

The Practical Assessment of Testamentary Capacity and Undue Influence in the Elderly

Phillip H. Witt

Associates in Psychological Services, P.A., Somerville, NJ

Mart, E. G., & Alban, A. D. (2011). *The Practical Assessment of Testamentary Capacity and Undue Influence in the Elderly*. Sarasota, FL: Professional Resource Press. 96 pp., \$24.95.

Gerontology is a growth industry. As our population ages, as it is in the United States and in most other industrialized nations, professionals are increasingly called upon to provide services for the elderly. In my home state, New Jersey, perhaps the greatest density of physicians' offices is clustered around an enormous group of "active adult communities" in the center of the state—drawn to that area like bees to flowers because of the increased medical needs of New Jersey's senior citizens. When one reads the APA Monitor, it is difficult to avoid the liberal sprinkling of psychologist job ads for nursing homes.

For forensic psychologists, one primary area of application with the elderly is determining whether such individuals are competent to write their wills. In my experience, most psychologists who perform forensic evaluations regarding competencies focus on either criminal law competencies, such as competence to stand trial (perhaps the most frequently requested forensic psychological evaluation in the country) or family law competencies, such as competence to parent children (relevant in both child custody and child-abuse evaluations). The evaluation of competence to execute a will (or testamentary capacity, as the present book defines it) is comparatively unexplored.

Mart and Alban's *Practical Assessment of Testamentary Capacity and Undue Influence in the Elderly* provides an overview of this area. As is typical of the books published by Professional Resources Press, the present volume is an excellent grounding for this work, providing the legal context, assessment procedures, and even a CD of a structured interview and relevant assessment instruments for such evaluations.

The first section of *Practical Assessment*, written by Alban (who is both a psychologist and an attorney), focuses on the legal background necessary to perform these evaluations. He defines the relevant questions regarding testamentary capacity as:

- Does the testator understand the nature of the act of making a will?
- Does the testator have an understanding of his or her property?
- Does the testator know the natural objects of his or her bounty?
- Does the testator understand how the will disposes his or her property?

In a lucid discussion, Alban describes each of these elements in terms readily understandable to the non-attorney. He points out that testamentary capacity is the minimum cognitive and emotional threshold that the law requires for making a will, suggesting that some individuals are competent to make wills despite obvious cognitive deficits. He clarifies, as have other commentators, that a sophisticated understanding of wills and

financial assets is not necessary. He notes that mental illness does not necessarily lead to the inescapable conclusion that an individual is not competent to make a will, parallel to the analysis in criminal cases in which mental illness does not necessarily lead to a finding of insanity or incompetence to proceed to trial.

Alban discusses the complicated topic of reasonableness. That is, does the fact that a will has unreasonable provisions invalidate the will? He notes that this issue is not as simple as it seems on the surface. On the one hand, if the testator was competent when he or she wrote the will, then courts tend to defer to the testator's wishes, however unreasonable those wishes may be. On the other hand, the inclusion of unreasonable provisions in the will may itself at least raise the question of the testator's competence in the first place. He also notes (p. 9), "The line between a provision in a will that is so unreasonable that it indicates incompetence and a provision that is unreasonable without indicting the testator's competence is sometimes blurred."

Alban then reviews the legal background regarding undue influence, which he defines as the substitution of the wishes of one person for another's. He notes that, theoretically, discussions of undue influence assume that the testator was competent and that his will was overborne by the will of another. However in reality, undue influence assessments typically occur in situations in which the testator is showing some impairment, making the individual vulnerable to another's influence. He also notes that, in many jurisdictions, the threshold for contesting a will postmortem is much lower for undue influence than for testamentary capacity, so evaluators may receive referrals that on the surface appear to be related to undue influence, but in the end are really regarding testamentary capacity. Alban nicely parses the issues involved in these assessments.

After Alban establishes the legal context, the remainder of the book—focusing on practical assessment-related issues—is written primarily by Mart, a forensic psychologist. Mart approaches the evaluation following Grisso's (2003) five-factor analysis of competence, those being: functional, causal, interactive, judgmental, and dispositional/remedial. He notes that the dispositional/remedial aspect is important for two reasons. First, testators' competencies frequently vary over time. Second, in numerous other forensic contexts concerning competencies—such as criminal competencies or parenting competency—remedial programs for improving or restoring competency are well accepted.

Mart discusses at some length the issue of postmortem evaluations of testamentary capacity. He discusses the ethical issues involved, given that, obviously, contemporaneous interviewing and psychological testing of the testator are not possible in post-mortem evaluations, and he concludes (p. 20):

On a practical level . . . it is ethical to perform an assessment of a deceased testator if the evaluator believes that there is enough information available on which to base opinions about testamentary capacity and undue influence. The evaluator should make clear any limitations that the

lack of a face-to-face interview places on his or her data or refrain from giving an opinion if sufficient data do not exist.

Regarding the evaluation proper, Mart dovetails his presentation nicely with the legal context laid down by Alban. For example, with regard to the testator's understanding of his assets, Mart states (pp. 23-24):

Because the legal bar for testamentary capacity has traditionally not been set high, it is not necessary that testators know their assets to the penny, and the clinician should not hesitate to prompt subjects about specific assets that they may have temporarily forgotten. However, having prompted the subject, clinicians should revisit the material later in the interview to discover whether the information has been retained by the subject.

Mart indicates that conducting a functional assessment is the core of an evaluation for testamentary capacity, and if the testator can perform the four major functions outlined earlier, then the evaluation need proceed no further. Mart describes an interview developed by the authors, the Semi-Structured Interview for the Assessment of Testamentary Capacity (SSIATC), which can be used as a guide for determining the functional testamentary capacities. The interview guide itself is included on the CD provided with the book. He lists a series of well-specific questions that the testator should be able to answer, those being (p. 31):

- Who are the immediate members of your family?
- What is a (will, trust, etc.)?
- Why do people have them?
- Do you have one?
- Did you have one before the latest one?
- How is the new one different from the last one?
- Why are you making these changes?
- With whom did you discuss these changes?
- Do you have any misgivings about these changes? (Why or why not?)

If, however, functional deficits are present, then the evaluation proceeds further, perhaps with psychological testing to better articulate the causes of the functional deficits. Mart describes a range of psychological tests, including brief cognitive-status tests and mental-status exams that can be useful in these evaluations.

Mart and Alban together address the question of whether the evaluator should give an opinion on the ultimate issue of testamentary competence. They acknowledge that this is an issue of debate in the field, and they provide the following reasonable analysis (p. 36):

There is ongoing controversy regarding whether mental health professionals should opine regarding the ultimate issue. However, it has been our

experience that attorneys and, more importantly, the courts expect to hear the professional's opinion about whether the testator possessed testamentary capacity or not. We have found that the best way to express such an opinion in reports is to state it as follows: "While decisions regarding the ultimate issue rest with the court, it is my opinion that the testator did/did not possess testamentary capacity at the time of his/her revision of the will."

Mart then addresses the issue of assessments of undue influence. With living testators, when the individual is available to be interviewed, he recommends that the evaluator explore the reasons for any deviations from traditional patterns of wealth distribution or any changes from previous wills.

Finally, Mart provides three case examples to illustrate evaluations regarding testamentary capacity with either a living or deceased testator and a testamentary capacity/undue influence evaluation with a deceased testator. These case examples are not simply unannotated reports. In each case example, Mart discusses the steps he took to perform the evaluation and reach his opinion. He also discusses any relevant ethical issues for each case, such as whether to offer an opinion on the testamentary capacity of a deceased individual.

In summary, this book is an excellent resource for evaluators in this assessment area that is likely to be growing. It provides the legal context essential for any sophisticated evaluator, and provides clear clinical guidelines on conducting the evaluation. Moreover, the semi-structured interview developed by the authors is itself worth the purchase cost. Although other books may provide some guidance for these evaluations, none, other than the present book, focuses solely on this area in such a comprehensive yet practical manner. Especially for forensic evaluators relatively new to evaluations of testamentary capacity, this book is an excellent place to start. Even for evaluators who have worked in this area, this book provides examples of two skilled, experienced evaluators practicing their craft.

Reference

Grisso, T. (2003). *Evaluating Competencies: Forensic Assessments and Instruments* (2nd ed.). New York: Kluwer Academic/Plenum.