

Testamentary Capacity

Assessing a patient's capacity is a common part of medical practice. Assessing a patient's testamentary capacity however (that is, their capacity to make a will), has additional requirements to a standard capacity assessment, and is likely to be less familiar to many doctors. This factsheet provides a brief overview of the relevant legal test for determining a person's mental capacity to make a will, and best practice for doctors performing a testamentary capacity assessment.

In certain circumstances, a doctor – most often a GP, or sometimes a specialist such as a geriatrician or psychiatrist – may be approached by a patient, or a patient's lawyer, to undertake an assessment of the patient's testamentary capacity. This is often done to ensure the will that the patient intends to make is valid.

The legal test for determining a person's mental capacity to make a will was established many years ago, in a case called *Banks v Goodfellow*. In summary, the test requires that the person making the will:

1. Understands the nature and effect of making a will;
2. Understands the extent of his or her estate/property;
3. Understands the claims of those who might expect to benefit under the will; and
4. Does not have an abnormal state of mind that might influence how the person disposes of their estate in a way that they otherwise would not have done.

Whether the above criteria are met is a matter of clinical judgment.

What this means for the assessing doctor is that additional inquiries to a standard capacity assessment need to be made when assessing a patient's testamentary capacity. This includes asking questions such as, what property does the patient have that will be included in their will, who do they intend to leave that property to, is anyone being excluded from the will who might have expected to have been included, and if yes, for what reason? (And so on). The answers should be recorded verbatim.



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It is also best practice for the doctor to take steps such as asking about and reviewing the patient's previous wills – noting in particular any significant changes the patient intends to make in their new will, and asking the patient about those changes – and confirming the accuracy of the patient's answers, for example by speaking with the patient's lawyer after the assessment is completed.

Given the unique aspects of a testamentary capacity assessment, it is recommended that the assessing doctor obtains a letter from the patient's solicitor prior to the assessment which details clearly the legal tests and relevant inquiries. If after assessing a patient, there remains doubt as to the patient's testamentary capacity, a second specialist opinion should be sought.

Contact Us

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