

Assessing Testamentary Capacity

In this factsheet, we explain the role of the GP generally in assessing testamentary capacity for a patient who wishes to make a will, or in providing an opinion on the capacity of a deceased patient who previously made a will.

Making a will

Under Irish law, a “testator” (person making a will) must be 18 years or over or be married and must be of sound mind. Adults are presumed to have the capacity to make a will unless proven otherwise.

Even though a person may not have capacity all the time, a will can be made in a lucid period if the person has capacity at the time it is made.

Assessment

Any medical practitioner can assess testamentary capacity. A GP must respect the individual requirements of each patient and create a suitably calm and quiet environment in which to test capacity. When a GP assesses a patient’s mental capacity to make a will he/she should carefully document his/her findings in the patient’s medical records and the basis upon which the findings are made. If a GP feels it is not within his/her expertise to assess the capacity of a particular patient or the GP has doubts as to a patient’s capacity to make a will, the GP can recommend a referral for these purposes to an appropriate expert, for example a geriatrician.

Legal test of Testamentary Capacity

Testamentary capacity is a specific legal test, which is different to assessing general mental capacity. It is the solicitor’s duty and not the GP’s duty to determine whether or not his client has testamentary capacity. Medical opinion from a GP or other medical practitioner may assist the solicitor in deciding whether his client has testamentary capacity but a medical opinion is not a substitute for a legal determination of testamentary capacity.

As part of the assessment, we suggest that a GP might consider asking the patient general questions about the nature and extent of his/her assets, rather than asking the patient’s solicitor for specific details of a patient’s assets. When responding to the solicitor, the GP can then relay what the patient had advised in terms of the nature and extent of his / her assets. If there is a discrepancy between what the GP recorded and the solicitor knew to be true, it then falls to the solicitor to resolve the issue with his / her client.

GP’s role

The GP may have a role to play at two points in time:

- 1. When a patient wishes to execute a will.**

If the solicitor has any doubt as to the client’s testamentary capacity when the client requests to make a will, the solicitor may ask the GP to assess his/her patient and confirm in an affidavit the GP’s medical opinion that the patient has the requisite capacity to make the will.

At the outset the GP is advised to request from the solicitor:

- Formal written instructions to ensure that the GP understands the reason for the requirement for the mental capacity to be tested;
- Proof in writing that the patient consents to the examination and to disclosure of the requisite information to the solicitor;
- Written confirmation that the GP's fee will be paid.

The GP should:

- Assess and document carefully his/her findings on capacity;
- Confirm the patient is acting freely without any undue influence from third parties;
- Confirm the patient understands that he/she is making a will;
- Confirm the patient understands the nature of his/her assets in general terms;
- Confirm the patient understands the consequences of his/her proposed dispositions and that the patient has given due consideration to persons expected to benefit.

2. When a patient (testator) dies and an application is made to the Probate Office to prove the patient's will.

The Probate Office will presume the testator had testamentary capacity unless there are indicators which would raise a concern as to the testamentary capacity of the testator. Such indicators include a situation where the death certificate of testator indicates Alzheimer's disease, dementia, or cognitive impairment either as the main cause of death or a co-existing condition.

In such circumstances an Affidavit of Testamentary Capacity may be required by the Probate Office. The solicitor acting for the Legal Personal Representative (e.g. executor) of estate will usually write to the testator's GP asking the GP to give an opinion on the testator's testamentary capacity at the time of making the will.

The Probate Office usually insist on affidavits sworn under oath of testamentary capacity from the GP as opposed to accepting a letter from the GP. An affidavit is a written sworn statement of fact. The solicitor will usually send a GP a standard affidavit for signature under oath.

If the testator's GP at the time of execution of the will is retired or deceased and the current GP has access to the previous medical records and / or had treated the patient subsequent to the will being made, he / she may be able to swear an affidavit. The current GP should review the medical records carefully and if they are satisfied that there is nothing in the records to suggest the patient had any capacity issues at the time the will was made, they can consider swearing an affidavit to the effect that:

- The testator's original GP at the time of the testator making the will is deceased or retired, and
- The testator's more recent GP has known and treated the testator for a number of years and while the patient was diagnosed with dementia in more recent years there is nothing in the medical records to suggest the testator lacked capacity at the time they made the will.

If the testator's GP at the time of execution of the will is deceased and the GP who has taken over the practice of the deceased's practitioner has no access to the medical notes of his predecessor, the GP cannot swear an affidavit on the testator's capacity. In those circumstances the Probate Office may accept an affidavit from the solicitor who took the instructions and drew up the testator's will and this is a matter for the solicitor.

Affidavits

A GP is advised to view an affidavit in the same way as if he/she was giving evidence in Court under oath and realise that he/she could in the future be questioned on the truth of the affidavit. A GP must ensure that he/she is satisfied with the wording of the affidavit and not feel intimidated or pressurised into swearing one. A GP can ask the solicitor to amend the wording of any such affidavit before swearing.

When the GP is happy with the content of the affidavit, they must sign it in front of a Commissioner for Oaths or practising solicitor, who will check the identity of the GP swearing it. The GP will be asked to take an oath on the bible or make an affirmation before signing.

Members are invited to contact Medisec for advice in relation to any affidavit prior to signing it.

“The contents of this publication are indicative of current developments and contain guidance on general medico legal queries. It does not constitute and should not be relied upon as definitive legal, clinical or other advice and if you have any specific queries, please contact Medisec for advice”.