



Different Tools in Evaluating Testamentary Capacity

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While lawyers are not trained in medicine, wills and estates practitioners consider their clients' cognition and mental abilities on a regular basis in order to assess testamentary capacity. Sometimes this task requires the assistance of a medical professional – if it is unclear whether the client has capacity, or precautionary measures are necessary due to concern that a will challenge may occur. Under such circumstances, experts agree that a contemporaneous capacity assessment is “the gold standard”.¹ This Solicitor's Tip explores three medical screening tools available to assist practitioners in an assessment of testamentary capacity.

Mini-Mental Status Examinations

Informally known as an MMSE, this screening tool is a minimally invasive test used for measuring cognitive function and screening for cognitive impairment. The client is asked a commonly used set of questions, which are typically scored out of 30, with a score of 26 or lower suggesting some degree of cognitive deficit.²

While MMSEs have been utilized as evidence in a variety of cases,³ this tool has its limitations. Since MMSEs do not formally test executive brain functions, some experts consider it a “blunt tool” for detecting frontal lobe dysfunction or deficits in executive functioning.⁴ The results of an MMSE may also be misleading – it is possible for a person with a cognitive impairment to achieve a perfect score, and vice versa, for a person who is not impaired to score low. Extraneous factors may also impact the test results, such as how the test is administered, the presence of distractions, whether the client is coached, language barriers, and even the client's medications.⁵

If a practitioner is concerned that the client does not have mental capacity, it would be wise to ensure that further testing is completed in addition to an MMSE. However, in other cases, MMSEs can be used to confirm competency if supplemented with additional information, such as detailed notes from a solicitor's interactions with the client.

Cognitive Testing

¹ See Kenneth Shulman et. al., “The Role of the Medical Expert in the Retrospective Assessment of Testamentary Capacity” (2021) 66:3 Can J Psychiatry 255 at 260.

² *Shannon v. Hrabovsky*, 2018 ONSC 6593 at para 33 [*Shannon*]; *Taperek c. Taperek*, 2016 QCCS 5101 at para 253 [*Taperek*].

³ See, for example, *Jung Estate v. Jung Estate*, 2022 BCSC 1298 [*Jung*]; *Shannon, ibid.*; *Phillips c. Douek*, 2018 QCCS 3794 [*Phillips*]; *Taperek, ibid.*; *Laszlo v. Lawton*, 2013 BCSC 305 [*Laszlo*].

⁴ See *Laszlo, ibid.* at para 171.

⁵ *Taperek, supra* note 2 at paras 254-255.

Cognitive testing focused on language, memory, and executive functioning can also be used to evaluate testamentary capacity. Verbal language abilities, such as comprehension and receptive language skills, are essential to understanding the purpose of a will and its consequences. Testing focusing on both long-term and short-term memory ought to indicate if the client is capable of recalling recent changes to personal circumstances, which may impact how the client wishes to distribute his or her property. Lastly, executive functioning is pertinent to ensuring that the client is able to comprehend the distribution of property and assets through a will.⁶

Cognitive assessments have been accepted by the courts as useful evidence related to testamentary capacity in a number of cases,⁷ although it appears that such test results have greater value when synthesized as part of a medical opinion,⁸ or otherwise put into context.⁹

Contemporaneous Assessment Instruments

Lastly, a contemporaneous assessment instrument (a “CAI”) is a customizable screening tool that can be used to explore capacity in greater depth. A CAI is conducted as a semi-structured interview that tests a client’s executive functioning and working memory, and can be tailored to address different aspects of capacity, depending on the types of questions posed. To utilize a CAI, the medical professional conducting the assessment must be provided with information about the client prior to the interview, such as medical records, the client’s previous wills and other legal documents. The clinician then assesses capacity using all of the evidence provided.

While CAIs have been discussed in scientific literature¹⁰ and legal articles,¹¹ they have not yet been addressed in case law with respect to proving testamentary capacity.

Conclusion

Tools like MMSEs, cognitive testing, and CAIs can be an excellent source of information when assessing a client’s capacity. However, it is important to keep in mind the limitations of screening tools and remember that no medical test can substitute the nuances of a legal assessment of capacity. For clients who want to make a will, the ultimate decision as to whether a client does or does not have capacity remains in the hands of counsel.

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⁶ See Amanda Kenepf et. al., “A Comprehensive Approach to Assessment of Testamentary Capacity” (Dec. 2021) *Frontiers in Psychology*, online: Frontiers <https://www.frontiersin.org/articles/10.3389/fpsyg.2021.789494/full> [Kenepf].

⁷ Many cases refer specifically to Montreal Cognitive Assessments (“MOCA”), which assesses frontal lobe capabilities, including higher abstract thinking, judgment, insight, multi-tasking, and abstraction. See, for example, *Jung, supra* note 3; *Phillips, supra* note 3; *Raczkowski-Filliter v. Raczkowski*, 2022 NSSC 64.

⁸ *deBalinhard (Estate) (Re)*, 2014 SKQB 162 at paras 67-68; *Phillips, ibid.* at para 17.

⁹ *Tecter v. Reimer Estate*, 2021 MBQB 133 at para 52.

¹⁰ Kenepf, *supra* note 6; Megan Brenkel et. al., “A case for the standardized assessment of testamentary capacity” (2018) 21:1 *Canadian Geriatrics Journal* 26, online: <<https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5864571/>>.

¹¹ See Sarah Lawson, “Testamentary Capacity in Canada: A Call for Medical-Legal Co-operation” (2022) 43 *Windsor Review of Legal and Social Issues* 76, online: 2002 CanLIIDocs 3269 <<https://canlii.ca/t/7mxmr>>; Kimberly A. Whaley et. al., “Standardizing the Assessment of Testamentary Capacity” (2017) 46 *Advocates’ Q.* 441, online: WEL <<https://welpartners.com/resources/WEL-Adv-Quarterly-46-Standardizing-the-assessment-of-test-cap.pdf>>.

