DEMENTIA, TESTAMENTARY CAPACITY AND UNDUE INFLUENCE

DÉMENCE, CAPACITÉ TESTIMONIALE ET INFLUENCE INDUE

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INTRODUCTION

CONTEXT

- Testamentary capacity and undue influence are important issues in the context of dementia (Spar & Garb 1992)

- However, they did not receive much attention (Moye & Marson 2007) and there is a gap between case law and clinical research (Peisah et al. 2009)

- How to fill the gap between theory and practice?
INTRODUCTION

1. - Brief review of international literature and case law
2. - A comparison of practices in Europe
3. - From theory to practice
LITERATURE AND CASE LAW REVIEW

TESTAMENTARY CAPACITY

- Presumption of capacity  (Redmond 1987)
- A situation-specific ability  (Fountoulakis & Despos 2008)
- Need for specific assessment  (Jacoby & Steer 2007)

BANKS v. GOOFELLOW  (1870)

- Understanding the meaning and effect of making a will
- Knowledge of the nature and extent of one’s assets
- Claims of natural heirs
- Being free of mental disorders or delusions that influence the disposition of assets

⇒ Cornerstone of testamentary capacity assessment
LITERATURE AND CASE LAW REVIEW

UNDUE INFLUENCE

- A legal concept which lacks a clinical definition (Moye & Marson 2007)
- Difficulty to distinguish “undue influence” v. “due influence” (Gutheil 2007)

WINGROVE v. WINGROVE (1885)...

To be undue influence there must be a form of coercion
An overpowering of the testator’s volition, judgment or wishes
Influence is relative to the vulnerability of the testator
A COMPARISON OF PRACTICES IN EUROPE

RETROSPECTIVE CHALLENGE OF A WILL

TYPICAL PROFILE

<table>
<thead>
<tr>
<th>Condition</th>
<th>Percentage</th>
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<tbody>
<tr>
<td>Dementia</td>
<td>40%</td>
</tr>
<tr>
<td>Undue influence is alleged</td>
<td>56%</td>
</tr>
<tr>
<td>Testator with no biological children</td>
<td>52%</td>
</tr>
<tr>
<td>Radical change from a previous will</td>
<td>72%</td>
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<tr>
<td>Will executed less than a year prior to death</td>
<td>48%</td>
</tr>
</tbody>
</table>

- The burden of proof is on the claimant
- Courts take into account every means at their disposal
- Retrospective challenge looks like a “psychological autopsy” (Noffsinger 2008)
A COMPARISON OF PRACTICES IN EUROPE

CONTEMPORARY WILL’S ASSESSMENT

ALZHEIMER EUROPE
Dementia in Europe Yearbook 2010

- Similarities between countries
- Differences across countries
When assessing if a person is capable of making a will, notaries should consider the person’s:

- **Ability to understand**
  - Could you reformulate in your own words what I told you about the will?

- **Ability to appreciate**
  - Why is it important to you to make a will?

- **Ability to reason**
  - What are the grounds of your choice?

- **Ability to express a choice**
  - Do you fully agree with the extent and wording of the will?
### “RED FLAGS” FOR UNDUE INFLUENCE

<table>
<thead>
<tr>
<th>Condition</th>
<th>Description</th>
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<tbody>
<tr>
<td>the testator invests significant trust or confidence in another person</td>
<td>Isolation of the person</td>
</tr>
<tr>
<td>isolation of the person</td>
<td>Impairment in vision, hearing or mobility impairs communication</td>
</tr>
<tr>
<td>impairment in vision, hearing or mobility impairs communication</td>
<td>Change in family dynamics or family conflict</td>
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<td>Physical or psychological dependence on a carer</td>
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<td>Beneficiary instigates or procures the will</td>
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<tr>
<td>beneficiary instigates or procures the will</td>
<td>Content of will is not in keeping with previous wishes</td>
</tr>
</tbody>
</table>

A useful guidance for professionals
CONCLUSION

- Assessing testamentary capacity: a complex, cross disciplinary endeavour
- A need for shared and clear criteria
- A need for professionals to collaborate more actively
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Thank you

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for your attention