What is testamentary capacity and how is it assessed?

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In Australia, a Will-maker has the freedom to make any testamentary arrangement they desire. For example, they can choose what to put in their Will and who will act as executor. However, we live in a society with an aging population. For a Will to be valid, a Will-maker must have sufficient mental capacity to make the Will. This is known as ‘testamentary capacity’.

There are many factors which may affect a person’s testamentary capacity. They may be of advanced age or have an illness (temporary or permanent) such as dementia, an Acquired Brain Injury (ABI), a psychiatric disorder, delirium, depression, bipolar disorder or another form of psychosis.

The test to determine testamentary capacity

The test for testamentary capacity, set out in case law is as follows:

1. The Will-maker must know and understand that they are making a Will and what a Will is and does. In other words, they must understand that a Will disposes of their assets after their death and is legally binding in nature.
2. The Will-maker must be aware of and understand the nature and extent of their assets.
3. The Will-maker must understand how they wish those assets to be divided and who they should consider when dividing those assets. The Will-maker must be aware of those people who might reasonably be thought to have a claim upon his or her ‘testamentary bounty’; that is, the persons who have a moral claim on the Will-maker.
4. They must be able to ascertain who various family members are, and if there is anyone else, they may be obligated to consider, such as persons who are financially dependent on them.

All the above factors must be present in order for a Will-maker to have capacity to make a Will.

Capacity depends on Will-maker's circumstances

Whether or not a person has 'capacity' can depend on the complexity of their circumstances. A person with a basic family arrangement, uncomplicated assets and wanting to prepare a simple Will could have testamentary capacity whereas the same person with complex circumstances may not have the necessary capacity to deal with those circumstances.

Even some of the most basic of Wills include clauses that a layperson would struggle to understand. However, it is not necessary that a Will-maker understand the legal effect of every clause in a Will, but rather, that he or she understands that they are executing a Will and the practical effect of the central clauses.

It is also not necessary to show that the Will-maker be able to recollect each and every item of property they own. A general knowledge of that property is sufficient. However, a Will-maker who cannot recall the existence of large portions of their estate, or significantly overestimates or underestimates the value of portions of their estate, may lack the capacity required to make a Will.

Capacity can fluctuate

A person's mental capacity can fluctuate.

The mental state of some people may vary at different times and in different situations, especially the elderly or the chronically ill. Elderly people may have good and bad days of mental cognition, as well as days of varying capacity. A person may have testamentary capacity to make a Will one day, but not another.

That being said, a Will made at an advanced age may be carefully scrutinised by the court.

Timing of determining capacity

The relevant time for ascertaining that a person has mental capacity to make a Will is when the instructions for the Will were given, as opposed to the signing of the Will.

If a person made a Will at a time when it was determined they had testamentary capacity, that Will shall remain valid even should the Will-maker lose capacity at a future date.

Evidence as to capacity

A Will-maker is presumed to have capacity unless evidence is produced that calls their capacity into question.

In considering whether a Will-maker had the necessary capacity to make a Will, the court can hear evidence about capacity from medical practitioners including:

- the medical practitioners whom the Will-maker consulted during their lifetime; and
- medical experts who had not seen the Will-maker at the time the Will was made but have reviewed their file.

The court can also hear and consider evidence from laypeople including carers, friends and family members who were in contact with the Will-maker in the years and months leading up to and including the time when the Will was made.

In considering whether a Will-maker had the necessary capacity, a court may also consider their background in order to seek reasons for the manner in which, and to whom, they have bequeathed their assets in their Will.

A court may compare the terms of a Will with those of previous Wills made by the same person if there are doubts about capacity. A court may scrutinise a current Will which may name beneficiaries or bequests entirely different from those in a previous Will. They may also consider the relationship between a Will-maker and a beneficiary and persons who would normally expect to receive that person's estate, in order to ascertain whether the Will is invalid due to a lack of testamentary capacity.

The court may also take into account comments made by a Will-maker immediately before they changed an earlier Will in order to prove their state of mind.

Statutory Wills

In Victoria, the state government has established a Statutory Wills regime enabling Wills to be made for persons who lack testamentary capacity.

The Supreme Court of Victoria is authorised to make Wills in specific terms for persons who lack testamentary capacity.

Where a person does not have a Will and they lack testamentary capacity, a Statutory Will may be required when the beneficiaries (ordinarily determined through the laws of intestacy), are not always appropriate beneficiaries to receive that person's estate and other persons are more appropriate.

For example, it may be more appropriate to make provision for one sibling or parent of the person lacking capacity, as opposed to both parents or multiple siblings. Or it may be suitable that a long-term carer would be more appropriate than a family member. Further, there may be persons dependent on the incapacitated person who would not be entitled to receive the person's estate on intestacy.

In Victoria applications to the court to make a Statutory Will may be made by any person. They are usually made by family members, carers, or persons authorised to manage the incapacitated person's affairs.

To make an order regarding an incapacitated person's estate, the court must be satisfied:

- that the person lacks testamentary capacity;
- the proposed Will reflects the likely intentions of that person, or what the intentions of the person might reasonably be expected to be if they had capacity; and

- that it is reasonable in all the circumstances that a will should be made.

How a Wills and Estates lawyer can help

Smith Famiy Law can assist you where you believe someone lacked the testamentary capacity when they made their Will and that, due to this, the Will could be invalid.

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