



Special Article

The Medico-Legal Approach to the Assessment of Testamentary Capacity: A Systematic Review

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ABSTRACT

An increase in will challenges on the grounds of lack of capacity and undue influence is anticipated in the face of an imminent transfer of generational wealth by a growing elderly population with a high prevalence of cognitive impairment. Medical experts will be a necessary element of litigation to help the courts make the best legal determinations involving cognitive and psychiatric functions that may affect mental capacity and vulnerability to influence. We conducted the first systematic literature review using Preferred Reporting Items for Systematic Reviews and Meta-Analyses ("PRISMA") guidelines in order to identify articles that addressed a comprehensive medico-legal approach to the assessment of testamentary capacity. Only 12 articles met the criteria for the systematic review. Banks v Goodfellow ("Banks") continues to be considered the leading case that defines the criteria for the courts and lawyers in the determination of testamentary capacity. However, quantitative data to support this impression is nowhere to be found. Moreover, unpredictability remains a hallmark of cases involving will challenges. Since calls for increased medico-legal collaboration and updates to the Banks test have not been evaluated, a scoping review of a large number of judicial decisions is required to better understand the current approach to this legal determination. Relevant variables could be used to develop a predictive model that would help lawyers and medical experts in this important societal collaboration. (Am J Geriatr Psychiatry 2025; 33:546–555)

Editorial accompaniment, please see page 556.

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Highlights

- **What is the primary question addressed by this study?**

The primary question of the literature review is what does a systematic literature review of the medico-legal approach to the assessment of testamentary capacity reveal about the guiding legal criteria and the related medical input.

- **What is the main finding of this study?**

The main finding of the review is the striking lack of systematic and quantitative data on the judicial determination of testamentary capacity.

- **What is the meaning of the finding?**

The meaning and implications of this finding from the systematic review is the need for a scoping review of a large series of judicial decisions and the potential value of a predictive model based on the most relevant variables in these cases.

OBJECTIVE

An increase in will challenges and related estate matters is an inevitable consequence of a rapidly aging population cohort who is about to make the greatest transfer of wealth in human history to a younger generation of complex families under economic strain.¹ These legal challenges, based often on allegations of lack of testamentary capacity and undue influence, are associated with a high prevalence of cognitive and mental disorders in older, vulnerable populations.

The determination of testamentary capacity and undue influence is ultimately a legal decision; however, it involves the assessment of cognitive and psychiatric factors best informed by medical experts.^{2,3} In order for the courts to make the best possible determinations, a cadre of medical experts who understands the needs of the judicial system is essential.⁴ Recent systematic reviews focused on standardized assessment instruments for testamentary capacity found that the gold standard remains clinical judgment.^{5,6} Therefore, medical experts should have the requisite expertise in the assessment of older adults who may be suffering from cognitive, neurological and psychiatric disorders that can affect mental capacity and vulnerability to influence. They also need to appreciate the context of the relevant legal tests and the potential benefits and limitations of their role in these legal disputes. Hence, the universal directive for

medical experts is to acknowledge their first duty to the court. They must provide expert opinions that are within their scope of expertise, be objective and non-partisan, and avoid advocacy on behalf of those who have retained them. The present study aims to systematically review the medical-legal literature on a comprehensive clinical and legal approach to the assessment of testamentary capacity. To our knowledge, this is the first systematic review of this topic in the medical or legal literature and will hopefully inform both medical experts and the legal profession on the current state of knowledge.

METHODS

Information Sources and Search Strategies

We conducted a systematic literature search according to Preferred Reporting Items for Systematic reviews and Meta-Analyses ("PRISMA") guidelines⁷ to identify articles describing the collaborative medico-legal approach to the assessment of testamentary capacity. We searched the following databases: Omni, MEDLINE, PsycINFO, Embase, Cochrane Library, PubMed, and Google Scholar. Search filters included peer-reviewed articles published between 2000 and 2024. Keywords included "Testamentary capacity," "Banks v. Goodfellow," and "Test," both in isolation and in combination using Boolean operators. We adjusted the keywords for each database to ensure relevance and limit the scope of review (see [Table 1](#)).

TABLE 1. Keywords Used for Each Database

Database	Keywords Used	Number of Search Results Produced
Omni	"Testamentary Capacity AND Test"	26
	"Banks v. Goodfellow AND Test"	6
	"Banks v. Goodfellow"	23
Ovid Databases (Cochrane Library, Embase, MEDLINE, and PsycINFO)	"Testamentary Capacity AND Test"	77
	"Testamentary Capacity AND Banks v. Goodfellow"	31
	"Banks v. Goodfellow AND Test"	14
PubMed	"Testamentary Capacity AND Test"	6
	"Banks v. Goodfellow"	10
Google Scholar	"Testamentary capacity AND Banks v. Goodfellow"	380

Notes: A total of 573 search results were produced.

Selection Process

- **Inclusion criteria:** Articles were eligible if they 1) addressed current practices, criticisms, or reforms related to the assessment of testamentary capacity; and/or 2) adopted an interdisciplinary approach, integrating both legal and medical perspectives.
- **Exclusion criteria:** We excluded articles that 1) were not peer-reviewed, not written in English, or not accessible to the general academic or professional community (e.g., behind a paywall); 2) focused on topics outside the scope of testamentary capacity, whether legal or medical; 3) centered on the development or validation of specific instruments or tools for assessing capacity, due to their narrow focus, which may overlook broader interdisciplinary concerns; 4) concentrated exclusively on specific cognitive screening tools or methods used by medical experts for assessing cognitive impairment without considering the legal implications or broader context; 5) served primarily as practical guides or educational resources for legal or medical practitioners focused individually on the technical aspects of assessing capacity; and/or 6) focused on statutory wills, made on behalf of individuals whose testamentary incapacity was established before their final will was executed.
- **Selection of relevant articles:** We compiled the articles into a master list and discarded duplicated before screening. Two reviewers (AJ and BC) independently assessed the titles and abstracts of the remaining articles, removing those that met the exclusion criteria. AJ and BC retrieved the full texts of articles that appeared to meet the inclusion criteria and evaluated them for eligibility. Each reviewer critically appraised the remaining

full texts, focusing on their relevance to the research question, and independently decided which articles to include. AJ and BC resolved any discrepancies between them through discussion and consulted a third independent arbitrator if necessary.

- **Data collection:** AJ and BC independently extracted data from each included article and recorded the information in identical spreadsheets based on predefined variables. AJ and BC then met to discuss recurrent themes before AJ synthesized the data from both spreadsheets into a cohesive analysis.

Variables

We collected numerous variables from the PRISMA 2020 checklist from each article. We selected variables based on their relevance to the research objective and defined them to capture the full scope of the discussion surrounding the legal and medical assessment of testamentary capacity.

- **Article details:** the title of the article, the year of publication and the relevant jurisdiction(s)
- **Primary objectives and perspectives:** discussions of *Banks v Goodfellow* ("*Banks*"), other relevant statutes and laws, the pitfalls and challenges in the legal approach, as well as perspectives on the medical approach to the assessment of testamentary capacity, focusing on the role of medical experts in testamentary capacity assessments, the distinction between contemporaneous and retrospective assessments, the consideration of lucid intervals and the evaluation of cognitive screening tests and their role in assessing cognitive function

- **Proposed reforms and implications:** scope and focus of suggested legal and medical reforms, including the potential implications of the proposed changes on practice and policy.
- **Quantitative data:** any quantitative data to support the articles' arguments and opinions
- **Conclusions:** concluding statements regarding the assessment of testamentary capacity
- **Miscellaneous notes:** any proposed directions for future research, other relevant information not captured in the above categories and any limitations of the articles
- **Excluded variables:** quantitative variables such as the study risk of bias assessment, effect measures, synthesis methods, reporting bias assessment and certainty assessment

RESULTS

Search Results

Fig. 1 illustrates the selection process. The initial database search yielded a total of 573 articles. After identifying and removing 160 duplicates, 413 unique articles remained for initial screening. During the screening process, we reviewed the titles and abstracts of articles. Based on the exclusion criteria, we excluded 391 articles, leaving 22 articles for further review. AJ and BC subsequently sourced and independently appraised the full texts of the 22 articles. Additional exclusion criteria at this stage included: 1) articles providing broad overviews of well-established concepts, such as the *Banks* case or the importance of medical-legal collaboration in assessing testamentary capacity ($n = 3$); 2) articles that were reflective rather than analytical ($n = 1$); older iterations of included articles written by the same primary author ($n = 1$); and articles with full texts not available in English or unavailable altogether ($n = 5$). Ultimately, 12 articles met all the inclusion criteria and were included in the final analysis (see Table 2).

Theme Identification and Analysis

Banks as the leading case

Almost all of the articles underscored the central role of *Banks* in assessing testamentary capacity. The case was repeatedly described as:

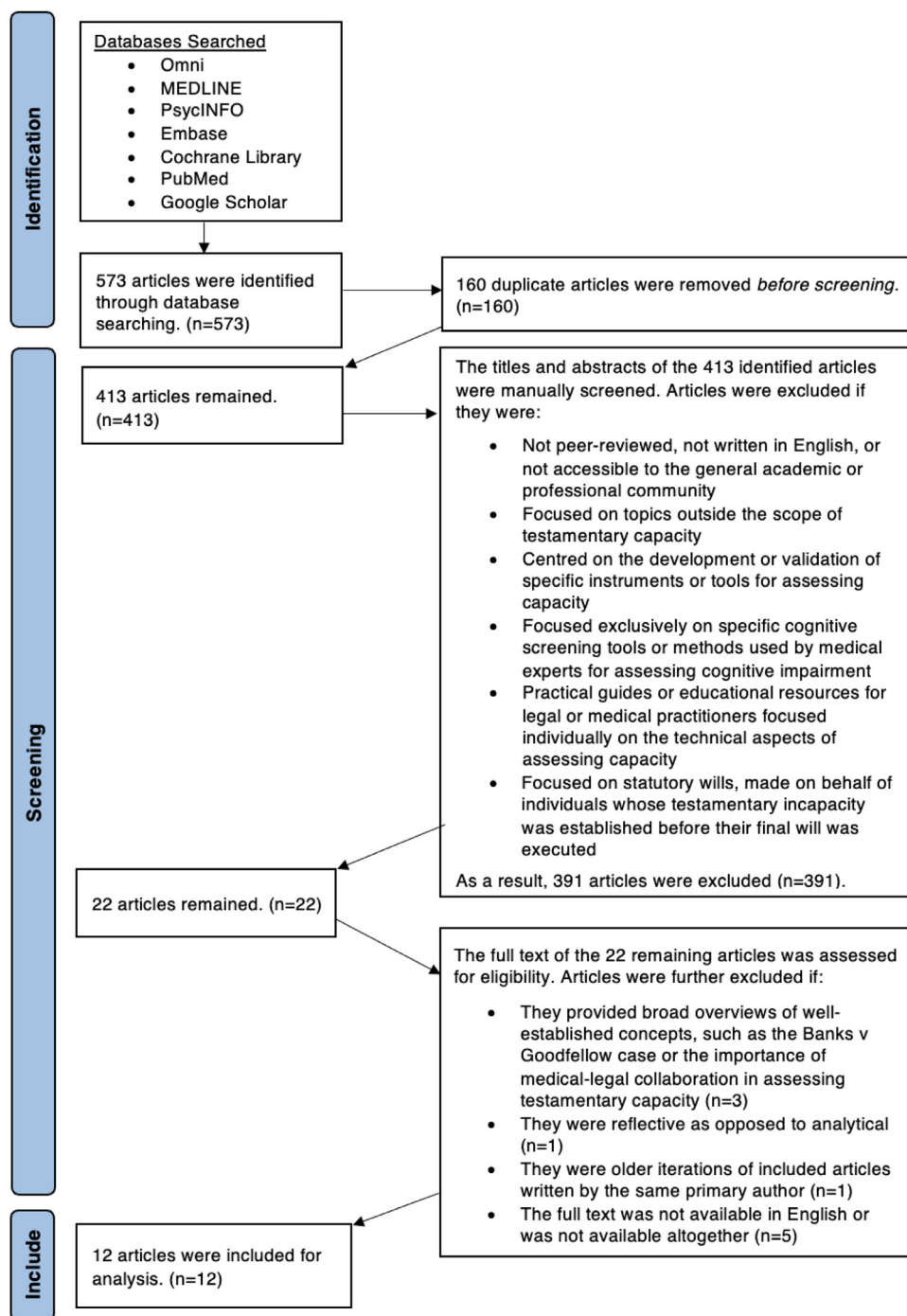
- “The landmark case for determining testamentary capacity” (Article 1)
- “Authority for the principle that the capacity to make a will is not lost because of unsoundness of mind that does not affect the will itself” (Article 2)
- “The landmark judgment for assessing testamentary capacity” (Article 3)
- “The overriding legal test for testamentary capacity under common law” (Article 4)
- “The English case that underpins most legal discussions of testamentary capacity” (Article 5)
- “The leading case on testamentary capacity” (Article 9)
- “The case that still dominates the question of testamentary capacity” (Article 10)
- “The leading case on testamentary capacity [in Canada and most other English-speaking jurisdictions]” (Article 11)
- “Essential to any discussion of testamentary capacity” with “strong precedential value” (Article 12)

Despite the consensus on the importance of *Banks*, no articles provided quantitative data on the case's citation frequency or influence on judicial decisions. The closest reference was a non-peer-reviewed article citing Professor Albert H. Oosterhoff's assertion that *Banks* “has stood the test of time and continues to be cited as the authority on testamentary capacity in England, Canada, and the rest of the common law world”.¹⁸ However, it is important to note that this quote is from Oosterhoff's paper, which revealed no quantitative data on the frequency of *Banks* citations in judicial decisions. The article focused on topics such as the burden and standard of proof, suspicious circumstances, and the timing for establishing testamentary capacity within the context of selected recent cases. As a result, this paper by Oosterhoff did not meet the eligibility criteria for the present systematic literature review.

The need to update the testamentary capacity test

Several articles explicitly argued for the need to update the *Banks* test. For instance, Article 2 highlighted significant advances in psychiatry and psychology, noting the surprising lack of refinement in the legal doctrine over time. The article emphasized the “reluctance of the law to adapt to the intricacies of

FIGURE 1. Is a flow diagram of the study selection process, based on the PRISMA guidelines.



human behavior and evolve with scientific knowledge.” Similarly, Article 3 argued that advancements in medical science demand updated legal standards,

describing *Banks* as “too confining in light of the greater understanding of the mind now available from modern psychiatric medicine.” Other articles implied

TABLE 2. Final List of Articles for Systematic Review

#	Author(s)	Article Title	Main Findings
1	Purser, K. ⁸	Assessing Testamentary Capacity in the 21st Century: Is Banks v Goodfellow Still Relevant?	Compared to <i>Banks</i> , dementia is the most common condition involved. Advocate for a general code of practice.
2	Zuscak, S., Coyle, I., Keyzer, P., et al. ⁹	The marriage of psychology and law: testamentary capacity	Need to update the legal test considering advances in clinical neuroscience. Call for validated protocols.
3	Casey, J., & Grant, A. ¹⁰	The assessment of testamentary capacity	<i>Banks</i> is too confining in light of medical advances in understanding of capacity.
4	Lam, C. L., Siu, B. W. M., & Yau, V. C. K. ¹¹	Advancement in the medicolegal requirement for testamentary capacity assessment in older adults: the dilemmas in Hong Kong	Criticized inadequate instructions from lawyers and failure to review prior wills.
5	Shulman, K. I., Peisah, C., Jacoby, R., et al. ¹²	Contemporaneous assessment of testamentary capacity	Contemporaneous assessment as gold standard because of ability to probe cognition. Importance of situation-specific factors while standardizing the approach to assessment.
6	Weisbord, R. K., & Horton, D. ¹³	The future of testamentary capacity	Rulings on lack of testamentary capacity have resisted progressive forces that have swept guardianship legislation.
7	Lonie, J., & Purser, K. ¹⁴	Assessing testamentary capacity from the medical perspective	Increased focus on dementia found in 50% of cases reviewed in 12 months. Highlights disconnect between clinical and legal perspectives.
8	Tan, K. W. ¹⁵	A tale of two capacities: Assessing the mental capacity act's relevance in proving testamentary capacity in Singapore	Need to recognize a broader range of conditions which affect capacity. Propose to adopt the UK Mental Capacity Act as the test for testamentary capacity.
9	Shulman, K. I., Himel, S. G., Hull, I. M., et al. ¹⁶	<i>Banks v goodfellow</i> : time to update the test for testamentary capacity	<i>Banks</i> inadequate for the intricacies of modern estate litigation. Need to recognize more complex cognitive abilities such as executive brain functions in reasoning.
10	Shulman, K. I., Cohen, C. A., & Hull, I. M. ¹⁷	Psychiatric issues in retrospective challenges of testamentary capacity	Emphasis on complexity and conflict in the determination of the threshold for capacity. Review of 25 cases revealed prominence of dementia and alcohol abuse.
11	Shulman, K., Herrmann, N., Peglar, H., et al. ²	The role of the medical expert in the retrospective assessment of testamentary capacity	Defined the role of the medical expert including potential benefits and limitations. Provide a guide to the retrospective assessment of capacity as an aid in standardization.
12	Lawson, S. ¹⁸	Testamentary capacity in Canada: a call for medical-legal co-operation	Call for medico-legal collaboration in light of the inherent unpredictability in testamentary case law.

the need for an updated test by discussing the limitations of the present test and proposing reform.

Criticisms of the banks test

The *Banks* test has faced criticism for its limitations in addressing the complexities and subtleties of modern testamentary capacity cases. Article 1 noted that increased personal wealth and more complex estate plans make it challenging for a modern testator to understand the nature and extent of their financial assets. Article 9 echoed this concern, observing that the test does not account for the intricacies of modern estate litigation. The *Banks* test's general approach to

capacity overlooks the testator's specific context, including complex family dynamics, blended families, or potential conflicts among family members.

Similarly, Articles 1, 2, 7, 8, 9, and 12 argued that the focus on psychosis makes the test less applicable to other more common capacity-affecting conditions, such as dementia. Article 8 emphasized that modern psychiatric medicine recognizes a broader range of circumstances and mental disorders affecting decision-making. Furthermore, Article 9 explained that while the original test references relevant cognitive skills, such as understanding and appreciating claims, it does not account for additional contemporary concepts crucial to testamentary capacity, including the

testator's ability to manipulate relevant knowledge, reason from it, and draw conclusions.

Article 10 suggested that while *Banks* provides a solid foundation for assessing testamentary capacity, the complexity and subtlety of the issues in recent cases highlight the need to move beyond traditional criteria and consider situation-specific factors. Article 12 further critiqued the overwhelmingly legal nature of the current test, highlighting that despite advancements in neuroscience, the legal test remains disconnected from modern medical understanding of capacity. These concerns are particularly relevant, considering the increasing prevalence of dementia and other conditions that affect testamentary capacity. Article 7 notes that five out of ten disputed testamentary capacity cases reviewed over a twelve-month period involved testators whose capacity was questioned due to dementia. Such a significant prevalence indicates that the challenges associated with this condition are not merely theoretical but are frequently encountered in legal proceedings. Moreover, a psychiatrist's review of 25 consecutive will challenges (Article 10) revealed that frank dementia was present in 40% of the cases, often accompanied by comorbid conditions such as alcohol abuse (28%) and other neurological or psychiatric disorders (28%). The frequent occurrence of complex, overlapping conditions underscores the need for a legal test that can account for the diverse and multifaceted nature of modern capacity challenges.

Concerns with the application of the banks test

Numerous articles focused on the testamentary capacity assessment process and the application of the test. Article 1 described *Banks* as a sound, general formulation of the legal elements necessary for assessing testamentary capacity. To support its assertion, the article provided empirical data which revealed that 60% of legal practitioners and 90% of medical practitioners believe the test itself does not need modification, but its application should be reconsidered in light of modern challenges.

Article 4 critiqued the assessment process, highlighting common pitfalls, including inadequate instructions from lawyers to medical experts, a lack of a detailed estate outline for assessment, failure to review previous wills, and inconsistent detection of mental, cognitive, or physical disorders affecting

testamentary decisions. The *Banks* test also has interpretative issues, such as uncertainty in understanding what "the extent of one's property and appreciate claims" entails.¹⁶

Article 7 further stressed the fundamental disconnect between legal and medical professionals in assessing capacity. While health professionals assess capacity from a medical and cognitive standpoint, legal professionals focus on the legal requirements necessary to make a decision or enter into a legally recognized transaction, often without the necessary training to assess clinical capacity. Echoing this concern, Article 5 emphasized the importance of medico-legal collaboration in assessing testamentary capacity.

Proposed reform

Based on these concerns, reform may require a two-pronged approach, whereby both the legal test itself and its practical application are updated. The present review reveals a strong consensus on the need for reform in these areas, with three recurrent themes emerging - 1) the overall standardization of capacity assessments; 2) updates to key aspects of the *Banks* test; and 3) and improved medico-legal collaboration.

Standardization of testamentary capacity assessments

Several articles emphasized the need for standardized practices in assessing testamentary capacity. Article 1 advocated for the development of guidelines or a general code of practice to clarify the roles of medical professionals and the legal elements to be assessed, along with methods for the effective communication of findings and opinions. Article 2 highlighted the high rate of disagreement among physicians on capacity determinations with a significant number of impaired patients being missed, underscoring the need for more reliable standards and validated protocols. Additionally, Article 5 discussed the development of standardized contemporaneous assessments, importantly noting that situation-specific factors must be incorporated. Article 4 aimed to address standardization, proposing a risk-based framework for testamentary capacity assessment, dividing responsibilities between legal and medical professionals. Finally, Article 11 further outlined a physician's guide to the retrospective assessment of

testamentary capacity, which includes essential components to aid in standardization.

The systematic review of standardized assessment instruments by Aravind et al.⁵ did not meet our inclusion criteria for a comprehensive medico-legal approach to the assessment of testamentary capacity as it focused only on a review of assessment instruments and was not a review of a medico-legal approach. This paper did not probe the legal perspective as no legal authors were involved. However, it is worth noting that they found only three instruments that had acceptable psychometric properties: The Testamentary Definition Scale¹⁹; The Testamentary Capacity Assessment Tool²⁰ and The Testamentary Capacity Instrument.²¹ Moreover, it was concluded that clinical judgment remains the gold standard and no current standardized instrument can be recommended. Similar limitations as in Aravind et al.⁵ also apply to the review by Kenepf et al.⁶ which focused primarily on current assessment methods and on standardized instruments without legal author input into the legal tests for testamentary capacity. Consequently, we are left with the various medico-legal guidelines provided by the articles reviewed in our systematic review.

Updates to specific aspects of the testamentary capacity test

Many articles identified specific aspects of the *Banks* test that should be updated to reflect the modern understanding and context of testamentary capacity. Article 1 promoted the use of contemporaneous assessments to evaluate a living testator as close as possible to the time of will execution. Article 7 outlined various considerations for an updated testamentary capacity assessment, such as conducting comprehensive cognitive assessments beyond the MMSE and choosing experts with specific knowledge related to the testator's condition. Article 8 proposed adopting the test for testamentary capacity in the *Mental Capacity Act 2005*, focusing on understanding, retaining, using, and communicating information, and removing outdated requirements like "delusions" or an "abnormal state of mind." Article 9 argued that the criteria for testamentary capacity should be adapted to the modern medical understanding, focusing on executive functioning and recognizing the task-specific and situation-specific nature of capacity. This includes the incorporation of

situational complexities, such as family dynamics and potential conflicts, into the criteria. Article 10 highlighted specific scenarios that require further probing and documentation by the lawyer or expert assessor, such as radical changes in the will, evidence of mental or neurological disorders affecting cognition or judgment, and dependent situations where the testator is vulnerable to undue influence. These recommendations are supported by a psychiatrist's review of 25 consecutive will challenges, providing a quantitatively justified profile of typical capacity challenges.

Medico-legal collaboration

Finally, numerous articles emphasized the importance of enhancing collaboration between legal and medical professionals to improve the accuracy and reliability of testamentary capacity assessments. Article 1 encouraged enhanced education and information-sharing between these professionals to improve assessment accuracy. Article 4 provided interdisciplinary recommendations to improve mutual understanding and communication, and to provide training for legal professionals on handling will preparation and execution for older adults. Article 5 highlighted the need for interdisciplinary collaboration, especially in theory and model building, instrument development, clinical education, and empirical studies. Article 7 suggested that part of the updated testamentary capacity assessment should include providing relevant legal information to medical experts, such as details of the client's assets, previous wills, and specific instructions on assessing each limb of the *Banks* test. Article 12 called for better collaboration between lawyers and healthcare professionals working with the elderly, noting that "it would be unreasonable to expect lawyers to be experts on dementia and neurologists to be experts on wills and estates issues. However, increased information-sharing between these professionals would benefit testators as the professions together possess the skills necessary to satisfactorily assess capacity."

Lack of data investigating reform implementation

Despite the various proposals for reform, the literature is notably missing an analysis on whether these recommendations are being implemented in practice.

None of the articles provided data on key aspects of reform implementation, such as whether judges are adopting these updated formulations in recent testamentary capacity decisions, or which cognitive screening tests are most prevalent in contemporaneous assessments. Additionally, there is little to no information on how frequently solicitors obtain capacity opinions from medical experts, a key reflection of the level of medico-legal collaboration in practice. Article 1 explicitly acknowledged this shortcoming, noting that “it is not documented in the literature how widely, if at all, this amended formulation is being implemented by legal and/or medical professionals.”

CONCLUSION

In this analysis, we have reflected the medico-legal approach currently described in the literature and have not attempted to provide our own guidelines for testamentary capacity assessments. The continued perceived dominance of *Banks* in discussions of testamentary capacity is clear. Despite the case’s historical significance, the current analysis reveals a striking lack of quantitative data supporting its ongoing relevance in contemporary judicial decisions. This gap in the literature highlights the critical need for a scoping review that systematically analyzes judicial decisions to determine the frequency of citations of *Banks* or other cases. Such a review could offer valuable insights into whether *Banks* is being supplanted by newer legal tests or if it continues to serve as the leading precedent in testamentary capacity cases.

Additionally, the literature reveals widespread calls for updating the legal test for testamentary capacity to reflect advances in medical science, particularly in psychiatry and psychology. However, the extent to which these proposed updates are implemented in practice remains unclear. A scoping review could also focus on the application of these reforms. Key questions include whether contemporaneous assessments are more heavily weighted than retrospective ones, which cognitive screening tests are most frequently used to assess capacity, and what role solicitors are playing in testamentary capacity assessments. Researching

these questions would not only address a critical gap in the literature, but also provide a more comprehensive understanding of how testamentary capacity is assessed in modern contexts, including the potential for a more standardized approach to assessment of testamentary capacity.

Furthermore, Article 12 highlighted the inherent unpredictability in testamentary capacity case law, noting that “the only certainty (...) is unpredictability.” This underscores the potential value of developing a predictive model informed by scoping review data. Such models could help identify trends in testamentary capacity disputes, enabling legal professionals to anticipate issues more effectively and potentially reducing the strain on judicial resources. By offering a more systematic and data-driven approach to assessing testamentary capacity, a predictive model could help reduce the unpredictability of case law in this area, offering a stronger framework for navigating the complexities of testamentary capacity disputes. Medico-legal collaboration is an essential approach to a legal determination that is informed by cognitive and psychiatric issues.

DATA STATEMENT

No research data was used in the preparation of this paper.

DISCLOSURES

The authors have no disclosures to report.

AUTHOR CONTRIBUTIONS

AJ – Implementation of PRISMA guidelines, review of relevant articles, drafting of manuscript, editing and revising manuscript, approval for submission.

TM – Critical review and revision of manuscript, editing and formatting of manuscript, preparation and approval for submission.

IMH, KS – Conception of the systematic review, critical revision of the manuscript, editing and approval for submission.

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