# Testamentary Capacity

Reading time:
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Date created: 14/03/2025

MIPS members are often asked by patients, their solicitors, or their family to assess or attest to a patient's testamentary capacity either before or after the patient's death. This can be complex and fraught with challenges. This article sets out how to navigate some of those challenges.

For a will to be valid, a will-maker must have "testamentary capacity". "Capacity" refers to a person's ability to make their own decisions. Adults are presumed to have capacity unless there is evidence to the contrary. Capacity can vary over time and is decision-specific. Therefore, a patient might have capacity to consent to a blood test, but lack capacity to make a will. These principles apply to testamentary capacity. However, "testamentary capacity" specifically refers to the capacity of a will-maker to make a valid will. The Courts have determined what must be established for a person to have testamentary capacity.

The leading case relating to testamentary capacity is Banks v Goodfellow (1870)[i] To have testamentary capacity, the will-maker must:

- understand the nature and effects of making a will; and
- understand the extent of their assets; and
- comprehend and appreciate the (moral) claims to which they must give effect; and
- not be affected by a disorder of the mind that "perverts the sense of right" or decision-making.

Therefore, assessment of testamentary capacity requires more than simply assessment of cognitive function or a mini-mental state examination, but an understanding of the patient's personal, financial, and family situation. This information might not always be available or verifiable, which can further complicate the assessment process.

## Prospective assessment of testamentary capacity

Members may be asked to assess a patient's testamentary capacity at the time the patient creates or amends their will. This requires the member to have reliable and verifiable information about the patient's estate, against which they can objectively assess the patient's understanding. Practitioners might need to ask patients or their solicitor (with the patient's consent) for this information prior to the assessment.

A practitioner is not under an obligation to assess testamentary capacity and may feel that it is more appropriate to refer the patient to a specialist, such as a psycho-geriatrician, for an assessment. Although a cognitive screen (such as a mini-mental state examination) may give an indication of the likelihood of the patient having a cognitive impairment, this is generally an insufficient basis alone to conclude that the patient has or does not have testamentary capacity.

Some sources suggest that members should consider asking a colleague to also assess the patient's testamentary capacity because two independent opinions are better than one. While this may assist the patient if their testamentary capacity is challenged, it would slow down the process for the patient and it is unclear why a second opinion would be routinely necessary.

## Retrospective opinion as to testamentary capacity

Members may be asked to retrospectively comment on a patient's testamentary capacity after the patient has died. This can be more challenging than a prospective assessment.

First, capacity can vary over time. Therefore, unless the member consulted with the patient at the time the patient created or amended their will, they cannot comment on whether the patient had any capacity at the specific time they created or amended their will. They may be able to comment on whether the patient had a condition that was likely to cause any fluctuations in cognitive ability. However, these would be impressions only, and do not amount to an assessment of testamentary capacity.

Second, capacity is decision-specific. The member may have consulted with a patient on the same day that they created or amended their will and may have formed the impression that the patient was capable of understanding and consenting to their medical treatment. However, unless the member specifically assessed the patient in relation to the matters outlined in the case of

Banks v Goodfellow, these would again be impressions only, and would not amount to an assessment of testamentary capacity.

# Completing an affidavit as to testamentary capacity

Having requested an assessment or opinion from the member, the patient's solicitor may then request that the member swear a pre-prepared affidavit of testamentary capacity. The affidavit is often in a specific form, such as this.

The member is not under an obligation to swear an affidavit at all. They should only swear an affidavit if they believe that it accurately reflects their professional opinion about the circumstances of the case and their assessment of the patient's testamentary capacity. If the affidavit does not reflect their opinion, they should decline to swear the affidavit or amend it accordingly.

If the member declines to swear an affidavit, then they may be called as a witness to give evidence in court proceedings about their assessment and opinion.

When disclosing an opinion either in a report or in an affidavit, the member should consider the privacy and confidentiality considerations below.

# Privacy and confidentiality

Before any records, opinion, report, or affidavit is provided to a solicitor or third party, the member should ensure that they have the appropriate consent or authority to release information about the patient.

If the patient is **alive** and deemed **capable**, then consent should be obtained from the patient (either directly or by way of a valid signed authority) before any health information is disclosed about their testamentary capacity.

If the patient is **alive** but deemed **not capable**, then the patient's substitute decision-maker should provide consent to the release of any health information.

If the patient is **deceased**, then the situation varies across Australian jurisdictions. The Privacy Act 1988 (Cth) does not apply to deceased individuals and the Office of the Australian Information Commissioner has issued guidance that information about deceased persons is not considered to be "personal information".[ii] Therefore, in all states where the Privacy Act applies to the collection, use and disclosure of health information (**Qld**, **SA**, **WA**, **NT**, **Tas**), no consent is required from a third party or substitute decision-maker prior to releasing information about the deceased individual.

In a private setting (private hospital or private health practitioner) in **Victoria**[iii] and the **ACT**,[iv] only the legal representative can consent to disclosure of health information about a deceased individual. The definition of legal representative includes the executor of the will where probate has been granted. Of course, where a will is being challenged, probate will not have been granted, so it will not be possible to fulfill this requirement. It would be advisable to inform the executor about this, who may need to subpoena the member to provide the requested information.

In **NSW**, privacy laws protect health information for up to 30 years after a patient's death.v Health Privacy Principle 11 permits disclosure of an individual's health information only where:

- there is a serious and imminent threat to the health or welfare of the individual or another person or a serious threat to public health or safety; or
- the information is genetic information and its disclosure could lessen or prevent a serious threat to the life, health or safety of a genetic relative of the individual; or
- the information is sought by an immediate family member of the individual, there are compassionate reasons for its release andthe disclosure is limited to the extent reasonable for those compassionate reasons.

Therefore, it may be difficult to argue that disclosure of a testamentary capacity opinion to the executor of a deceased individual is justified on compassionate grounds. Again, it would be advisable to inform the executor about this, who may need to subpoena the member to provide the requested information.

If in doubt, contact our claims and 24-hour medico-legal advice and support team on 1300 698 573.

You should consider the appropriateness of the information and read the Member Handbook Combined PDS and FSG before making a decision on whether to join MIPS.