Capacity and Older Adults

Kenneth I. Shulman
Increased Requests for Contemporaneous 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
Suspicious Circumstances

- Dramatic change from prior expressed views
- Death bed Will
- ‘Unnatural’ provisions
- Presence of mental or cognitive disorder
- Anticipated challenge
- Beware social graces
Testamentary Capacity

legal concept

medical assessment
Capacity Assessment

- Understanding and appreciation
- Task-specific
- Situation-specific
- Conflict and complexity
- Clear, consistent rationale
Banks v. Goodfellow
Criteria for Testamentary Capacity

- The nature and effect of a Will
- Extent of assets
- Appreciate claims of potential beneficiaries
- Free of delusions which influence the Will
Other Issues to Assess (probing)

- Knowledge of prior Wills/wishes
- Rationale for changes including potential beneficiary who has been excluded
- Understanding of the emotional milieu
- Evidence of psychiatric or neurologic disorder
- Beware preservation of social graces
Cognition, Emotions and Situation-Specific Capacity

Level of Cognition or Emotional Stability

High

Capable

Low

Incapable

Situation Complexity

Uncomplicated

Conflictual or Complex

Increased Complexity →

Shulman (2005)
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

Not Undue

Undue

Mild Suggestion

Coercion

Increasing Severity →
Ultimate Question:

Does the testator have the task-specific capacity to execute a Will in the context of a specific environment?
Some Advantages of Retrospective Assessment

- Longitudinal perspective
- 20/20 hindsight
- More sources of information
- Sharper relief of BPSD (suspiciousness)
Retrospective Review

- Nature and severity of psychiatric or cognitive disorder
- Impact on relevant cognition and perception
- Frontal-Executive function
- Identify BPSD
- NOT TO DETERMINE CAPACITY
Retrospective Review

Lawyer’s Notes

• TC criteria
• Rationale for distribution
• Rationale for changes
Retrospective Review

Medical Records

• Contemporaneous psychiatric ± cognitive assessment
• Longitudinal course
• Diagnosis (=? neurodegenerative)
Contemporaneous Assessment

- History
- Mental Status Exam
- Cognitive assessment
- Provisional diagnosis
- Repeat exam if necessary
Brain Functions and Testamentary Capacity

Understanding and Appreciation

- Orientation
- Memory
- Perceptions/Reality testing
- Delusions
- Executive (Frontal) functions
Executive Brain Functions

- Impulse control
- Abstract thinking
- Planning
- Judgment
- Appreciation of consequences
To Screen or Not to Screen?

“No cognitive screening measure is an ‘Alzheimer test’ ”

Ganguli (1997)
Interpretation of Cognitive Tests

- MMSE
- MoCA
- Frontal testing (set shifting)
- Limitations of score
Mini-Mental State Exam (MMSE)

- World wide prevalent use
- Lingua franca
- By far most common screening test
- Cultural/translation issues

Folstein et al (1975)
Effect of Age and Education

MMSE scores

from Brave and Hebert (1997)
Cognitive Functions in Clock Drawing

- Comprehension
- Abstract thinking
- Planning
- Visual memory
- Visuo-spatial abilities
- Motivation
- Concentration
- Inhibition of stimulus pull to 10
Clock-drawing Test

• Pre-drawn circle (~ 10 cm diameter)

• Instructions:
  “This is a clock face. Please fill in the numbers and then set the time to 10 past 11.”
Improvement Following Toxic Delirium

Day One  Two Weeks Later  Five Weeks Later
Sensitivity to Deterioration in Dementia

Example 1

Example 2

Example 3

Baseline  |  6 Months  |  12 Months
75 year old female
chronic headaches, resistant depression
Consecutive Clocks

March 2000

Nov 2000

Jan 2001

June 2001

Aug 2001

Oct 2001

Sept 2002

Feb 2003

May 2004
FACTITIOUS DISORDER
The CBCDD* Scale

Dementia Stage

<table>
<thead>
<tr>
<th>Score</th>
<th>Mild</th>
<th>Moderate</th>
<th>Severe</th>
</tr>
</thead>
<tbody>
<tr>
<td>&gt; 22 / 30</td>
<td>16:10</td>
<td>12:00</td>
<td>&lt; 15 / 30</td>
</tr>
</tbody>
</table>

*Clarfield / Bergman Clock Drawing Dementia Scale
Mini – cog
GP Dementia Screening

% Correctly Identified

CDR Score

0 Normal
0.5 MCI
1 Mild
2 Mod
3 Severe

Mini-Cog
GP’s

Frontal Lobe Tasks

• Initiation tasks
  - verbal fluency: ‘F’, animals

• Abstraction
  - similarities

• Response-inhibition and set shift testing
  - Go-no-Go
  - alternating hand movements (Luria)
  - trail making
The Montreal Cognitive Assessment (MoCA)

- Screen for MCI (10 minutes)
- Sensitivity - MoCA 83% vs MMSE 17%

Nasreddine et al (2005)
The Montreal Cognitive Assessment (MoCA)  

Six Domains

• Short term memory (5 words)
• Visuospatial (CDT)
• Executive function
  ► trails B
  ► verbal fluency
  ► abstraction
• Attention
• Language - naming/fluency
• Orientation

Nasreddine et al (2005)
Case Examples
“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)
Multiple Wills

- 99y/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