

Use of Legal Terms in Will Contests: Implications for Psychiatrists

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This article reviews legal concepts involved in challenges to wills and how wills are influenced by psychiatric testimony. The outcome of litigation in certain landmark cases and in cases from the extensive experience of the first author is discussed. Clarifications of legal terms of art such as "lucid interval," "testamentary capacity," "undue influence," and "insane delusion" are offered. Pre-death psychiatric evaluations are becoming increasingly important in an aging population more susceptible to mental impairment.

From the point of view of the law, a testator who is old and sick is still the owner of his assets and should be accorded the respect given any owner. To ascertain and identify exceptions to those circumstances, the legal system has developed certain terms of art, which are not used by medical doctors but describe certain conditions, such as "lucid interval," "testamentary capacity," "undue influence," and "insane delusion." These legal terms are frequently mentioned in will contest cases in which the mental state of mind of the testator is a key issue.

To explain the influence of this use of terminology, 23 landmark cases that in-

involved contested wills were reviewed. A careful survey of the facts and circumstances surrounding the cases reveals some interesting results. Although there was an allusion to medical testimony, most of the judges in these cases did not seem to found their decision on the doctor's report unless this doctor was the treating physician. In no case was there a testator who was in the last stages of Alzheimer's disease, although there were many early senility cases. Undue influence or fraud was alleged in 14 cases and proved in 5 cases. In 3 cases the divorce of the testator and estrangement from the child were mentioned. In all but 2 of the 23 cases, the testator appeared to be over 70 years of age at the time of making the will in question, although the testator's age was not specifically mentioned in 10 cases. In the 13 cases where the age of the testator could actually be determined, two

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of the testators were over 90 years old, seven were over 80, and three were over 70 at the time of signing the will at issue before the court.

Basic Issues Involved in Challenges to a Will

Wills are usually challenged by disgruntled family members who have been left out or slighted after an earlier will had named them in what they felt to be a more appropriate way. Occasions for these will contests include: (1) a later will differing from an earlier will, since any will acts to revoke prior wills, with different relatives as beneficiaries; (2) an older person disposes of his or her property in a will that is "detrimental" to family members who had expected the property to be left to them; (3) the older person marries or becomes involved affectionately with a person who family members question; (4) the older person becomes mentally incapacitated or shows evidence of severe physical incapacity before the will is made; (5) The older person becomes more susceptible to the influence of others by virtue of a change in his or her circumstances (i.e., either physical or mental disability or unusual dependence on the influencing person); (6) the older person refuses medical intervention or a procedure that may be necessary to prolong his or her life, thus bringing up the question of competency.

Hospitalization for mental illness alone is not a reason to consider a person incompetent to make a will. A delusion that bears directly on the individual's reasoning for provisions of his will would affect testamentary capacity, while a delusion

that does not bear directly on the provisions of the will is not usually considered a reason to negate it. Generally, the courts will lean favorably in the direction of protecting family integrity if there is a balance of testimony, since it is in the state's interest that families care for themselves and not become wards of the state. Suicide subsequent to a will does not in itself negate the will. Courts, in the interest of family maintenance, are unlikely to uphold a will that pauperizes a helpless member of the family. Distant relatives who have not seen a testator for many years, but who are the only natural relatives, seldom prevail in a will contest in which the testator has willed his possessions to a church, Moose lodge, or other meaningful organizations in his life.

Courts have consistently held, in cases testing the validity of a will, that: "It is the policy of the law to hold wills good wherever it can be done. This, according to the authorities, is particularly true of old people. They are, no doubt, generally speaking, reasonably easily influenced and are generally childish and forgetful and possibly, from the layman's viewpoint, not qualified to make a will. But the only weapon these old people have to enforce consideration and good treatment of themselves, and proper care, is the power to dispose of their estate by will."¹ In *In re Estate of Weil* the court noted that short-term memory loss did not render a testator mentally incompetent. "The rationale behind the requirement that the testator recollect who are 'the natural objects of his bounty' appears to be founded upon the reasoning that one of the purposes of making a will is to change the prospective

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inheritance of heirs so that they would not take the property of the testator in the manner provided for by intestate succession; and that while prospective heirs have no present legal interest in the testator's property, the law regards their expectations as something which a competent testator will normally have in mind, for these expectations will, by the very act of making a testamentary disposition, be changed."² Further, the court reasoned ". . . it is obvious that the inquiry concerning this element of testamentary capacity must be focused on whether the testator has the capacity to know who these objects of his bounty are and to appreciate his relationship to them (i.e., they are my sons) and not whether in fact the testator appreciates his moral obligations and duties toward such heirs in accordance with some standard fixed by society, the courts or psychiatrists."³

"The making of a will does not depend upon a sound body, but upon a sound mind. By 'sound mind' is meant the ability of the testator to mentally understand in a general way the nature and extent of the property to be disposed of, and the testator's relation to those who would naturally claim a substantial benefit from the will, as well as a general understanding of the practical effect of the will executed. . . The fact that one is a user of narcotics does not necessarily deprive him of testamentary capacity."⁴

"Mental capacity to make a will is determined at the precise moment the will is executed. . . . A will made by an insane person may be valid if made during a lucid interval."⁵ However, there are exceptions to this rule. In the *Estate of Lam-*

berson, an 89-year-old man left his estate to his housekeeper/caretaker of only one month and the court held "when considered with the fact that the disposition of decedent's entire estate to a person he had known for only a few weeks was an unnatural disposition, the 'before' and 'after' evidence of the testator's mental condition was sufficient to sustain the trial court's conclusion that decedent lacked testamentary capacity when the will in question was executed."⁶ In this case the former housekeeper got too sick to care for the 89-year-old testator, so a woman who worked for his podiatrist got his power of attorney and moved him from his home without telling relatives where to find him. This new housekeeper got her lawyer to prepare a will that was witnessed by her friends, who met the testator only once. They said that the testator was alert and stable when the beneficiary/caretaker read the will to him and that he seemed to understand it based on their single contact with him.

The burden of proof is upon the person who seeks to invalidate the will⁷ with two exceptions: in the event a testator was adjudicated incompetent prior to signing the will, then the burden of proof is upon the proponents of the will signed during incompetency⁸; and in cases of undue influence, the burden of proof is on the beneficiary. If a substantial beneficiary under a will occupies a confidential relationship with the testator and is active in the procurement of the contested will, the presumption of undue influence arises. Active procurement means: (1) presence of the beneficiary at the execution of the will; (2) presence of the beneficiary on

those occasions when the testator expressed a desire to make a will; (3) recommendations by the beneficiary of an attorney to draw the will; (4) knowledge of the contents of the will by the beneficiary prior to execution; (5) giving of instructions on preparation of the will by the beneficiary to the attorney drawing the will; (6) securing of witnesses to the will by the beneficiary; and (7) safekeeping of the will by the beneficiary subsequent to execution.⁶

Testamentary Capacity

Testamentary capacity is a legal term used to determine the ability of a testator to competently sign a will. The standard test of testamentary capacity in most states is as follows:

1. The testator understands that he is indeed making a will and appreciates the effect of making that will.

2. He understands the natural objects of his bounty, meaning those individuals whom society would naturally expect him to remember in his will, especially relatives.

3. In a general way he understands the extent of his property and the form in which that property is held; that is, cash, stocks, bonds, real estate, personal possession, etc. It is not necessary that the testator have an exact dollar figure in mind as to his net worth at the time of making his will, but in a general way he should know whether he has a substantial amount of property, very little, etc. and what form the property takes.

4. Lastly, the testator must have the capacity to hold these previous three ca-

pacities in mind long enough to devise and execute the will.

In one of the most interesting cases, the judge heard testimony from four nationally known psychiatrists and several nationally known pharmacologists. The testator had terminal cancer and, "out of the blue," had given her entire estate to a hospital where a friend of hers worked. Since her brother had hoped to inherit the estate of nearly \$2,500,00, there was a furious battle. Having heard extensive testimony, the judge stated that he was most convinced of the testator's competence by the fact that 11 days after signing the will, she had calculated the value of her entire stock portfolio, both over-the-counter and New York Stock Exchange, in her own handwriting using the local newspaper. The judge stated that "This was a remarkable exhibition of mental powers. It was not the work of a metastasized brain, not the act of an unbalanced mind or even of an affrighted mind; it certainly was not the act of the mind of a child aged three to five." He discounted the expert testimony to the contrary.⁹

Likewise, the court in another case discounted the testimony of medical experts who testified hypothetically as to the competency of a testator taking certain levels of thiorazine and phenobarbital in favor of her treating physician who made two house calls a week and found her competent, as did the housekeeper, her CPA, and the lawyer's secretary (the lawyer had died).⁷ Again, the treating physician and 26 other witnesses proved a testator competent, although she had senile dementia and unsound memory. Testimony from two doctors with hypothetical

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testimony was discounted.¹⁰ Psychiatric testimony was also involved in a case in which a mother disinherited her sons who had not visited her often. The sons tried to say that their mother could not understand the natural objects of her bounty and a psychiatrist testified that she “was totally unable to be aware and recognize the relationship to her own children.” The court stated, “We further hold that the psychiatric testimony that Mrs. Weil did not know the true relationship between her as a mother and her sons as sons did not influence in any manner testamentary capacity insofar as it dealt with the legal requirement that she know natural objects of her bounty.”²

In cases in which testamentary capacity might be questionable or in which the will is going to be controversial, there are a number of safeguards that attorneys take.¹¹

1. Procure detailed information from the client relating to assets and kindred. If close kindred are being excluded from the will, inquire as to the reasons for the exclusion.

2. Procure a psychiatric opinion as to competency as close to the will execution date as possible.

3. Permit the witnesses to participate in both the preliminary conference with the client and the conference immediately prior to execution of the will.

4. Prepare detailed memorandum of the preliminary conference and the execution conference, including memorandum by the witnesses.

5. Be alert to circumstance that may cause the validity of the will to be questioned. If such circumstances exist, con-

duct the conference and execution as if such a will contest were a certainty. Preserve all documentation and consider the desirability of recording by video tape.

6. Be ever conscious of the fact that attorneys may be called upon to testify years after the will execution. Records should be kept in perpetuity.

Lucid Interval

The concept of lucid interval is used as a defense of a will being contested for an individual who is known to have been severely demented or mentally ill for some time. Black's Law Dictionary* defines lucid intervals as “intervals occurring in the mental life of an insane person during which he is completely restored to the use of his reason so far restored that he has sufficient intelligence, judgment, and will to enter into contractual relations or perform other legal acts without disqualification or by reason of his disease. In connection with Wills, a period of time within which an insane person enjoys the restoration of his faculties sufficiently to enable him to judge his act.” The mere fact of the testator taking or receiving drugs, even if the drugs are the type that could influence the functioning of the mind, would not necessarily deprive the individual of testamentary capacity or would not necessarily render him susceptible to undue influence. The expert psychiatrist who is reviewing such things as documents and medical records should seek evidence through documented observations over

* Black HC: Black's Law Dictionary, 5th ed. Edited by Nolan JR, Connolly MJ. St. Paul, MN: West Publishing Co., 1979, p 854

time of periodic fluctuations in the person's cognitive state and correlate these with the timing of the claimed lucid interval in order to provide evidence of temporary lucidity. This is especially true in dementia cases in which factors such as medications, changing environmental stress, and diurnal variation may cause an individual to be more or less lucid at particular times of the day. It is generally conceded by geriatric psychiatrists that individuals with advanced stages of Alzheimer's disease do *not* have the capacity for lucid intervals, whereas individuals with vascular dementias and early stages of Alzheimer's disease do have fluctuations in mental capacity.¹² The cases in the author's practice in which lucid intervals were alleged in elderly individuals with advanced Alzheimer's disease did not prevail in probate court, since periods of fluctuation in mental functioning could not be established in these individuals.

Three appellate cases are cited here in which the testator had been adjudicated incompetent and then signed the will, and the will was then contested after that adjudication of incompetency. In two of the cases, the wills were upheld, and in the third, the part of a codicil that benefited a person guilty of undue influence was set aside. In the first case,⁸ the testator died at the age of 79, having made her will at age 76. She suffered from chronic brain syndrome and had been adjudicated incompetent before signing her will, which named her stepdaughter, niece, and brother as the beneficiaries of the residue of her estate instead of leaving it all to her "favorite" stepdaughter. The testator had

been in the hospital, and when she returned home some items of small value, such as a gold-colored ice tray, were not in her home. She blamed her stepdaughter and later changed her will from leaving all of the residue of her estate to the stepdaughter to leaving only one-third to her. The court upheld the will, saying that she was not having an "insane delusion," because the things were actually missing, and went on to say that: "It should also be recognized that the will under attack was executed by this decedent after a series of severe heart attacks and it is generally recognized that when a person is faced with the stark reality of meeting his maker, that person is prone to forget the past petty annoyances or prejudices and to consider basic values." The case turned solely on the testimony of witnesses at the signing and other witnesses at or around the time. The court said, "Florida law is likewise well settled to the effect that although an incompetency adjudication creates a presumption of lack of testamentary capacity as to any will thereafter executed during the continuance of such adjudication that such presumption may be overcome on proof that the will was executed by the adjudicated incompetent during a lucid interval."⁸

In the second case,¹³ a testator drank as much as a case of beer a day; the codicil being contested was one in which the guardian had been named a beneficiary and the same guardian had participated in the preparation and execution of the codicil. The codicil benefiting the guardian and signed after adjudication was set aside, but others signed after adjudication were upheld. There is much case law to

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support the finding that a chronic alcoholic is considered to have the capacity, when sober, to make a will.

In the third case,⁵ a veteran who had been adjudicated incompetent with a diagnosis of schizophrenia left everything to his mother and nothing to his daughter, who saw him rarely. She had been raised by her maternal grandparents because her parents had divorced before the testator was hospitalized, and then her mother had died after the testator was hospitalized. The court stated that the testator's schizophrenia was controlled by medication and further that "Mental capacity to make a will is determined at the precise moment the will is executed. A will made by an insane person may be valid if made during a lucid interval."⁵ Evidence necessary to prove a lucid interval includes information about the testator's conduct, his organic condition, the type of disposition, and the opinions of others¹⁴ about his mental state.

Undue Influence

To successfully contest a will on the basis of undue influence, objectors must show that the heirs had the *opportunity* and *disposition* to unduly influence a *susceptible* testator to obtain a *coveted result*. The issue of susceptibility is usually in the province of a psychiatrist who reviews documents, witness reports, and such and renders an opinion postmortem as to the testator's susceptibility to undue influence. Greist and Nelson¹⁵ have contended that most dying individuals who execute death-bed wills have an increased susceptibility to influence for good or ill because of a common psychological re-

action to the process of dying. Simple influence, however, differs from undue influence. Undue influence implies the concept of influence that comes from the outside and is applied with the intent of unfairly benefiting the person who exercises the influence. Questions most often arise when someone who is in constant attendance in the last days of the testator is made the beneficiary of a changed will. The dying process includes regressing to earlier levels of mental functioning and overutilizing denial, anger, and bargaining. Many appellate cases involving undue influence originate in Florida, since it is a retirement haven to which old people move in their final years, making new acquaintances and associates and leaving their families. The court in *In re Lamber-son* held that "evidence. . .that a beneficiary moved decedent into her home, failed to notify his family, refused to notify his friends of his whereabouts, and never told decedent of his wife's death two weeks before his own, was sufficient to sustain the trial court's finding that appellant procured the execution of the January 23, 1980, will by undue influence."⁶

Arizona courts have identified eight factors as tending to establish undue influence: (1) whether the person accused of undue influence has made any fraudulent representations to the deceased; (2) whether the will was hastily executed; (3) whether such execution was concealed; (4) whether the person benefited was active in securing the drafting and execution of the will; (5) whether the will was consistent with prior declarations of the decedent; (6) whether the provisions were

reasonable rather than unnatural in view of the decedent attitude's, views, and family; (7) whether the decedent was susceptible to undue influence; and (8) whether there existed a confidential relationship between the decedent and the person allegedly exerting the undue influence.¹⁶

None of these factors alone would be sufficient to obtain a finding of undue influence, but a combination of them could raise a question as to the existence of undue influence.

Insane Delusion

Insane delusion has been defined as "a spontaneous conception and acceptance as a fact of that which has no real existence except in imagination. The conception must be persistently adhered to against all evidence and reason. It has also been defined as a conception originating spontaneously in the mind without evidence of any kind to support it, which can be accounted for on no reasonable hypothesis, having no foundation in reality and springing from a diseased or morbid condition of the mind."¹⁷ In the latter case the testator thought that he had been "kicked out" of his Masons' Lodge. His lawyer verified that he had not been kicked out of the Masons' Lodge, but the testator refused to believe him. This will was set aside because of insane delusion without psychiatric testimony. In *Cap-pock v. Carlson*,¹⁸ the testator died at age 84 and had a 92-year-old sister whom he disinherited. His sister claimed an interest in the estate because the testator had left his money to a woman he had known only three or four years. Testimony revealed

that he had told his lawyer that he was not leaving anything to his sister because he did not think she would survive him and she was "well fixed." His will was upheld despite the fact that he thought he was a member of a SWAT team and a drug enforcement agent at age 84. The court found that since his delusions had nothing to do with his sister, and because there was no confidential/fiduciary relationship between the testator and his beneficiary, his will should be upheld. Also, there was no proof that he was unable to manage his affairs.

The court has made a clear distinction between a testator who has consistently "told a story" about his family as opposed to one having a delusion. In *Smith v. Smith*, a former congressman had deserted his former wife and had lived for years with a much younger woman, who had medical training. His paramour had convinced him that he was unable to father children, and therefore, that the children he had in Massachusetts could not be his. He had, in fact, married his wife after she was pregnant with the first child. When he disinherited his wife and children and left his estate to charity, since the paramour predeceased him, the will was upheld because he did not have an insane delusion. The court said, "The test is his ability to exercise reason and reach a rational conclusion however erroneous with reference to them [the children]. Stupid error in either his reasoning or conclusion is not a lack of testamentary capacity."¹⁹

A belief based on evidence, however slight, is not a delusion that rests on no evidence but on mere surmise.²⁰ This is

also affirmed in *Owen v. Crumbaugh*,²¹ in which case religious belief is distinguished from delusion.

Dead Man's Act

It is difficult to imagine a will contest in which the exclusionary rule Dead Man's Act does not play a crucial role. In general, the Act provides that any person interested in the outcome of the litigation is incompetent to testify in his own behalf concerning any conversation or event that took place with or in the presence of the testator. Because those most likely to have relevant information as to the testator's mental condition and relationships are usually the testator's closest relative and the parties to the contest, the Dead Man's Act often excludes much of the best evidence. The justification usually given for this sweeping exclusionary rule is that the opposing party cannot call on the testator to make a rebuttal. Dead Man's Act prevents an interested person from testifying on his own behalf concerning any conversation or event that took place in the presence of the testator if an adverse party in the contest is a representative of the testator.²² The term "interested person" includes all parties to the litigation and all persons with an interest in the outcome but is defined to exclude persons who merely receive fiduciary appointments under the will. Cases have held that neither the attorney who wrote the will nor any person without a direct monetary interest in the outcome of the litigation is an interested person.

Alzheimer's Disease

The particular testamentary problem posed by Alzheimer's disease will, in all likelihood, increase in the next century. At the turn of the 20th century, only 4.1 percent of the American population was 65 years of age or older, whereas by 1985, 11.9 percent of the population was at least 65. Conservative projections are that this age group will grow to more than 12 percent of the population by the year 2000. Dementia affects approximately 10 to 15 percent of older adults. Fifty to sixty percent of older people with dementia are thought to suffer from senile dementia of the Alzheimer's type. Alzheimer's disease has seven stages: (1) no cognitive decline; (2) very mild cognitive decline (forgetfulness phase); (3) mild cognitive decline (early confusional phase); (4) moderate cognitive decline (late confusional phase); clear-cut deficits are easily elaborated in a careful clinical interview; denial is the dominant defense in this phase; (5) moderately severe cognitive decline (early dementia phase); (6) severe cognitive decline (mid-dementia phase); and (7) very severe cognitive decline (late dementia phase).²³ Stages 5, 6, and 7 definitely would involve lack of testamentary capacity with no possibility of lucid interval return. Stage 4 is on the borderline. Persons in stages 1, 2, and 3 usually have testamentary capacity.²⁴

The first author has been an expert in 64 will contests over the past 28 years. Twenty-eight of those cases settle before trial and 36 went to trial in probate court; 24 of them, including many that were settled, involved a psychiatric eval-

uation done at the time of the making of the will or a physician's certificate attached to the will at the time of its making. These cases more or less insured that the testator was of sound mind by having a trained person present at the time of the making of the will. However, one case was set aside by probate court when it was shown by a later expert that the psychiatrist who was present at the time of the making of the will did not take into consideration delusions held by the testator. *Undue influence* was alleged in 29 of the cases; in 23 of these the will was upheld, but in 6 the will or the later codicil to it was not upheld by the court. Fourteen of the cases involved the testator making a will while under guardianship. Despite that fact, the will was upheld in 11 of the cases. The burden of proof shifts to the testator and his estate when a will is devised while under guardianship because the testator has been considered legally incompetent. *Lucid interval* was alleged by defenders of the will in 20 of the cases with the Will being upheld in 15 of these cases. Four cases not upheld involved testator with advanced stage 4 or stage 5 Alzheimer's disease at the time of the making of the will, and there was nothing in the medical records to indicate any sort of lucid interval. A fifth case involved a severely psychotic paranoid schizophrenic whose records in the hospital where he was being cared for at the time he made the will showed nothing to indicate that he at any time met the criteria for testamentary capacity. Many of the lucid interval cases in which the will was upheld involved severe chronic alcohol or drug abusers who had prolonged

episodes of lucidity between their episodes of uncontrolled substance abuse.

Pre-Death Competency Evaluation

When asked to do a pre-death competency evaluation for testamentary capacity, which evaluation will be attached to an upcoming will, psychiatrists should be aware that they are not dealing with a simple, ordinary making of a will. The essential ingredients of a will contest are *money* and *unhappy potential heirs*. Therefore, if the attorney or the testator do no offer explanations, the psychiatrist should ask questions to determine what is really happening. The psychiatrist should be suspicious of questionable testamentary capacity or undue influence in the following circumstances:

1. The psychiatrists is assured that a competency statement is routine due to the testator's age.
2. The appointment is made by someone other than the testator or his attorney.
3. The testator is brought to the appointment by someone who answers most of the questions for the testator and is reluctant to allow the testator to be interviewed alone.
4. Specifics about the will are not given, or the testator seems unclear about specific items in the will.
5. There is reluctance to give information about potential heirs and their relationships with the testator.

It is important for the psychiatrist to understand that mere anger or hurt or a need to act in a mean way toward some potential heir does not in any way negate the will. The psychiatrist should assure

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the testator that he or she has the right to disinherit someone; but the psychiatrist needs information to establish that the anger or hurt is not based on a delusion. The psychiatrist may become a spokesperson for the testator in a future will contest where he has given a psychiatric evaluation to be attached to the will.²⁵

As the population ages and as the prevalence of Alzheimer's disease increases, it will be ever more important for testators to be examined carefully at the time of their will-making in order to avoid problems later. It will also be important for psychiatrists to define the nature and extent of lucid interval so that the courts will have reliable information available to them about such a possibility in cases involving demented patients who have not been examined contemporaneously with the making of their will. In the meantime, the courts are likely to continue to use terms of art such as lucid interval, undue influence, insane delusion, and testamentary capacity in an expedient way to decide legal cases without reference to scientific validity.

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