs such as his family; and

(iv) The testator is not suffering from any disorder of mind such as delusions and hallucinations which influence his decisions.

One may proceed with a semi-structured questionnaire asking a series of questions including:

(i) Asking the testator to explain the effects of a Will, and asking whether he understands what would happen to his property if he does not make one.

(ii) Asking the testator to give a general estimate of his property and its value.

(iii) Asking the testator to describe the reasoning behind his decision to include or exclude potential heirs.

(iv) Asking the testator whether he understands that the Will revokes all previous Wills.

Specific questions posed to the testator may help in elucidating and probing the relationship between task-specific and situation-specific factors:

(i) Can you tell me the reasons that you decided to make changes in your will?

(ii) Why did you decide to divide estate in this particular fashion?

(iii) Do you understand how individual A might feel, having been excluded from the will or having been given significantly less amount than previously expected or promised.

(iv) Do you understand economic implications for individual B for this particular distribution in your will?

(v) Can you describe the nature of any family or personal disputes or tensions that may have influenced your decision?

(vi) Can you tell me about the important relationships in your family and others close to you?

If the client has the possibility of suffering from dementia, Mini Mental State Examination (MMSE) should be administered. The examination of the client should be conducted in the absence of anyone who stands to benefit or might exert influence.

Common Cognitive Screening Tests

Clinicians tend to use a small number of cognitive screening tests that may be referred to in medical records or expert reports. These tests assess high level brain functions that control initiative, motivation, planning, impulse control, capacity for abstract thinking and exercise of the judgment. The identification of subtle impairment of these functions in the context of a complex environment could easily produce a vulnerability to undue influence and affect testamentary capacity (Royall et al 2002).

Assessors of testamentary capacity and undue influence and the courts must be able to interpret the significance of these commonly used tests. Clinicians and legal experts must understand that cognitive tests are not diagnostic of dementia and can be used as a measure of capacity. Their value lies in ability to screen for cognitive impairment and reflect changes in cognition over time. The Mini-mental State Examination (MMSE) and Clock-draw Test are the two most commonly used cognitive screening tests (Shulman et al 2007).

The Mini-mental State Examination (MMSE)
The MMSE is by far the most commonly used cognitive screening examination in the world. It includes several cognitive domains of functions (Folstein et al 1975), with a total possible score of 30: orientation to time (5 points), orientation to place (5 points), registration of 3 word (3 points), attention and calculation (5 points), recall of 3 words (3 points), language (8 points) and visuo-spatial ability (1 point).

Limitations of MMSE include the fact that it does not test specifically for frontal lobe or executive brain functions. The MMSE is heavily weighted towards orientation, short-term memory, and language skills. Nonetheless, the MMSE score has come to be used as a short-hand for severity of cognitive dysfunction, and thus it is important that the lawyers and clinicians understand the use and limitations of the instrument and its scoring. The score alone is not necessarily a reflection of dementia or clinically significant cognitive impairment (Landmark Trust v. Goodhue 2001). The scores below 26 suggest impairment. However, the MMSE score may be significantly influenced by factors such as native language, education and pre-morbid IQ.

The Clock-drawing Test
The Clock-drawing Test which has been widely used as a cognitive screening instrument (Shulman 2000), consists of a standardized circle with the instruction, “This is a clock face; please put in the numbers so that it looks like a clock.” The patient is then instructed to “set the time to 10 past 11.” This test is useful as a cognitive screening because it subsumes many different brain functions covering a wide range of intellectual and perceptual skills: comprehension; planning; visual memory and construction of a graphic; visuo-spatial ability; motor planning and execution; numerical knowledge; abstract thinking; inhibition of tendency to be pulled by perceptual features of the stimulus (i.e. the “frontal pull” of the hands to “10” in the instruction “10 past 11”); concentration and frustration tolerance.

The mix of visuo-spatial ability as well as executive control function makes the clock-drawing test particularly useful as a cognitive screening instrument. Although various methods of scoring and interpretation have been proposed, the test’s qualitative merits and simple global assessment are considered more important than complex scoring systems (Shulman 2000).

RETROSPECTVE ASSESSMENT

Retrospective Assessment

- Obtaining the relevant document
- All medical records
- Results of any neuropsychological examination
- Neuro-imaging results
- References to the testator’s mental state or behaviour
- Relevant financial documents
- Other personal documents such as cheque books, diaries, business records or contracts

- Obtaining corroborative information about deceased's behaviour from:
  - The surviving spouse
  - Relatives
  - Friends and business associates
- Informed assessment

Often medical professionals are asked to give a retrospective assessment of whether a testator did or did not have testamentary capacity at the time of making his Will after that person has died. Where some medical conditions existed, questions may be raised after testator's death about his competence at a particular time.

When asked to make a retrospective assessment, a physician should carefully attempt to obtain following documents:

- All medical records (which may contain formal diagnoses)
- Results of any neuropsychological examinations
- Neuroimaging results
- References as to the testator's mental state or behaviour
- Relevant financial documents
- Other personal documents such as
  - cheque books
  - diaries
  - business records
  - contacts

The Will itself and any contemporaneous notes made by the legal practitioner preparing the Will may offer additional insight into the mental state of the testator. In addition to this, the physician should attempt to gather corroborative information about the deceased's behaviour and functioning from

- the surviving spouse
- relatives
- friends and business associates

After the receipt of the above information, a physician can make an informed assessment as to whether the testator had or was likely to have had testamentary capacity at the time of making the Will.

Documentation for Assessment of Testamentary Capacity and Undue Influence (Shulman et al 2007)

The following issues should be addressed and documented in a forensic assessment

(i) Rationale for any dramatic changes or significant deviations from the pattern identified in prior wills or previous consistently expressed wishes regarding disposition of assets.

(ii) The appreciation of the consequences and impact of particular distribution especially if it deviates from or excludes "natural" beneficiaries such as close family members and spouses.

(iii) Clarification of concerns about potential beneficiaries who are excluded from the Will or bequeathed lower amounts than might have been expected – that is, ruling out the presence of a specific delusion or overvalued ideas that influence the distribution.

(iv) Evidence of the presence of a specific neurological or mental disorder that may affect cognition, judgment or impulse control.

(v) Evidence of behavioural disturbances or psychiatric symptoms at the time of execution of a will, such as agitation, impulsiveness, dis-inhibition, aggression, hallucinations or delusions.

(vi) The emotional/psychological milieu in which the testator lives, with specific reference to conflict or tension within the family.

(vii) The testator's understanding and appreciation of any conflicts or tensions in his environment.

(viii) Evidence of pathological or dependent relationship with a formal or informal caregiver, such as a younger woman who gives comfort and reassurance or plants seeds of suspiciousness towards family and friends.

(ix) Evidence of inconsistency in expressed wishes or an inability to communicate a clear, consistent wish with respect to distribution of assets; for example, frequent will changes are sometimes made in a desperate attempt to garner care, support or comfort at a time when testator feels increasingly vulnerable or threatened.

(x) Any of the indications of undue influence.

Documentation for assessment of testamentary capacity and undue influence

- Rationale for making changes
- Appreciation of consequences and impact
- Clarification of concerns about potential beneficiaries
- Evidence of presence of specific neurological or mental disorders
- Evidence of psychiatric symptoms' at the time of execution of Will.
- Emotional/psychological milieu
- Testator's understanding and appreciation of any conflicts
- Evidence of pathological or dependent relationship with a formal or informal caregiver.
- Evidence of inconsistencies in expression.
- Any indication of undue influence.

Where there is a Will, there is law suit. It is expected that in the times to come challenges to testamentary capacity in the courts of law are going to increase. The increasing complexity of modern families, where asset disposition is sensitive, complicated, may lead to feeling of rejection and injustice and result in more challenges. Number of elderly people is increasing and prevalence of cognitive impairment and dementia in older adults creates a fertile environment for challenge to Wills. It therefore behooves psychiatrists and other experts to be aware of the legal, medical and psychological issues that underlie the assessment of testamentary capacity and the role of undue influence.

REFERENCES

1. Banks v. Goodfellow (1870) 5 LR QB 549.
2. Folstein MF, Folstein SE and McHugh PR (1975) "Mini-Mental State a practical method for grading the cognitive state of patients for clinician; *Journal of Psychiatric Research*; 12:189-198.
3. Frolik LA (2001) The strange interplay of testamentary capacity and the doctrine of undue influence: are we protecting older testators or or overriding individual preferences? International *Journal of Law and Psychiatry;* 24: 253-266.
4. Gorman WF (1996) Testamentary capacity in Alzheimer's disease. *Elder Law Journal;* 4:225-246.
5. Hyatt v. Wrote 43SW 2d 726 (Ark.1931) as quoted in the article by Gutheil TG (2007) Common pitfalls in the evaluation of Testamentary Capacity. *Journal of American Academy of Psychiatry and Law.* 35: 514-517.
6. Indian Succession Act 1925. Bare Act, Nabhi Publications New Delhi
7. Jacoby Robert and Steer Peter (2007) How to assess capacity to make a Will. *Practice British Medical Journal*, 335:155.
8. Krishna Kumar Sinha v. Kayasha Pathak (Pryag) Allahbad AIR 1966 All. 570.
9. Landmark Trust v. Goodhue, 782A 2d 1219, 1226-27 (vt 2001)
10. Nabhi (1999) How to make a Will. A Nabhi Publication; New Delhi
11. Regan MW and Gordon SM (1997) Assessing testamentary capacity in elderly people. *Southern Medical Journal,* 90, 13-15.
12. Royall DR, Lauterbach EC, Cummings JL, Reeve A, Rummans TA, Kaufer DI, LAfrance WC Jr and Coffey CE (2002) Executive Control Function: areview of its promise and challenges for clinical research. Journal of Neuropsychiatry and Clinical Neurosciences; 14: 377-405.
13. Shulman KI (2000) Clock-drawing: is it ideal cognitive screening test? *International Journal of German Psychiatry*; 15:548-556.
14. Shulman KI; Cohen CA; Kirsh FC; Hull IM and Champinr PR (2007) Assessment of Testamentary Capacity and Vulnerability to Undue Influence. *American Journal of Psychiatry*
15. Shulman KI, Hermann N, Brodaty H, Chiu H, Lawlor B, Ritchie K and Scanlan JM (2006) Survey of brief cognitive screening instruments. *International Psychogeriatrics*; 18:281-294.
16. Spar JE, Garb AS (1992) assessing competency to make a will. *American Journal of Psychiatry;* 149: 169-174.