

Testamentary Capacity

By

[Judy Wong](#)

American University
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Drafting a will ensures an individual's right to distribute his property as he sees fit. However, such a document often is not enough to protect the individual's, the testator's, right. Increasingly, slighted survivors of the testator question the testamentary capacity of the originator of the will in an effort to alter the terms of inheritance post mortem. Such challenges in court essentially seek to negate the given rights of the testator.

Unfortunately, instead of protecting the testator's given rights, the state, as represented by the courts, effectively aids in truncating testamentary rights. The state should not allow the rights of any individual to be damaged through as abstract and undefined a concept as testamentary capacity, so reforms of the definition and usage of testamentary capacity are necessary.

Testamentary capacity is the codified standard that declares mental incapacity as a basis for challenging the validity of a will. "When declaring a will as invalid, a psychiatrist must testify in court that the testator lacked the competency needed to execute a valid will" (Szasz 72). A forensic psychiatry expert testifies by judging if the testator fulfills the following: "(1) understand the nature of the act - that a will is being made and what a will is. (2) The person should have a reasonable awareness of the nature

and extent of the assets to be distributed and (3) should be aware of who might reasonably have a claim to be considered as beneficiaries of the will” (Arie).

During examination of testamentary capacity, the relationship between the state and the individual is problematic; through law and psychiatry, the state inadvertently deprives the individual’s rights by invalidating his will and sometimes even subverts the testator’s rights in favor of another’s rights. This oppression can occur through technicalities and misapplication of each and all of the three requirements. The first requirement of testator competency is that the subject has to be rational and cognizant at the time of executing the will. The court has the power to make judgments and assumptions about the subject’s rationality and, via that judgment, strip away the person’s right. For example, a mentally ill individual reasonably could draft a will if using medication to control the illness, but in the past, the court has arbitrarily ignored this reasonable assumption and assumed otherwise. In the English case, *Banks v Goodfellow*, the court accepted that all the evidence, including the testimony of the testator’s acquaintances, demonstrated that the illness was virtually under control. Yet the court still held that the testator did not have testamentary capacity, randomly judging that the first requirement had not been fulfilled (Keating 47). As seen in *Banks* and many other similar cases, the courts have extensive flexibility in deciding whether a person is rational and cognizant; it is basically a judgment call with little guidance or clarity allowing the courts unrestricted and arbitrary control over the validity of a will.

The second requirement applies to the testator being aware of what properties he owns and can distribute. The state, via the legal institution, can distort this requirement by taking away the right to define what property is. For example, if there is an obscurity,

the court can define what property was granted and distributed despite all evidence showing that the testator intended otherwise. In *Tompkins v. Leary*, an individual was given the key to a desk drawer by the benefactor who verbally stated that the individual could take what was within the drawer when she dies; within the drawer were valuable papers including securities and a deed to the house which were actually listed as granted to other relatives within an older written will. The individual argues that the benefactor meant to give him the securities and the house, but even though the benefactor had mentioned verbally at least the securities, the court felt that the symbolic transfer was not valid and granted the valuables to the other relatives (*Tompkins v. Leary* 134 A.D. 114). In this situation, one would assume that being given a key to a drawer would entitle you to everything inside it, especially since the testator verbally stated so. Since the court's decision is in many ways illogical, the state is then taking away a right without reasonable cause. It is disturbing to consider that one of the three principle rights in the United States out of life, liberty and property can so easily be stolen.

Finally, the third condition requires the testator to be aware of who is the beneficiary. This is a dilemma because it creates a technicality allowing the state to remove the testator's right to distribute the property as intended by substituting the states judgment in lieu of the testator. For example, a discontented beneficiary could contest a will by claiming that at the time of the will's execution, the testator lacked the mental capacity to make a will and could not rationally realize to whom he was passing the property. "If a probate court determines that a testator lacked the required mental capacity, the will (or portions of it) is invalid and the testator's estate becomes subject to distribution through intestacy" (Trusts & Estate Planning Law). No one, not even the

state, should be allowed to withhold an individual's right to decide the fate of the property, and challenges to this right should definitely not be so easy. And it seems almost facetious for the state to assume that its choice of inheritor is any wiser than that of the testator.

The requirements allow for many possibilities of an individual's testamentary capacity and thus right to property to be violated by the state; several factors aggravate the state's role in damaging their rights. First, there is a very low standard of evidence; minor technicalities can result in certain individuals unfairly prevailing in the case. Even judges have admitted that the higher standard of proof has not extended to testamentary capacity. For example, in *Estate of Wagner*, Judge Meschke acknowledges that the standard of proof is low in comparison to other judicial standards (551 N.W.2d 292). The most provoking evidence is provided by the forensic psychiatric expert who often measures capacity by post-mortem examination of the brain or review of the testator's previous behavior via interviewing family members (Szasz 75). This evidence is in essence secondary and highly speculative.

The psychiatrists, who have a lot of the power to declare whether or not the individual was mentally capable, abide by rules that are rarely directly devised, and these very psychiatrists are trained to suspect illness unless proven otherwise ("Myth" 100). The elimination of an individual's rights are taken so lightly and done with such ease even though a written will, in itself, should be a reasonable verification of the testator's able capacity. It is ironic, then, that testamentary capacity is based mainly on assumptions of a person, yet our law supports it. Confiscation of an individual's right is simply justified by an unsatisfied benefactor contesting a will and by shaky evidence from

forensic psychiatric evaluations. It is distressing that so little stands between innocent people having their right to write and execute a will and having it stripped from them.

In addition, the importance of psychiatric evidence in litigation over testamentary capacity calls for care to be taken by psychiatrists (Szasz 73). Just because they say this incapacity exists, that in itself does not make it automatic truth. We, as a society, are assuming that we can trust what these experts say even though there is no scientific work done for proof. Instead, they are exploiting it, and running a successful, financial industry in it. If they can get away with cases like this, perhaps they would have more power in our judicial system in future years.

By allowing such numerous easy methods of eradicating the testator's rights via insignificant technicalities, the state, through the courts, basically denies the rights of the testator while encouraging others to act similarly. This encouragement results in a slippery slope effect where allowing one individual to file a lawsuit contesting testamentary capacity will encourage and allow others to follow suit. The court can become overwhelmed by thousands of such lawsuits simply on this very topic, and those copious plaintiffs could easily prevail simply due to precedent. Through the legal system, the ideals behind testamentary capacity are creating an enterprise and business all on its own (Szasz 73). When a search is done on the term "testamentary capacity" on any online search engine or "forensic psychiatry" on any phone book, thousands of advertisements for lawyers and psychiatrists are found as a result. It seems to be more of a business encouraged by legal means rather than a legitimate way of protecting the public. This overwhelming business, in a way, attenuates the court's weak position on testamentary

capacity, forming a vicious cycle. Since mental capacity is allowed to be considered enough reason to invalidate a will, more problems are being created rather than solved.

In effect, the state is weakly allowing one party to exercise their rights at the expense of another party. It is a problematic factor when faced with the question of which party or parties are benefiting. There are conflicting interests where testators are interested in the right to create a valid and binding will to be later executed, thus protecting their property, while prospective heirs are interested in obtaining their rightful inheritance (Szasz 75). Usually there is no one to defend the rights of the often deceased testator which encourages so many potential heirs to challenge the competency of the testator through legal aspects. Through this legal procedure, the lawyers and the forensic psychiatric experts are paid monetarily and the plaintiff is awarded the inheritance if they prevail in the case. The aforementioned business is the real benefactor. Although it could be argued that society is benefiting because that business is booming, it is important to question whether society should let that business thrive and whether society is damaged in other ways through this.

As a solution to all of these problems brought on by testamentary capacity, there needs to be a reform within the legal system. To do this, the standards must be altered to strictly and clearly define full mental capability. The wording and descriptions that are currently used in the requirements for mental capacity are very vague and open-ended. A lawyer could easily argue and misconstrue to his advantage many of the words used in the requirements; the lack of definition of rationale leaves open many possibilities to question testator actions. A testator could arguably feel right in giving away his goods to charity, but to another doing so could be considered irrational. At this time, the courts

only have precedent and judicial judgment to decide what is rational or irrational, creating uncertainty for jurists. In addition to the legal professionals, regular testators, trying to create a valid will, could be easily confused by the terms of requirements or misinterpret them.

Basically, the standards need to be clarified possibly via codification. This requires reforming existing statutes within legislatures on state and national levels. Within such statutory reform could be established additional restrictions upon the court such as more stringent standards of evidence. If there is indeed a reason to contest a will, there should be ample evidence to provide the courts and the officials of wrongdoing or otherwise. Establishing such standards will require psychologists to help determine an appropriate level of care. Such a threshold definitely should not be as weak as the current one which allows speculation based on video footage to trump an official document. Possibly, psychiatric testimony and judgment should be discounted unless the psychiatrist actually had the opportunity to examine the testator before death.

Or within the statute, testators could be required to obtain certification that they were mentally capable at the time of executing their will. Of course this would have to involve a dedicated psychiatrist and lawyer to “evaluate” the individual but perhaps it could authenticate the certification. This reform would help protect the testator against later misallocation of their inheritance and eliminate unnecessary litigation.

As a final potential solution, as some authors such as Thomas Szasz suggest, there needs to be a complete separation between psychiatry and the law. By doing so, it would not allow psychiatry to be one of the bases for determining a valid will. This would take the aforementioned suggestion of discounting certain testimony and expand it to include

any and all psychiatric evidence. In fact, it would solve many other controversial problems in relation to the combination of law and psychiatry. Judges would no longer have to decide which psychiatrist's judgment is sounder, when even psychiatrists cannot agree. And those that argue that psychiatry is not a valid reliable science would be satisfied that important decisions no longer rest on possibly unsubstantiated procedures. This type of reform would remove the power of psychiatrists from being part of the control in individual rights.

All the solutions above point to a problem within the state; it treats the testator as one basically without rights following death and execution of the will. This is against the very thread of this nation's principles. The state is established to protect the rights of the individual, not neglect and destroy those rights. Ironically, the fact that the problem lies within the state is in itself the greatest obstacle to any of the mentioned solutions.

The solutions require radical reform within the state, which is at best impossible. Tightening the requirements for testamentary capacity as suggested would most likely hinder the very rights of the testator that are trying to be saved. Requiring certification of the will via psychiatric evaluation would make drafting a will inaccessible to the poorer classes and also make it difficult to quickly alter the will near death. Clarifying the wording may also disqualify some individuals from their rights if the courts construe the specific wording too literally.

Similarly, changing standards of evidence requires challenging age-old standards of the state stemming from centuries old common law carried over from Britain. To make such a radical elimination of psychiatric evaluation from the court would require either a statute from the legislature or a groundbreaking precedent case. But in recent years, "our

democratic republic has, in effect, become transformed into a pharmacratic autocracy, based on the union of medicine and the state” (“Liberation” 166). Getting to such a stage would take incremental steps, but even these minor case precedents are unlikely due to the entrenchment of legal fiction. “In law, they are suppositions of fact taken to be true by the courts of law, but which are not necessarily true. A rule of law that assumes as true, and will not be allowed to be disproved; something that is false but not impossible” (Schaler). In general, despite opponents, psychiatry is accepted in the court and state as valid proof and will indefinitely exist as fact.

Although challenges through testamentary capacity seem entrenched and promote a negative relationship between the state and the testator, reform must be attempted. Allowing the rights of individuals, even those recently deceased, to be violated goes against the very nature of democratic society. The right to property and the handling and distribution of that property have long been one of the most revered rights within our nation. Individual rights should not, by any means, be injured so easily.

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