

Assessing testamentary capacity in a patient

GPs are advised to tread carefully when asked to assess a person's mental capacity to make a will, writes Claire Cregan

A WILL IS AN IMPORTANT DOCUMENT as it allows an individual to communicate their wishes as to how their assets and property is 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. This article seeks to explain the role of the GP in assessing testamentary capacity for a patient who wishes to make/alter a will and also addresses requests to GPs to provide a retrospective opinion on the testamentary capacity of a deceased patient at the time of making their will. Members regularly contact us at Medisec with queries of this nature.

Legal test

Testamentary capacity and mental capacity are not one and the same. A person may have capacity for some legal purposes but lack capacity for others. Adults are presumed to have testamentary capacity unless proven otherwise. Testamentary capacity or the test of 'sound disposing mind' is set out in *Banks v Goodfellow* (1870), where it was held that a testator must be capable of understanding the following:

- The nature of the act of making a will and its effects
- The extent of the property of which they are disposing
- The claims to which they ought to give effect (those who might expect to benefit from the 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 GP

Most testators make their wills without the need for an assessment of their mental capacity; however, where there is uncertainty a solicitor may ask a medical practitioner, usually their client's GP, to assess the patient and confirm in an affidavit their medical opinion as to the patient's capacity to make a will. 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.

As a GP, you may have a role to play at two points in time:

- When a patient wishes to execute a will
- When an application is made to the Probate Office to prove the patient's will after their death.

Carrying out the assessment

If you are asked to assess a patient's testamentary capacity, you should first consider if it is within your 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 to make a will, you can recommend a referral to a specialist, eg. a geriatrician, and you should explain your decision to the patient or solicitor who has requested the assessment.

If you are happy to proceed with the assessment, it is advisable to see the patient as close as possible to the time of making their will. You should request from the solicitor:

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

When assessing your patient, you must respect their individual requirements and create a suitably calm and quiet environment. 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 relay what the patient advised and if there is a discrepancy between what you recorded and what the solicitor knew to be true, it then falls to the solicitor to resolve the issue with their client

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

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.

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

Following your assessment, if there is any doubt as to your patient's testamentary capacity, we suggest that you refer the patient to a specialist.

Application to the Probate Office to prove the patient's will

The Probate Office is part of the High Court and its main function is to give lawful authority to deal with a deceased person's estate. The Probate Office will presume the testator had capacity unless there are indicators that would raise a concern, eg. where the death certificate of the testator indicates Alzheimer's disease, dementia or cognitive impairment 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 to prove the will.

The solicitor acting for the legal personal representative, ie. executor, of the deceased person's estate may write to the GP asking for an opinion on their deceased patient's testamentary capacity at the time of making their will. The Probate Office usually insists on receiving an affidavit, which is a sworn statement of fact, rather than a letter, from the GP. The solicitor will usually send the GP an affidavit with standard wording for signature under oath. If you are requested to swear an affidavit, you should carefully review the medical records and if you are satisfied that there is nothing in the records to suggest the patient had any capacity/cognitive issues at the time they made their will, you can swear the affidavit as requested, provided you can stand over all statements being attested to in it. It is open to you to make any changes you feel more accurately reflect the position.

If the testator's GP at the time of execution of their will is retired or deceased and you as their current GP have access to the previous medical records, you may be able to swear an affidavit. In this situation you should review your colleague's records to ensure there is nothing to suggest the patient had capacity/cognitive issues when they made their will and you can 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 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.

- You have known and treated the testator for a number of years (if that is the case)

If you do not have access to the medical notes of your predecessor, you should not swear an affidavit on the testator's capacity. 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.

You should not swear an affidavit unless you can stand over the content; we advise you to view an affidavit in the same way as if you were giving evidence in court under oath. It is therefore important not to feel intimidated or pressurised into swearing an affidavit and to ask the solicitor to amend the wording before swearing to ensure that it accurately reflects the position, as you could be questioned on the truth of the content in the future.

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 that you contact your indemnifier to seek advice in relation to any affidavit prior to signing it. 

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ICGP Library Recommended Reading – Recent Highlights



Each month ICGP librarians scan resources to highlight recently published material relating to Irish general practice

ICGP PUBLICATIONS (LOGIN REQUIRED TO ACCESS QRGS)

- *Eating Disorders: Guide to Assessment and Management in Primary Care: Quick Reference Guide* from the ICGP Quality and Safety in Practice Committee (2nd March) accessible from www.icgp.ie/go/library
- *Quick Reference Guide: Assessment and Management of Covid-19 in General Practice* from the ICGP Quality and Safety in Practice Committee (4th March) accessible from www.icgp.ie/go/library
- *Quick Reference Guide: Good Practice Points - Antipyretic Prescribing* from the ICGP Quality and Safety in Practice Committee (26th March) accessible from www.icgp.ie/go/library
- *Advice for Caregivers on Managing Your Child's Fever: Patient Information Leaflet* from the ICGP Quality and Safety in Practice Committee (26th March) available from www.icgp.ie/go/library

REPORTS

- Gavin A, Költő A, Kelly C, Molcho M, Nic Gabhainn S. *Trends in Health Behaviours, Health Outcomes and Contextual Factors between 1998-2018: findings from the Irish Health Behaviour in School-aged Children Study*. Dublin: Department of Health 2021 (8th March) <https://aran.library.nuigalway.ie>
- General Medical Council. *Good Practice in Prescribing and Managing Medicines and Devices* (February 18) accessible from www.gmc-uk.org
The GMC recently updated this guideline following a call for evidence on remote prescribing in early 2020 and responds to the huge increase in remote consultations resulting from the Covid-19 pandemic. It came into effect on April 5, 2021 following a six-week familiarisation period.

ARTICLES

- Collins C, Doran G, Patton P, Fitzgerald R, Rochfort A. *Does education of primary care professionals to support patient self-management improve patient outcomes in chronic disease management? Updated systematic review*. *BJGP Open* 2021
- Keyworth C, Epton T, Goldthorpe J, Calam R, Armitage CJ. *Patients' experiences of behaviour change interventions delivered by general practitioners during routine consultations: A nationally representative survey*. *Health Expect* 2021
- Korotchkova I, Al Khalaf S, Sheridan E, O'Brien R, Bradley CP, Deasy C. *Paediatric attendances of the emergency department in a major Irish tertiary referral centre before and after expansion of free GP care to children under 6: a retrospective observational study*. *BMJ Paediatr Open* 2021
- Yusuf S, Joseph P, Dans A et al. *Polypill with or without Aspirin in Persons without Cardiovascular Disease*. *N Engl J Med* 2021

WEBINARS

- Dementia Research Network Ireland. Brain Health: Online Webinar Series. See <http://dementianetwork.ie/brain-health-online-webinar-series>
Throughout March-May 2021, the DRNI will host a free online webinar series on the topic of brain health. For further details and to register, see <https://bit.ly/36BqyAY> Webinars will be recorded on the DRNI YouTube channel

For more articles and details on the material referenced, see www.icgp.ie/go/library/notice_board/ and click 'ICGP Library Recommended Reading'.