

# **Case Study: The Assessment of an Intestate Ward With Anomic Aphasia to Determine Testamentary Capacity**

**Author: Eric G. Mart, Ph.D., ABPP (Forensic)**  
**Manchester, New Hampshire USA**  
[emart@comcast.net](mailto:emart@comcast.net)

## **Abstract**

This article describes the assessment of an elderly intestate woman with early Alzheimer's dementia and anomic aphasia who wished to create a will with the assistance of her guardian and the justice of probate. A brief review of the legal criteria for guardianship and testamentary capacity is provided, along with a description of a flexible approach to the assessment of specific competencies relevant to the legal standards governing this case. Implications for the assessment of persons with circumscribed cognitive deficits are provided.

**Keywords:** Competency, guardianship, testamentary capacity.

---

## **Introduction**

This case study describes an assessment of an elderly widow with early dementia who was intestate and under guardianship and wished to develop an estate plan. The purpose of this case study is to describe how individuals who have been found to generally lack capacity may still be able to provide the court with information relevant to a determination of whether relevant capacities may still be intact. This may be accomplished using techniques designed to address aspects of cognitive functioning as they apply to circumscribed aspects of capacity. This case study will also address how the use of a flexible protocol can be utilized to work around an individual's expressive deficits in a manner that helps to demonstrate some unimpaired aspects of the individual's cognition.

## **Testamentary Capacity**

The ability to make a will or trust is referred to as "testamentary capacity." The exact wording of the legal requirements for an individual to be considered to have testamentary capacity varies across states, but there are a number of common elements that are generally accepted. These elements are that the testator/testatrix (1) knows the nature of the act of making a will or trust; (2) has an understanding of the nature and extent of his or her property; (3) is aware of the natural objects of his or her bounty; and (4) knows how the will disposes of his or her assets (Frolik, 1999). In this context, it should be noted that the testator/testatrix need not have a detailed grasp of each and every asset in his or her estate. Jurisdictions vary in the extent to which they require such knowledge, but most only require that the testator/testatrix have a general

grasp of the significant parts of his or her estate. The requirement for knowing the natural objects of his or her bounty means that the testator/testatrix must know who would generally be seen as his or her natural heirs (e.g., wife, husband, sons and daughters, other close relatives); a will allows the testator/testatrix to distribute his or her assets in a manner other than what is dictated by statutory formulae, assuming he or she is considered to have testamentary capacity.

Thomas Grisso (Grisso, 2003) has written extensively about the assessment of competencies. He provides a five-step model, which provides a useful conceptual framework for performing psychological evaluations of a wide range of competencies and capacities. Assessments of testamentary capacity can be improved by using Grisso's methodology for several reasons. The first reason is that using such an explicit methodology allows evaluators to explain their general methods to the judge or jury so that their approach can be assessed and evaluated in the light of their conclusions. This methodology also provides a logical framework for the evaluator to use in performing such assessments. The components of this model are as follow:

- 1) The functional component

This component of the model is designed to determine the extent to which the individual being assessed can perform the tasks required by the specific competency being examined. In the case of testamentary capacity, the evaluator would interview the testator/testatrix to determine whether he or she has the ability to perform the tasks listed above. If the subject is able to perform these tasks at an acceptable level, the evaluation can often be considered complete.

- 2) The causal component

If deficits are observed in the functional abilities of the subject in relation to the tasks required for competency, the evaluator then attempts to assess the reasons for the observed deficits. Functional deficits in abilities related to testamentary capacity may be the result of a wide variety of causes. The testator/testatrix may suffer from dementia, delirium, psychiatric conditions such as depression or psychosis, or the effects of a stroke or traumatic brain injury, and these problems may be the underlying cause of the observed functional deficits. At the same time, it is important that the evaluator not make the mistake of equating the presence of some type of functional or organic condition with functional incapacity. Many individuals with mild or even moderate dementia are quite capable of demonstrating the necessary capacities involved in making a will. For this reason, it is important to demonstrate the practical impact of the observed medical or psychiatric condition on functional capacity.

- 3) The person-in-situation component

This component of Grisso's methodology addresses contextual/situational aspects of the subject's functional capacity. The functional demands of making a will or trust can

vary in complexity depending on many factors. In some cases, a testator/testatrix may simply wish to leave the residue of his or her estate to a spouse. If a testator/testatrix is pre-deceased by his or her spouse, he or she may wish to have any children share equally in the estate.

Additionally, a testator/testatrix's only assets may be his or her house and the contents of his or her checking and savings accounts. Other situations may be far more complex; there may be multiple properties, stock portfolios, offshore accounts, mortgages, and other complex financial arrangements. It is quite possible that a testator/testatrix with moderate cognitive deficits would be able to cope with the functional demands of making a will in the former situation and unable to do so in the latter. Specifically assessing important aspects of the context of the situation in which the subject's functional abilities are applied provides a more nuanced view of the situation to the court.

#### 4) The conclusory component

The conclusory component of Grisso's methodology addresses the evaluator's opinion on the ultimate issue. In the case of assessments of testamentary capacity, the expert would provide his or her opinion as to whether he or she concludes that the testator/testatrix has or does not have testamentary capacity. There is some disagreement among evaluators as to whether experts should opine directly on the ultimate issue. Some evaluators think that, since the presence or absence of testamentary capacity is a legal decision, it is inappropriate for experts to provide such an opinion since this decision is the province of the court. Those evaluators holding this opinion believe that providing an opinion on the ultimate issue is an example of overreaching by the expert. Other evaluators working in this area believe that the judge or jury is empowered by the legal system to give the expert's opinion on the ultimate issue as much or as little weight as is deemed to be appropriate.

Further, the judge or jury often wish to know the experts' "bottom line" on this issue and may actively elicit their opinion. Rendering ultimate opinions is an issue that each expert must decide based on his or her view of the ethics of the profession.

#### 5) Remediative component

This final component of Grisso's methodology is designed to provide information to the court regarding whether the subject of the assessment could possibly be considered competent if steps are taken to assist the testator/testatrix or if he or she could be restored to competence. For example, a testator/testatrix may be reasonably well in the morning when he or she is rested but have much more difficulty later in the day. It may also be the case that the subject suffers from a condition with symptoms that wax and wane, and while he or she may not be competent at the present time, he or she may be competent at a later date. In other scenarios, a testator/testatrix with bipolar disorder may be suffering from active symptoms of the disorder at the time of the

assessment; or one may be suffering from bereavement due to the recent loss of a spouse. In such cases, it may be advisable to perform another assessment at a later date, or to re-evaluate after psychotherapeutic measures have been taken, as the subject may exhibit improved functional abilities after appropriate remediation has occurred.

Assessing functional aspects of testamentary capacity using Grisso's methodology with a testator or testatrix is generally a fairly straightforward process wherein the subject is questioned about his or her estate and financial status. Typical questions might include:

- 1) How are you currently supported?
- 2) How much money do you have:
  - a) in checking accounts;
  - b) in savings accounts;
  - c) in IRAs; and
  - d) in pensions?
- 3) Do you own any property?
- 4) Do you own any vehicles?
- 5) Do you owe any debts? If so, how much do you owe?

The subject should also be questioned about the purpose of a will or trust. Such questions may include:

- 1) What is a will?
- 2) Why do people have them?
- 3) Do you have one at present?
- 4) Did you have one before the current will?
- 5) Why are you making this one?
- 6) With whom did you discuss the changes you wish to make?
- 7) Do you have any doubts or misgivings about these changes?

Finally, the testator/testatrix should be questioned about the natural heirs to his or her estate and reasons for leaving or not leaving assets to these individuals:

- 1) To whom do people usually leave their money or property?
- 2) Who are the members of your family?
- 3) What are your reasons for including or not including these people in your will or trust?

Generally speaking, the standard for an individual to be considered to have testamentary capacity is not high. Courts generally find that, if the individual has a general grasp of the issues outlined above, then he or she is deemed competent to make decisions about the estate plan. Persons who appear to have made a will based on frankly delusional thinking (i.e., "My sons are werewolves") are sometimes found to lack testamentary capacity; but, short of this type of deficit, courts generally work from

the proposition that individuals have a right to dispose of their assets in any way they wish.

Situations sometimes arise, however, in which the assessment of testamentary capacity is less straightforward. A testator/testatrix may suffer from particular cognitive deficits, such as aphasia caused by a stroke (as in the case example provided later). In other cases, the subject may have conditions in which levels of lucidity and capacity wax and wane. For example, a testator with a mood disorder may have capacity when his or her symptoms are in remission but lack capacity during exacerbations. Some types of dementia, such as vascular dementia, may also have a variable course. In such cases, those given the task of evaluating testamentary capacity may need to develop a detailed understanding of the individual's condition and develop case-specific methods for determining the presence or absence of capacity.

### **Testamentary Capacity and Guardianship**

In the case described in this article, a factor complicating the determination of testamentary capacity was the fact that the testatrix ("Mrs. Smith") was the subject of a guardianship. Guardians are commonly appointed by courts to provide support for a person legally determined to be incapacitated. The Uniform Guardianship and Protective Proceedings Act (1997) provides the following definition for incapacity:

"Incapacitated person" means an individual who, for reasons other than being a minor, is unable to receive and evaluate information or make or communicate decisions to such an extent that the individual lacks the ability to meet essential requirements for physical health, safety, or self-care, even with appropriate technological assistance. (p. 1)

An individual with a guardian is sometimes referred to as a "ward." A "guardian" is defined in the same document as follows:

"Guardian" means a person who has qualified as a guardian of a minor or incapacitated person pursuant to appointment by a parent or spouse, or by the court. The term includes a limited, emergency, and temporary substitute guardian but not a guardian ad litem. (p. 1)

In many jurisdictions, there are two types of guardians: guardian over the estate and guardian over a person. The former may be appointed when an incapacitated individual needs help with the management of his or her financial affairs; this role is also sometimes referred to as a 'conservatorship.' The latter type of guardian is responsible for seeing that the day-to-day needs of the ward (e.g., safety, health, and self care) are met. In many cases, one person may fulfill both roles and in others the roles may be split between two persons. When one individual fulfills both roles, this is referred to as a "plenary guardianship."

It should be noted that, even if a person is under a plenary guardianship, it does not necessarily negate his or her right to execute a will or trust (*In re Estate of Kesler*, 1985; *Clement v. Rainey*, 1932; *Pape v. Byrd*, 1991). This is because, in many jurisdictions, the legal standard for guardianship is different from that for testamentary capacity. At the same time, the fact that a guardian has been appointed can be a factor in judicial consideration of whether the person has or had testamentary capacity at the time a will or trust was executed. New Hampshire, for example, has a statute that directly addresses this issue. New Hampshire Revised Statute Annotated 464-A:26-a, entitled "Estate Planning by Guardian," states that "The probate court may authorize the guardian of the estate to make lifetime gifts and/or plan for the testamentary distribution of the ward's estate consistent with the ward's wishes." The statute goes on to state, "Before authorizing the guardian to make lifetime gifts or to plan for the testamentary distribution of the ward's estate, the probate court must find by a preponderance of the evidence, that the proposed gifts and/or testamentary plan are consistent with the ward's wishes."

### **Case Example**

The issue in this case was to assist the court in determining whether an elderly widow (Mrs. Smith), who was the ward of a court-appointed guardian, was able to express her wishes with regard to the distribution of her assets at the time of her death. Mrs. Smith was 86 years old at the time of the assessment. Despite having an estate in excess of \$16,000,000, she had never executed a will or trust. The probate court had placed her under guardianship when she began to have significant problems with self-neglect and had been tentatively diagnosed with Alzheimer's dementia. Because of her problems with activities of daily living and her cognitive decline, her guardian had moved her to an assisted-living facility. Once there, her condition improved to the point that the option of allowing her to move back to her home with 24-hour assistance was being considered.

Mrs. Smith was seen by the evaluating psychologist on two occasions at the assisted-living facility where she was residing. The evaluator initially met with the guardian and the ward together so that the evaluator could be introduced and the purpose of the assessment explained to the ward by the guardian. This accomplished, the guardian left, and the examination began with a mental-status examination.

Mrs. Smith's ability to perform simple mathematical calculations was found to be unimpaired as she could add, subtract, multiply, and divide. She had mild constructional deficits as evidenced by some difficulty with the clock drawing and copying of a cube. Her insight and judgment appeared to be good. Mrs. Smith was able to recall the roles of important persons in her life and their relationships to her, but she had significant difficulty naming them. This became apparent when her guardian stopped by to see how the assessment was going. Mrs. Smith was able to recognize her guardian and explain her role, and could recall that she and the guardian were in the process of arranging to move her from the assisted-living facility, where she was

currently residing, to her own home (with 24-hour assistance); however, she could not recall the guardian's name without cueing.

After completing the mental-status examination, Mrs. Smith was questioned about her wishes with regard to estate planning. She was aware that she had never had a will or trust, and she told the evaluator that, because she had no children or other close relatives who were still alive, it had not seemed important until recently. She was able to explain the purpose of a will, as well as the fact that most people leave their assets to their spouse, children, or other close blood relatives under normal circumstances. Mrs. Smith was asked about the extent of her assets and she reported that her guardian had recently shown her a document completed by an accountant and that she had approximately 16 million dollars in various accounts and mixed securities; this report was reviewed, and Mrs. Smith was shown to be correct in her estimation of her assets. Mrs. Smith explained that, upon her death, she wanted her money to be left to a distant cousin in New Jersey, and to two women with whom she had worked when she was younger. She also wanted to leave some of her estate to an animal shelter in honor of a deceased friend who was active in that organization; however, she was unable to remember the names of these individuals. While comprehensive neuropsychological assessment was not undertaken in the current evaluation, her symptoms seemed best characterized as anomic aphasia. Anomic aphasia is a condition in which the patient has generally intact language capability but problems remembering names. The condition may be limited to difficulty remembering the names of people but can also be manifested in problems remembering the names of objects or the inability to use verbs; the latter condition is generally accompanied by problems recalling names.

After the completion of this initial assessment, Mrs. Smith's guardian was contacted and these preliminary findings were discussed. The guardian reported that, although Mrs. Smith had been able to provide the names of her beneficiaries in the past, similar problems had been observed in more recent months and she wanted to see that Mrs. Smith's wishes regarding her estate were presented to the court before Mrs. Smith's condition further deteriorated. While Mrs. Smith appeared to be generally able to express her wishes, her inability to name the beneficiaries was a potential problem. Further, it was possible that simply reminding her of the names she had mentioned previously might create an artifactual memory that might not reflect her true current wishes. The information gathered from the mental-status examination and clinical interview of Mrs. Smith corresponds to both the functional and causal components of Grisso's methodology, since it provided a picture of her capacity to perform the actions required, her limitations in that regard, and an explanation of the observed deficits.

After considering the problem, the evaluator decided that this issue could be addressed using a modification of symptom-validity testing. The names of the individuals she had previously mentioned as potential beneficiaries of her estate were obtained from the guardian. Using these names, the evaluator constructed a multiple-choice test of six items. In the first four items, a list of four names was provided, one of which was a name she had provided to her guardian; the other three were distracter names taken at

random from the telephone book. The last two items contained only distracter names. This test would be used as the first part of the assessment. The evaluator created separate sheets for each potential beneficiary. Each sheet contained questions about Mrs. Smith's relationship to each individual and her reasons for wanting to leave each a portion of her estate. Finally, the evaluator made a document that displayed all four names of the potential beneficiaries with the following written across the top of the sheet:

*I have placed 32 pennies on the table before you. Each penny represents \$500,000 (half a million dollars.) Please use the pennies to show me how much money you would like to leave to each person by placing pennies under their name.*

Mrs. Smith was seen several days later for further assessment. In the first part of the examination, Mrs. Smith correctly identified all four potential beneficiaries immediately, and she did not identify any of the names on the lists made up only of distracter names. In one case, she was able to supply the last name of one of the potential beneficiaries that the guardian had been unable to supply. Mrs. Smith also corrected a misspelling of one of the names. She was able to give the history and nature of each relationship and her reasons for wishing to leave money to each party. Her reasons were identical to those she had given to her guardian some months previously. There was no indication of confused thinking in her wishes, which appeared to be well considered and rational.

Mrs. Smith was then shown the sheet designed to help her indicate her wishes regarding how much money she wanted to leave to each of the named parties using the pennies that had been provided for stimulus support. The evaluator made it clear that the purpose of this exercise was not to make any kind of binding agreement and that the exercise was only an attempt to ascertain her wishes in a general way. Mrs. Smith understood this and was willing to proceed. Mrs. Smith chose not to use the pennies and, without their aid, was able to explain how much money she wanted to will to each of the four individuals she had identified. Her reason for her pattern of distribution was also rational; for example, she thought that one of the individuals should receive an extra \$500,000 since she had three children to support.

In this case, the use of the multiple-choice format for presenting Mrs. Smith with the names of the potential beneficiaries to her estate can be related to the person-in-situation, remediative, and conclusory components of Grisso's methodology. Mrs. Smith might not be considered to have the capacity to express her wishes regarding her estate if she were required to recall the names of her potential heirs without cueing of any kind, but demonstrated that she could do so if names were provided in a multiple-choice format. This aspect of her functional capacity can be seen to relate to both the person-in-situation component (her abilities in a specific context) and the remediative component (the use of the multiple-choice format as a way of assisting her to communicate her wishes). The conclusory component follows from the determination



that she could express her wishes regarding the distribution of her estate in a knowing and rational manner if minor accommodations were provided.

These findings were discussed with Mrs. Smith's guardian and the guardian's attorney. All parties agreed that the results of the assessment were consistent with Mrs. Smith's prior representation of her wishes, and that these results likely met the conditions stated in the controlling statute. A hearing took place before the presiding probate justice in the county with jurisdiction. The justice did not require testimony in the matter and allowed the guardian and her attorney to proceed on offers of proof. When the results of the assessment were presented, the justice ruled that the dictates of the statute had been met, and that he would allow an estate plan to be presented at a later hearing. His only proviso was that no large gifts or other transfer of funds or properties were to be made during Mrs. Smith's lifetime.

### **Conclusions**

The cognitive abilities of persons deemed by probate courts to lack capacity may vary over time and in different contexts. Further, many of these individuals may lack capacity in some areas yet retain normal abilities in others. This may be true even in cases in which an individual is deemed to be so generally functionally impaired that a guardian is appointed. Mental-health professionals performing assessments of capacities and competencies with individuals under guardianship (including but not limited to testamentary capacity) should be mindful of the specific strengths and weaknesses of the individuals they assess, since patterns of capacity and disability are so individualized, specific, and dynamic. In many cases, it will be necessary to tailor assessments to address these highly individualized patterns of disability and ability so as to best assist the courts in making determinations in such cases.

Received February 13, 2012; revision submitted October 3, 2012; accepted October 16, 2012.

### References

Clement v. Rainey, 50 S.W.2d 359 (Tex. Civ. App. 1932).

Frolik, L. (1999). Science, common sense, and the determination of mental capacity. *Psychology, Public Policy, and Law*, 5, 41-58. doi:10.1037/1076-8971.5.1.41

Grisso, T. (2003). *Evaluating competencies: forensic assessments and instruments* (2nd ed.). New York: Kluwer Academic/Plenum Publishers.

Guardians and Conservators Act, N.H. Rev. Stat. § 464-A:26-a (1998 & Supp. 2011).

In re Estate of Kesler, 702 P.2d 86, 96 (Utah 1985).

Pape v. Byrd, 582 N.E.2d.164, 168 (Ill. 1991).

*Uniform Guardianship and Protective Proceedings Act* (1997).