



Medico-legal guide to Testamentary capacity

8.0

Introduction

Doctors are sometimes asked to comment on a patient's testamentary capacity. During their life, a patient or their solicitor might ask you to witness the signing of a will or to produce a letter to confirm that the patient has capacity to make a will. After a patient has died, you might be asked to comment on whether the patient had testamentary capacity at the time they made a will.

A doctor can be called as a witness in court proceedings relating to a disputed will, and in certain circumstances may even face a civil claim or a complaint to the GMC about an assessment of testamentary capacity. It is therefore important to have an understanding of the legal meaning of testamentary capacity and a confident knowledge of your role in its assessment.

The law

The person who makes a will is known as the 'testator' (or testatrix if a woman). A subsequent addition or amendment to the original will is known as a codicil.

The capacity, or understanding, required by the testator to make a will is known as testamentary capacity. Mental capacity is decision-specific¹ and the test of testamentary capacity is set out in the case of *Banks v Goodfellow*². This case concerned a schizophrenic who passed his sizeable property estate to his teenage niece. The court held that the validity of the will was unaffected by partial unsoundness of mind; so long as the testator understood what he was doing with his property and affairs at the

time the will was drafted and executed, then it was valid. The Lord Chief Justice said³ :-

"It is essential...that a testator shall understand the nature of the act and its effects; shall understand the extent of the property of which he is disposing; shall be able to comprehend and appreciate the claims to which he ought to give effect; and, with a view to the latter object, that no disorder of the mind shall poison his affections, pervert his sense of right, or prevent the exercise of his natural faculties – that no insane delusion shall influence his will in disposing of his property and bring about a disposal of it which, if the mind had been sound, would not have been made."

Therefore, in order to have testamentary capacity the testator must be capable of understanding:

- the nature and effect of making a will
- the extent of his or her estate
- the claims of those who might expect to benefit from the will.

And:

- The testator should not have a mental illness that influences him or her to make bequests that he or she would not otherwise have made.

Solicitors will usually follow a golden rule, namely that the making of a will by an elderly person, or one who has suffered a serious illness, ought to be witnessed or approved by a medical practitioner who "satisfies himself of the capacity and understanding of the testator, and records and preserves his examination and finding".⁴

If you witness a will, you will be inferred to have made an assessment of the testamentary capacity of the testator, and may be called upon later to justify your opinion. This poses a challenge for doctors, many of whom may not have had specific training or experience in assessing testamentary capacity.

The doctor's role

In order to assess whether a person has testamentary capacity, a doctor should be aware of the legal test to be applied and check that the person understands each of the points above from *Banks v Goodfellow*. This may be time-consuming and it is worth setting aside adequate time to assess the person thoroughly. You may find it uncomfortable to ask about the extent of the estate, potential beneficiaries, and about the patient's choices regarding who to leave out of a will. However, embarrassment is "best not deferred to the witness box, after a patient's death".⁵

We would recommend that any doctor considering witnessing a will or writing a letter about capacity to make a will, at the request of a patient or anyone else on a patient's behalf, pauses before doing so and gives careful consideration to the matter. The following series of questions may be a useful reference:

Do you have sufficient expertise in assessing testamentary capacity?

Assessment of testamentary capacity is a specialised task. Doctors are obliged to work within the limits of their own competence⁶ and to take reasonable steps to ensure that anything they write or sign is verifiable⁷. A doctor who witnesses a will, or writes a letter expressing an opinion that a patient is capable of signing a will, will be inferred to have made an assessment of testamentary capacity.

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Do you have enough information about the legal test to be applied?

If you agree to carry out an assessment while a patient is alive, or to comment on a deceased patient's testamentary capacity, ensure that you have a good understanding of the legal principles that relate to testamentary capacity. These should be set out for you by the patient's (or their executor's) solicitor.

Do you have enough information about the extent of the estate, and potential beneficiaries, in order to discuss these with the patient?

Ideally, a letter of instruction from the patient's solicitor will include information about previous wills in order for you to be able to discuss with the patient their reasons for including or excluding potential beneficiaries.

Detailed records

A doctor making an assessment of testamentary capacity must keep detailed, clear and contemporaneous notes of the assessment, and their opinion. The notes may be of great significance should the issue of testamentary capacity be challenged at a later date (for example if a dispute arises following a patient's death). Keep a note of who else was present during the assessment.

Several sources of guidance are available for doctors who wish to develop an expertise in this field. For example, *Assessment of Mental Capacity: a practical guide for doctors and lawyers*⁸ includes helpful points clarifying the approach to assessing testamentary capacity. A task force of the International Psychogeriatric Association has undertaken to develop guidelines on the contemporaneous assessment of testamentary capacity and information can be found at www.ipa-online.net

If you are asked to comment on testamentary capacity, you may wish to seek specific advice from the MDU. Please call our medico-legal advisers for assistance relevant to your individual circumstances.

References

1. This applies to mental capacity generally, as per the Mental Capacity Act 2005 s2(1)
2. *Banks v Goodfellow* (1870) LR 5 QB 549
3. *Ibid* at 656.
4. *Kenward v Adams* (1975), *The Times*, 20 November 1975
5. Jacoby R, Steer P. *How to assess capacity to make a will*, BMJ [2007] 335:155-7
6. GMC, *Good Medical Practice* (2013), paragraph 14
7. GMC, *Good Medical Practice* (2013), paragraph 71
8. *Assessment of Mental Capacity: A practical guide for doctors and lawyers*, BMA/Law Society (2010) 3rd Edition. General Editor Penny Letts.

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