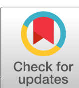

Testamentary capacity

ARTICLE

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SUMMARY

To make a valid will, a person should be able to understand the nature and consequences of doing so, the extent of their estate and the claims others may have on it. No disorder of mind should be present that would affect their testamentary decisions, and clinicians are therefore often asked to give an opinion on whether a person has testamentary capacity. This article discusses the legal issues involved, with reference to UK case law (in particular, the legal test of *Banks v Goodfellow* (1870)), and outlines the requirements of testamentary capacity assessment (including retrospective assessments), the clinician's responsibilities when requested by a solicitor to make an assessment of capacity ('the golden rule') and what they might expect if appearing in court to give expert witness regarding testamentary capacity. Fictitious case studies are presented illustrating certain points in testamentary capacity assessment.

LEARNING OBJECTIVES

After reading this article you will be able to:

- understand the criteria for a person making a valid will
- be able to assess testamentary capacity in a living person and retrospectively after a person's death
- appreciate the pitfalls in the process of that assessment.

KEYWORDS

Psychiatry and law; testamentary capacity; mental capacity; retrospective assessment; medico-legal.

Testamentary capacity refers to the capacity of a person to make a valid will (Frost et al 2015). As society changes, and inherited income increases (largely related to house price increases), disputes in wills have grown. The presence of second marriages often adds a layer of complexity in assessing the competing demands of children from previous relationships. The UK's Channel 5 documentary series 'Inheritance Wars: Who Gets the Money?' signals its emergence into popular culture. A person making the will is a testator and we will use that term to refer to people of any gender (a female testator is sometimes called a testatrix).

Doctors are often asked to opine on whether a person has testamentary capacity to make a valid will (Jacoby 2007). In these circumstances, as with other assessments involving capacity, there is a legal test that a person must satisfy to execute a valid will.

In this article we make specific reference to UK legislation, but the principles of assessment apply equally in other jurisdictions.

Legal issues

If asked to assess testamentary capacity of a person, whether living or dead, it is essential to understand the recognised legal test for testamentary capacity, which is set out in Box 1. The test is summarised in the following terms in one authoritative legal textbook (Barlow 2021: para. 4.8):

> 'At common law sound testamentary capacity means that four things must exist at one and the same time:
>
> (i) the testator must be able to understand the nature of making a will and its effects;
> (ii) they must be able to understand and recollect the extent of their property;
> (iii) they must be able to understand the nature and extent of the claims upon them both of those whom they are including in their will and those whom they are excluding from their will; and
> (iv) no insane delusion shall influence their will in disposing of their property and bring about a disposal of it which, if the mind had been sound, would not have been made.'

The first limb of the test is usually interpreted to mean whether the testator is able to understand in general terms the nature of the act of making a will and its effects, rather than the specific effects of the will that they are then making (that comes later in the test).

The second and third limbs are about the ability to understand, which is not the same as simply being able to remember those things. Case law has established that this is not a test of memory. The question of how much assistance a person may be given in order to understand those things is left somewhat open. We would suggest that in order to be able to show that a testator understands the claims of potential beneficiaries it would be helpful to find evidence of their reasoning in making the decision that they did. Sometimes this is contained in the solicitor's attendance note of the person who drafted the will,

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BOX 1 The legal test for testamentary capacity

This is set out in the Victorian case of *Banks v Goodfellow* (1870), where Lord Chief Justice Cockburn said:

'It is essential to the exercise of such a power 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.

Here, then, we have the measure of the degree of mental power which should be insisted on. If the human instincts and affections, or the moral sense, become perverted by mental disease; if insane suspicion, or aversion, take the place of natural affection; if reason and judgment are lost, and the mind becomes a prey to insane delusions calculated to interfere with and disturb its functions, and to lead to a testamentary disposition, due only to their baneful influence—in such a case it is obvious that the condition of the testamentary power fails, and that a will made under such circumstances ought not to stand.'

if it was professionally drafted, or in a letter of wishes that accompanies the will. Of course if you are interviewing a living person, you can ask them directly for their reasons and gently probe the rationale why a will may have changed from a previous one.

The fourth limb is about the presence of disorders of the mind that could potentially affect the disposition in the will. In the original case of *Banks v Goodfellow* (1870) it was agreed that Mr Banks (the testator) suffered from delusions, but as those did not affect the will he made the will was found to be valid. The most common types of delusion that might affect a will are paranoid delusions that lead to someone being excluded.

It has been suggested that testamentary capacity should be judged according to the test in the Mental Capacity Act 2005, but a series of recent cases has found that this is not so: the case law remains definitive.

There have been a number of cases since 1870 that have clarified some aspects of the test (Box 2). Traditionally, the threshold for testamentary capacity has been kept fairly low, so as not to deprive elderly persons of the ability to make wills in their declining years.

Solicitors sometimes refer to 'the golden rule', which is a judicial recommendation that when a solicitor draws up a will for an aged or seriously ill testator it should be witnessed or approved by a medical practitioner, who ought to record their examination of the testator and their findings. An earlier will should be examined and any proposed alterations should be discussed with the testator. This is not part of the test for testamentary capacity, but a recommendation for good practice. Failure to follow the golden rule will not necessarily invalidate a will.

Assessment of testamentary capacity

Mental capacity is decision and time specific. The presence of testamentary capacity depends on how the testator is at the time when the will is instructed and executed.

The guide on assessment of mental capacity published by the British Medical Association & the Law Society (2022) has a checklist of what a person needs to understand when instructing and executing their will. This is based on the understanding of the nature and effects of making a will, the extent of the person's estate, the claims others may have on

BOX 2 Cases since 1870 that have clarified some aspects of the testamentary capacity test

- Bereavement has been found to fall within the legal definition of mental conditions that may undermine testamentary capacity.
- If a testator has capacity when giving instructions, but then loses capacity before they sign the will, the will may still be valid, provided that those instructions were sufficiently clear and the testator understands that the will they are signing follows those instructions (the rule in *Parker v Felgate* (1883)).
- The standard of proof is 'on the balance of probability'.
- Ordinarily, if the will is properly drawn up and appears rational, the court will presume its validity and it will be for the person claiming it is invalid to prove otherwise. But if there are circumstances that arouse 'real doubt' about the testator's capacity, the burden shifts back to the person seeking to prove the will to establish capacity.
- The court will need strong evidence of incapacity to displace the view of an experienced independent solicitor who drafted the will (but not all wills are drafted by experienced or independent solicitors).
- Although in psychiatry a delusion must be shown to be fixed by attempting to persuade the person that it is not true, this is usually impractical for someone who is deceased, so the question will be whether a rational person in the position of the testator could reasonably have believed the matter (or could not have been reasoned out of it).
- Estates that are more complex, or families with second marriages and stepchildren may require a higher degree of cognitive function to understand than simple ones, which would require a lesser degree of capacity.

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that estate and the absence of delusions resulting from disorder of mind that might affect the will. When assessing capacity, having the checklist in mind is most helpful. Although the full checklist is quite extensive, the person should usually be able to understand:

- that they will die
- that the will comes into effect on death but not before
- that they can change the will (assuming they still have capacity) before they die
- who they have appointed as executors
- the extent of their property
- who gets what in the will
- that if they spend the money before they die this may mean there is less left in their estate for people to inherit
- that if someone they leave a gift to dies before they do, that gift will fail
- if they have made a previous will, how the current one differs from that and why they have made the change, although provided they understand the new will, knowledge of the previous one is less important
- who they might be expected to consider in making a will.

The testator needs to be able to understand the extent of their estate in broad terms (rather than knowing the specific value of it). For example, if an elderly person bought their family home several decades before, in answer to the question 'How much is your house worth?', the response may be that they do not know, but they should understand that it could be a very substantial amount. They should usually need to know if they own a house, if it is jointly owned with a spouse and if any mortgage is in place. They should usually be able to understand that for assets that are jointly owned (for example, property held as joint tenants or most joint bank accounts), the asset will automatically pass to the surviving joint owner(s) on the death of one of them, irrespective of what the will may say. However, it is possible to formally sever a joint tenancy, in which case each person may do as they please with their share of the asset, and it will then form part of their estate under their will.

Understanding the claims of others is important and in practice that would usually be close relatives, although this depends on the social dynamic of every testator. If a person leaves money to charity, then a brief discussion about reasons why is helpful.

It is in the assessment of the presence of a disorder of mind where a clinician usually feels on familiar ground. A normal clinical assessment is needed based on the traditional lines of a history of any difficulties (particularly with memory), collateral information (an informant or general practitioner (GP) notes), a current mental state examination (particularly looking for depression or delusions) and a cognitive test such as the Montreal Cognitive Assessment or the Addenbrooke's Cognitive Examination (the Mini-Mental State Examination is now subject to copyright).

When assessing a person make sure that, for at least some of the time, you have seen the person on their own. If they insist on another person being there, document the reasons why and, assuming it reflects the situation, document that the attendee did not interfere with the process. You should explain to the other person that it is important that the testator alone replies to your questions, without advice or support from the other person. In our experience, after a brief initial conversation with the testator and person supporting them together, the testator usually gains confidence and is willing to allow the other person to leave the room.

A helpful way to check a person's understanding is to give them a simple explanation and then ask them to repeat it back to you in their own words. It may not be sufficient simply to say to them 'Do you understand?'.

Undue influence

Undue influence is where a testator is coerced or pressured so that a will is not made of their own free will. This is a legal question of fact that is for the court to determine, not a doctor, but what a clinician can opine on is susceptibility (or vulnerability) to undue influence. It is more than simple persuasion, although the degree of coercion required may vary according to the condition and circumstances of the vulnerable person.

Peisah et al (2009) have produced a helpful list of issues, which they call 'red flags for undue influence', under the headings: 'Relationship risk factors', 'Social or environmental risk factors', 'Legal risk factors' and, importantly for clinicians, 'Psychological and physical risk factors'. The last include physical disability, mental disorders (including dementia, delirium, mood disorders, paranoid disorders), personality disorders, substance misuse and more general 'non-specific psychological factors'.

When doing an assessment, assuming you could not see any particular evidence that the person was acting under the influence of others, it is helpful to have asked the question 'Is anyone making you write your will in this way?', which usually results in a robust response 'Absolutely not!'.

Retrospective assessments

Psychiatrists are sometimes called on to assess testamentary capacity retrospectively (usually after a

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testator has died) by providing an expert report for a court. Courts may accept retrospective evaluations provided that they are prepared in line with the rules governing expert evidence (Civil Justice Council 2014). If giving evidence as an expert it is important to make sure that you are at least familiar with, and preferably have had some training in, the rules and guidance about giving expert evidence. It is a very different process from writing a report about testamentary capacity for a living person whom you have interviewed where there is no particular expectation that the case will go to court.

As you have probably not interviewed the testator in life you will have to build your opinion on a bundle of documentary evidence alone.

Try to get evidence from as many sources as possible. GP notes and records from secondary care can be very helpful, especially those from around the time the will was drawn up. These may amount to thousands of pages. Other potentially useful sources of information include care home records, social services records and solicitor's attendance notes. If a claim has already been made, it may also be helpful to see the particulars of claim, response and other legal correspondence. Witness statements may also convey some information about a person's mental state but are often less useful and may be subject to bias if prepared on the instructions of one side or the other in a disputed case.

Once you have received the bundle of information, check it has the records you need. Key evidence may be missing, for example GP records may indicate attendance at a memory clinic but there are no letters relating to this. Notes are often redacted, which can affect interpretation.

The next step is to assemble a chronology of relevant evidence, including key dates, such as the date of instruction and execution of the will. Pay particular attention to disorders that may affect mental capacity, such as dementia, delirium and depression. In our experience these may not have been formally diagnosed but may be hidden in plain sight in the records. Also look out for mental capacity assessments. These may not directly relate to testamentary capacity but can indicate impairment (for example if a person is subject to Deprivation of Liberty Safeguards/Liberty Protection Safeguards under the Mental Capacity Act). But bear in mind that as capacity is specific to a particular decision you cannot read directly across from one sort of capacity to another, and not all statements about capacity are well evidenced in clinical records.

In some cases there are indications a person either did or did not have mental capacity. For example, if a testator justifies excluding his daughter from his will because he has not seen her for years, yet there is clear evidence she has been supporting him with frequent contact, that may well indicate incapacity. Other cases are less clear-cut. If a person has significant cognitive impairment, you may have to decide there is 'real doubt' about capacity but fall short of saying a person lacks capacity.

Bear in mind that you must be honest and truthful, and that your overriding duty is to the court, not to the person instructing you. You need to give an opinion only on the balance of probability, but if you do not feel confident in saying something on that basis, do not say it. You may be challenged on your opinion later.

Appearing in court

If you complete a testamentary capacity report you should be aware that occasionally you may have to appear in court. In our experience this is not a common occurrence, and only happens in a small minority of cases. The usual reason for attending court is that there is a dispute about the person's capacity.

You may find you are called to attend court many years after you have completed the report (usually after the testator has died), so be sure to keep copies of your reports and any relevant evidence.

Appearing in court can be very anxiety provoking. If you have not attended court before, it is a good idea to sit for a few hours in a public gallery before your attendance so you can get a feel for the courtroom and processes. You might also consider going on one of the courses in giving expert evidence that are available from training providers.

You would normally have an idea of the areas of dispute well before the court date. If not, consult the solicitors who instruct you. Be very familiar with your report, as this is primarily what you will be asked about, but you will usually have a clean copy of it in the bundle in front of you on the day. On the day, dress smartly and be punctual. Check how you should address the judge (i.e. 'Your Honour' or My Lord/Lady').

At the start of your evidence you will be directed to the witness box and asked to take either a religious oath or non-religious affirmation (your choice). You may be asked questions by the barrister working for the solicitors instructing you, referred to as the examination in chief, where your responses are the evidence in chief, and then you may be cross-examined by the other side's barrister. The judge may also ask you questions. No matter who asks the questions, address your answers to the judge. Get used to swivelling your head, i.e. looking at the questioner then turning to address the judge with your answer. Speak slowly and clearly

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(remember that the judge is taking notes of everything that is said, so allow time for that). Think before you speak, and do not stray beyond your expertise or knowledge. If you do not know something, say so; do not speculate. Do not hesitate to ask for clarification if you do not understand a question – the chances are that others may not have understood it either. Sometimes, two experts are cross-examined together, so called 'hot tubbing'.

Finally and most importantly, always bear in mind that your role is to assist the court. You must remain completely impartial – you are not there to advocate for any side in the dispute. Expert witnesses who appear partisan should expect judicial criticism. Helpful advice is available from the Royal College of Psychiatrists' guidance (Rix 2023).

Case studies

These following case studies are fictitious and are an amalgamation from our experience of many hundreds of cases we have seen. They are presented to illustrate certain points as they represent common scenarios.

Mild dementia

Solicitors for a 75-year-old man of significant wealth were instructed that he wished to draft a new will. The draft will was complex, establishing a number of trusts. His assets were also complicated, including a number of properties, shares and offshore investments. The man had been married twice, with children from both marriages. The siblings did not get on. At this point it is worth remembering that the level of cognitive function required to achieve mental capacity can vary with the complexity of the testator's estate. This will required quite high levels of cognitive dexterity to think out.

Clinical assessment revealed autobiographical memory deficits and impaired cognitive function – the man scoring 74/100 on the Addenbrooke's Cognitive Examination. The profile of scores indicated a predominantly amnestic picture probably due to hitherto undiagnosed Alzheimer's disease.

The man could not recall up-to-date details of his property holdings. For example he had forgotten (and could not retain the information when reminded) selling his main family home 2 years previously. He forgot he owned significant shares in a family company.

Despite his relatively good performance on cognitive testing, the conclusion, on the balance of probability, was that he did not have testamentary capacity.

Moderately severe dementia: retrospective report

A 93-year-old woman died in a care home in July 2020 having had symptoms of dementia for 6 years and a formal diagnosis made in 2016. Her husband had died in 2012 and 2 years before that the couple had written mirror wills leaving their entire estates to each other, and if the other had already died, equally to their two children. In 2018, the woman's daughter moved in with her to give her the additional help and care she needed directly as a result of her dementia. In 2019, she rewrote her will leaving her estate entirely to her daughter. Her son challenged the 2019 will, saying his mother lacked testamentary capacity when she signed it.

The medical evidence was that a diagnosis of mixed Alzheimer's disease and vascular dementia had been made in 2016, after which the woman had been regularly reviewed by her local memory clinic. Three months after she made the will, she had had an assessment and had scored 68/100 on the Addenbrooke's Cognitive Examination (indicating moderately severe impairment of cognitive function). A solicitor had arranged the will, and contemporaneous attendance notes raised no concerns about testamentary capacity.

The medical report opined that the woman would have been able to understand the consequences of writing her will, was able to understand the extent of her estate and knew she had two children (the justification for excluding her son was that she had not seen him since his father died). There was no evidence of a delusion. The conclusion of the report was that although the testator had dementia, she had capacity to make her will.

The effect of marriage

An 82-year-old man decided to marry the person with whom he had been living for the past 20 years. He had previously been married and had three children from that marriage, but his wife had died many years ago. He had made a will while still married, leaving his estate to the children. He had Alzheimer's disease and although he understood that if he married his partner it would automatically cancel the previous will, he did not have sufficient cognitive function to be able to understand the extent of his assets. The result was that although he had capacity to marry (the legal test for capacity to marriage is deliberately set at a low level) he did not have capacity to make a new will, and as the old will would be revoked if he got married he would die intestate (i.e. without making a will). There are specific rules about intestacy which determine how much each person would receive. The

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MCQ answers
1 a 2 e 3 d 4 b 5 e

Law Commission is currently consulting on the law of wills and expects to publish its final report in 2025. One of the matters being considered is whether it is appropriate that a marriage should automatically cancel previous wills.

Data availability

Data availability is not applicable to this article as no new data were created or analysed in this study.

Author contributions

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Declaration of interest

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Cases

Banks v Goodfellow (1870) LR 5 QB 549.

Parker v Felgate (1883) LR 8 PD 171.

MCQs
Select the single best option for each question stem

1 As regards testamentary capacity:
a it refers to the specific mental capacity to make a will
b it always needs to have a medical assessment
c the golden rule is when a solicitor assesses a person making a will
d the Mental Capacity Act is the legal test used in the UK
e it can be assumed if there is no disorder of mind.

2 In terms of capacity to make a will:
a an insane delusion always renders a person incapacitous
b a person needs to know the value of their estate
c unwise decisions are always due to incapacity
d the Mental Capacity Act is the capacity test used in the UK
e you need to know who is in your immediate family to make a valid will.

3 When appearing in court:
a make sure you put the strongest case for your side
b bear in mind you are the most important person in the court
c never look at the judge directly – it is considered disrespectful
d the judge may ask you questions
e if you ask for clarification on a question, you will appear stupid.

4 Red flags for undue influence when a person is making a will include:
a no change from the previous will
b isolation of the person making the will by potential beneficiaries
c the absence of mental disorders
d the size of the estate
e a deathbed will.

5 When assessing testamentary capacity:
a never see the testator with a family member
b never get information beforehand on the testator's estate and family
c never look at previous wills
d only do a cognitive test if the testator is over 70
e complete a full mental state examination.

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