

Assessing Testamentary Capacity

A will is an important document as it allows an individual to communicate their wishes as to how their assets and property should 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 factsheet seeks to explain the role of the GP in assessing testamentary capacity for a patient who wishes to make/alter a will and addresses requests to GPs to provide a retrospective opinion on the testamentary capacity of a deceased patient at the time of making their 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 of making their will.

The Assisted Decision Making (Capacity) Act, 2015, which is the primary legislation dealing with capacity, explicitly states that nothing in the Act shall be construed to alter the law relating to a person's capacity to make a will.

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, for example, this may be the case where a patient has a complex mental health/psychiatric history, or may be experiencing severe cognitive decline, or the GP has doubts/concerns as to a patient's capacity to make a will, the GP can recommend a referral to an appropriate expert, for example a psychiatrist/geriatrician, to carry out the requested capacity assessment.

Legal test of Testamentary Capacity

It is important to bear in mind that 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 their client has testamentary capacity and is capable of

making their will. Medical opinion from a GP or other medical practitioner may assist the solicitor in deciding whether their client has testamentary capacity, but a medical opinion is not a substitute for a legal determination of testamentary capacity.

As part of the capacity 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 advised in terms of the nature and extent of his / her assets. If there is a discrepancy between what the GP recorded and what the solicitor knew to be true, it then falls to the solicitor to resolve the issue with their client.

GP's role

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

1. When a patient wishes to execute a will.

If a patient's solicitor has any doubt as to their client's testamentary capacity when they request to make a will, the solicitor may ask their client's GP to assess them and to confirm their medical opinion as to the patient's capacity to make a will; this may be provided in correspondence or the GP may be requested to swear an affidavit.

At the outset, we advise that the GP request from the solicitor:

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

The GP should:

- Confirm the patient understands that he/she is making a will;
- Confirm the patient is acting freely without any undue influence from third parties;
- 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;
- Assess and document carefully his/her findings on the patient's mental capacity to make their will.

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 at the time they made their will, unless there are indicators which would raise a concern as to the testamentary capacity of the testator.

Such indicators include where Alzheimer's disease, dementia, or cognitive impairment are noted on the death certificate of the testator 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. An affidavit is a written sworn statement of fact. The Probate Office usually insist on affidavits of testamentary capacity sworn under oath from the GP, as opposed to accepting a letter from the GP.

The solicitor acting for the Legal Personal Representative (e.g. executor) of the deceased patient's estate will usually write to the deceased patient's GP asking them to provide an opinion on their deceased patient's testamentary capacity at the time of making their will, and the solicitor will usually send an affidavit with standard wording to the GP for signature under oath. Prior to swearing an affidavit, we recommend contacting your indemnifier for advice.

If the testator's GP at the time of execution of the will is retired or deceased, and another GP has access to that GP's medical records and / or had treated the patient subsequent to their will being made, that GP may be able to swear an affidavit. In those circumstances, the GP should carefully review the medical records and if they are satisfied that there is nothing in the records to suggest the patient had any capacity issues at the time they made their will; for example, it may be that although the previous GP did not carry out a formal assessment of the patient's testamentary capacity, they did see the patient around the time they made their will and there is nothing in the records to suggest there were any concerns/issues relating to the patients cognition at that time, the GP may 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 had 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 their will; if that is the case following review of the records.

We recommend speaking with your indemnifier for specific advice regarding the content of an amended Affidavit of Testamentary Capacity, prior to swearing.

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 deceased patient's capacity at the time they made their will. 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 they were giving evidence in Court under oath and they should realise that they could in the future be questioned on the truth of the affidavit. A GP must ensure that they are satisfied with the wording of the

affidavit and not feel intimidated or pressurised into swearing a document they cannot fully stand over. A GP can ask the solicitor to amend the wording of any such affidavit before swearing to ensure that they are fully satisfied that they can stand over the complete content, bearing in mind they may be called to give evidence in court at a future date. 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.

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.

Please do not hesitate to contact Medisec for specific advice on any aspect of the above.

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.

Medisec Ireland CLG is a private company, limited by guarantee, having its registered office at 7 Hatch Street Lower, Dublin 2. Registration No. 216570. Medisec Ireland CLG (trading as Medisec Ireland) is regulated by the Central Bank of Ireland. Medisec's risk, education and medico-legal advisory services are not regulated by the Central Bank of Ireland.

September 2026