Medico-Legal **Opinion**

MS CLAIRE CREGAN

Assessing a patient's testamentary capacity

Ms Claire Cregan, *Legal Counsel at Medisec, provides advice on how to act in response to requests to assess the mental capacity of patients who want to make or alter a will*

Doctors are often asked to assess testamentary capacity for a patient who wishes to make/alter a will or to provide a retrospective opinion on the testamentary capacity of a deceased patient at the time of making their will. In Medisec, we receive regular queries regarding such requests and this article seeks to explain the role of a doctor in that process.

Legal test

A will is an important document as it allows an individual to communicate their wishes as to how their assets are to be distributed after their death. Testamentary capacity is the term used to describe a person's legal and mental ability to make or alter a will. Adults are presumed to have testamentary capacity, unless proven otherwise.

Testamentary capacity or the test of 'sound disposing mind' is set out in the case of Banks v Goodfellow (1870), where it was held that a testator (person making a will) must be capable of understanding:

i. The nature of the act of making a will and its effects;
ii. The extent of the property of which they are disposing; and,
iii. The claims to which they ought to give effect (those who might expect to benefit in their will).

Further, the testator must not have a mental illness that would influence them to make bequests they would not otherwise have made.

The role of a doctor

As a doctor, you may be requested to provide an opinion on testamentary capacity at two points in time:

i. When a patient wishes to execute a will; and,
ii. When an application is made to the Probate Office to prove the patient's will, after their death.

Most people make their will without the need for a formal assessment of their testamentary capacity; however, a solicitor may ask a medical practitioner to carry out an assessment of their client where there is some uncertainty; for example, where their client is showing signs of cognitive impairment or is in the early stages of dementia. This request will usually be made to their client's GP or to a geriatrician who, following assessment, will be asked to confirm their medical opinion as to the individual's capacity to make a will at that particular point in time.

It is important to remember that a medical opinion is not a substitute for a legal determination of testamentary capacity. Ultimately, it is the solicitor's obligation to determine whether their client has testamentary capacity and is therefore capable of making a will.

Carrying out the assessment

If you are asked to assess a patient's testamentary capacity, you should first consider if it is within your area of clinical expertise to do so. If you feel the assessment would be beyond your expertise or if you have doubts as to the patient's capacity, you can recommend a referral to a specialist, for example a geriatrician, and you should explain your decision for referral to the patient or solicitor who has requested the assessment.

If you are happy to proceed with the assessment, you should request the following information from their solicitor:

- Formal written instructions as to why you are being asked to assess the patient's mental capacity; and
- Written confirmation that the patient consents to the assessment and to disclosure of your opinion to their solicitor.

It is advisable to see the patient as close as possible to the time of making their will. When assessing your patient, it is important to respect each patient's individual requirements and create a suitably calm and quiet environment; for example, a person who is unwell may not have capacity all of the time, but they may have lucid intervals and can make a will if they have sufficient testamentary capacity at the relevant time.

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At the outset, you should confirm that the patient:

- Understands that he/she is making a will;
- Is acting freely without any undue influence from third parties;
- Understands the nature of his/her assets in general terms.

(We suggest 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 the patient's assets. When responding to the solicitor, you can then relay what the patient advised and if there are any discrepancies between what the patient reported to you and what the solicitor believed to be true, it then falls to the solicitor to resolve/clarify the issue with their client.)

- Understands the consequences of his/her proposed bequests and has given due consideration to persons expected to benefit.

Recording your assessment

It is vital that you carefully document the details of your assessment and your findings/opinion in the patient's medical records and the basis upon which your findings/opinion are made. If a patient's will is later contested and their testamentary capacity questioned, for example by a family member who expected to receive a bequest in the will, your contemporaneous consultation note will be of great importance and the details will assist you should you be requested to give evidence in court or swear an affidavit as to your clinical opinion at that time.

If, following your assessment, there is any doubt as to your patient's testamentary capacity, we suggest that you refer the patient to a specialist for further assessment.

Affidavit of testamentary capacity

The Probate Office is part of the High Court and its main function is to give lawful authority to a nominated person (eg, the executor named in the will) to deal with a deceased person's estate. The Probate Office will presume the testator had capacity at the time they made their will, unless there are indicators which may raise a concern; for example, where the person's death certificate indicates Alzheimer's disease, dementia or cognitive impairment. In such circumstances, an affidavit of testamentary capacity, which is a sworn statement of fact, may be required by the Probate Office in order to prove the deceased's will.

The solicitor acting on behalf of the legal personal representative (eg, executor) of the deceased's estate may write to the deceased's doctor, usually their GP in the first instance, asking for an opinion as to their patient's testamentary capacity at the time of making their will. The Probate Office usually insists on receiving an affidavit, rather than a letter, from the doctor confirming their opinion. The solicitor will likely send a draft affidavit to the doctor containing standard wording for signature/swearing under oath.

We advise a doctor to view an affidavit in the same way as if they were giving evidence in court under oath; a doctor should not swear an affidavit unless they can stand over the complete content as they could in the future be asked to attend court and be cross-examined under oath in respect of the content of a sworn affidavit.

If you are requested to swear an affidavit confirming a patient's testamentary capacity, you should carefully review the patient's medical records with a focus on the time period prior to/in and around when they made their will. If you are satisfied that there is nothing in the medical records to suggest the patient had any capacity/cognitive issues at that time and you can stand over all statements being attested to in the affidavit, you can arrange to have the document sworn as requested.

It is open to you to make any changes to the wording of the affidavit that you feel more accurately reflects the position following your review of the medical records. You should not feel intimidated or pressurised into swearing an affidavit and you should ask the solicitor to amend the wording before swearing to ensure that it accurately reflects the position.

It may be that the patient's GP, for example, at the time of execution of their will is now retired or deceased and you as the patient's current GP have access to the previous medical records. In that situation, you should carefully review the records drafted by your colleague to ensure that there is nothing to suggest the patient had any capacity/cognitive issues at the time they made their will and you may consider swearing an affidavit to the effect that:

- The testator's original GP at the time of making their will is deceased or retired;
- You have known and treated the testator for a number of years (if that is the case);
- You can refer to the fact that in recent years the testator developed, for example, Alzheimer's disease, dementia, cognitive impairment (as appropriate), but having carried out a detailed review of their records there is nothing to suggest the testator lacked capacity/had cognitive impairment at the time they made their will (if that is the case).

If, however, you do not have access to the medical notes of your predecessor, we suggest that you do not swear an affidavit in respect of the testator's capacity at the time of making their will. The Probate Office may instead 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. As mentioned above, it is the solicitor's obligation to determine whether their client had testamentary capacity and was capable of making their will at that time.

In summary, assessing a patient's testamentary capacity or providing a retrospective opinion on the testamentary capacity of a deceased patient may not be straightforward and we advise a doctor who receives such a request to contact their indemnifier for guidance and advice prior to responding and swearing an affidavit on the matter.