AAPL: Ask the Experts-2018

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Neil S. Kaye, MD, DFAPA and Graham Glancy, MB, ChB, FRC Psych, FRCP (C), will answer questions from members related to practical issues in the real world of Forensic Psychiatry. Please send questions to nskaye@aol.com.

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Q: I am getting more referrals for cases involving disputes by heirs of deceased parents. Often, there seems to be scant material to address the issue of capacity. Any advice would be welcome.

Kaye:

As the American population continues to increase in age, issues of wills, estates, trusts, and "testamentary capacity" will become an even bigger part of forensic psychiatric practice. These cases are fun because this is an emerging area in the law and thus provides for ongoing educational opportunities. At the same times, these cases are difficult due to the highly emotional nature of these usually intrafamilial battles and the often bitter, adversarial approaches taken by both sides.

The threshold for testamentary capacity is quite low: knowledge of one's bounty (extent and value of one's property,) natural heirs/beneficiaries, an awareness of the disposition being made, and a simple ability to express how one wants to dispose of the estate, finding objective evidence to support this can be difficult, as medical records often are silent on the facts that would support capacity. Treating doctors don't usually document a knowledge of heirs and I have never seen a set of records documenting any knowledge of the value of a patient's estate, financial planning activities, advisors, etc.

References to "dementia" or Alzheimer's are common, but absent some objective data are of limited significance since the range of severity can be extreme and the course while often predictable may still fluctuate. Mini Mental Status Exam scores will often appear in the records, but unless they are in the teens may not be very helpful as the MMSE questions don't target the actual issues of testamentary capacity. There are data on the usual progression of MMSE scores in Alzheimer's and forensic psychiatrists should be aware of that information.

Also, in most jurisdictions, if the challenging party meets the burden of proof and shows the testator lacked capacity, the burden then shifts to the party propounding the will to show by clear and convincing evidence that the testator possessed the requisite capacity.

It is infrequent that I see a case where the deceased lacked testamentary capacity. However, the issue of undue influence is more common and these concepts are linked in most States' laws. Undue influence requires a person to be "susceptible," for there to be the opportunity of exertion, for the influencer to have the disposition to exert the influence, actual exertion of the undue influence, and a result demonstrating that it occurred. In essence, the outside exertion must overcome the free will of the testator. A person with capacity may still fall prey to undue influence and thus the will may be invalidated.

As estate planning is advancing from simple wills to all sorts of trusts and complex financial arrangements (often designed to reduce tax liabilities,) I have made it a practice to ask the lawyer if I am to use the usual testamentary capacity standard or the higher standard of ability to contract. If the financial instruments are seen as contracts, the threshold is raised substantially and more often the issue of capacity to contract will be clearer and easier to evaluate. This is an emerging area in elder law; I frequently encounter lawyers who have not entertained this approach and are thankful for my raising this legal question.

Glancy:

All capacity evaluations, regardless of the specific issue at hand, share the same basic elements. These elements are the capacity to be aware of the situation; an understanding of the issues; and an ability to manipulate the information rationally. The difference when dealing with testamentary capacity as opposed to other types of evaluation, is that the evaluee is not available for an interview. Therefore, the evaluator must rely solely on collateral information. Sources of collateral information include medical and psychiatric records, interviews with relatives and friends, and any other information that can be accessed. There is often very little information in the records. Collateral sources may be in clear conflict of interest situations and this should be taken into account. This exercise is often extremely difficult in practice and the evaluator should be extremely careful in coming to any conclusion. The evaluator is clearly in an ethical dilemma in that they should clearly state that they have not examined the evaluee for obvious reasons. Any conclusion should all always be tempered by noting the limitations of the exercise. It is important to state that it may not be possible to come to any conclusion and the circumstances.

Take Home Points:

It is important to remember that if there is not sufficient data on which to rely, one should tell the referring party that the question can't be answered. In the future, it would ideal if as part of the estate planning, we were asked to evaluate people while they are still alive and thus focus our questions on the relevant areas in a preemptive manner. We are both seeing this emerging trend.