

Understanding testamentary capacity

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Most adult Australians do not have a Will. An unfortunate consequence of waiting to finalise such an important document is that life is uncertain. It is important to protect your wishes, and a crucial component of estate planning and maintenance is your testamentary capacity.

In this blog, we will discuss:

- what testamentary capacity is;
- how courts evaluate testamentary capacity;
- factors that affect testamentary capacity and what may happen if capacity is challenged; and
- preventative measures.

What is testamentary capacity?

Testamentary capacity refers to the Will-maker's ability to fully and completely understand the act and effect of making a Will (or other estate planning documents), including the contents of the documents and the assets being distributed.

Although this definition provides for 'full' and 'complete' understanding, this does not mean perfect capacity. Sufficient testamentary capacity can involve less than average mental capacity, so long as the Will-maker can demonstrate 'sufficient intelligence to

understand and appreciate' the effect of the Will they are making (see Banks v Goodfellow).

One of the most important aspects of an estate lawyer's job is to ensure their client demonstrates sufficient testamentary capacity. Some obvious examples of insufficient testamentary capacity involve any advanced cognitive impairments or diseases, including Alzheimer's and other forms of dementia, for example.

However, even if a prospective Will-maker suffers from a cognitive impairment, their capacity may still be sufficient for the purposes of Will-making. Testamentary capacity will depend on their medical status. It is important that if any health issues arise or have been developing prior to discussions surrounding the creation of a Will, that these are disclosed fully and frankly with your lawyer.

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Testing testamentary capacity and factors that impact testamentary capacity

In Queensland, testators (Will-makers) are presumed to have testamentary capacity when they make a Will. When capacity is challenged or contested, the onus is on the applicant to demonstrate to the court that the Will-maker:

- understood the nature and effect of the Will;
- understood the full extent of all property or assets disposed of;
- understood and acknowledged the entirety of all claims and wishes made in the document; and
- had no apparent or otherwise demonstrable influences impacting upon the Will-maker's wishes or claims comprising the document.

Some ways in which a court will make these assessments include:

- testimony of family members or other parties with a lawful interest in the estate who might hold reliable testimony on the testator's health status and day-to-day activities or abilities;
- file notes or other transcriptions of conversations occurring around the time the Will was created;
- relevant medical evidence at the time of Will creation concerning the testator's mental capacity or any health concerns;
- whether the testator was particularly vulnerable or susceptible to deception; and/or

analysis of the testator's death certificate or the coroner's report to determine whether there may be any indication of lack of capacity or other conditions that may raise suspicions.

Preventative measures if concerns might be raised about testamentary capacity

Some simple yet effective tips to have confidence in your will include:

Consulting a lawyer

When discussing your wishes or the process involved in making or changing a Will, it is important to engage a lawyer who will have the necessary expertise to guide you in the right direction.

This includes discussing any health issues so your lawyer can assist in assessing your capacity or working with your health professionals to establish your health status to ensure your Will is properly executed.

Consider undergoing a medical evaluation

Depending on your circumstances, it can be helpful to obtain a medical opinion in the form of a certificate to validate your capacity as a part of the estate planning process.

Use clear and simple language

One of the most important ways to ensure your wishes are adhered to is to work with lawyers who understand the importance of legal drafting in plain English.

This is beneficial from an administrator's perspective (as it is easier for them to understand your wishes and, subsequently, act upon your wishes) but also from a capacity perspective. The best way to ensure the testator satisfies the capacity requirements, particularly having complete understanding and comprehension of the nature of the Will, is to have the document written in a simple manner.

Get help from an estate planning lawyer

IM Lawyers has extensive experience and expertise in all estate planning, including drafting simple to complex Wills. Should you have concerns regarding testamentary capacity, do not hesitate to reach out to our firm for guidance.

Contact us today for a no-obligation, free phone call to discuss your estate planning queries.

This article is of a general nature and should not be relied upon as legal advice. If you require further information, advice or assistance for your specific circumstances, please contact us.