

The elderly vulnerable to abuse by undue influence

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Medical and legal experts provide criteria to help assess capacity in executing Wills

Psychiatrists have collaborated with law experts to provide a better understanding of the complex relationship between mental capacity and undue influence in the elderly who may be cognitively impaired or emotionally ill at the time of executing a will. Undue influence is yet another form of abuse of vulnerable older adults.

"We can expect challenges to testamentary capacity to increase because of a number of factors: a growing elderly population, the increasing complexity of modern families, the impending transfer of wealth to the next generation, as well as the high prevalence of cognitive impairment and mental disorders in older adults," says Dr. Ken Shulman, lead author of the paper, and Professor of Psychiatry at Sunnybrook Health Sciences Centre and University of Toronto. "It is fitting that psychiatrists and other experts be aware of the legal, medical and psychiatric issues that underlie the assessment of testamentary capacity and the role of undue influence – two concepts that are linked and often combined in legal challenges to wills."

The collaboration of experts took place in light of increasing challenges to wills and reflects an accumulation of their experience, as documented in their paper published in the May 2007 issue of the American Journal of Psychiatry.

At the time of the drafting of a will, lawyers make an initial assessment of testamentary capacity but may call upon medical experts to assist. The role of the expert may involve confirmation of capacity when cognition or mental state is a concern, and potentially to assess the role of undue influence. In addition, challenges to capacity after the testator's death often requires the legal team to seek evidence to support the challenge that may be informed by the retrospective assessment of a medical expert regarding capacity or undue influence. Assessment after death is challenging and requires a close examination of any documentation, medical records and first-hand accounts.

In the common situation where both testamentary capacity and undue influence are being considered, the fundamental question is whether an individual has the task-specific capacity to execute a will in the context of a specific environment. It is this complex interrelationship that should be the focus of assessments.

The medical experts' role is primarily to help the legal system make the best determination of capacity and to assess the role of undue influence. The lower the capacity or cognitive status of an individual, the less influence would be required to determine that the individual was incapable or unduly influenced. Conversely, an individual with only mild impairment of cognitive function would have to be subjected to a more severe level of influence to the point of coercion or containment before that influence would be considered undue.

In a complex situation where there is a suggestion of undue influence or "suspicious circumstances", the legal threshold is higher and will call for more careful probing and documentation of rationale at the time of the execution of the will. For example, there would be significant concern when an extremely wealthy testator with even mild cognitive impairment distributes a huge estate with significant implications within an environment that is rife with conflict and complex family dynamics.

"Research in this area is needed, and it should involve a combination of medical and legal domains to provide clearer guidelines for the assessment of these complex issues in individual cases," says Dr. Carole Cohen, a co-author of the paper, clinical director in community psychiatric services for the elderly at Sunnybrook, and Associate Professor in the Department of Psychiatry at University of Toronto. "We need a more uniform approach."

Increased awareness of the importance of establishing testamentary capacity at the time of the execution of a will may lead to a greater demand for contemporary assessments and possibly avoid a court challenge at the time the will is brought for probate.

On Sunday, May 27, Sunnybrook is hosting the Manulife Run for Research: Peace of Mind, when it matters most, Canada's first Run/Walk fundraiser to benefit mental health. Proceeds from the Run will provide essential funding for the work of Drs. Shulman and Cohen and the Hospital's entire Mood Disorders team. Participants can register at www.runforresearch.com and inquiries can be directed to the run hotline at 416-480-6777.

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