

MAKING A NEW WILL? Why might my solicitor recommend I involve my doctor?

In some circumstances when making a new Will, your solicitor may recommend that you also involve your doctor in the process. Occasionally, clients take offence at this recommendation.

This information sheet explains that if we request a doctor be involved in the making or signing of your Will, it is only because we are acting in your best interests to ensure the validity of your Will and reduce the risk of your instructions later being questioned or contested.

What are my solicitor's obligations when assisting me to make a Will?

Two obligations solicitors owe to clients when assisting to make a Will are:

1. To make sure the Will is valid and does what it is intended to, when it takes effect upon the Will maker's death
2. To not aid someone without testamentary capacity to make an invalid Will and cause unnecessary delay, cost and complexity for the client and their family in the long run.

What is testamentary capacity?

To make a Will, you must be over 18 years old and have sufficient mental capacity, called testamentary capacity. Testamentary capacity is a test set out in law. Testamentary capacity of the Will maker is one factor affecting the validity of a Will.

The test requires that at the time of making a Will, a person:

- is of sound mind, memory and understanding
- understands the nature of the act and its effect
- knows the nature and extent of their property
- appreciate the claims they should be considering when deciding who is to receive a benefit under their Will.

The test is not simply a scientific test or medical exercise. It is a test based on the specific task of making the intended Will. It has regard to the Will maker's assets and personal circumstances, as well as the nature and complexity of the intended Will. A person with a mental impairment may have testamentary capacity to make a simple Will. On the other hand, a person experiencing symptoms of mild dementia may not have testamentary capacity to make a complex Will.

Why might my solicitor recommend I involve my doctor?

Working together a solicitor and doctor can assess a client's testamentary capacity and create records of their assessment. These records can assist your Executor to administer your estate efficiently without unnecessary delay and without having to make arduous enquiries. They also assist to reduce the risk of your Will being challenged.

These records can later be used as evidence when your estate is being administered, for instance in the following circumstances

- if a Death Certificate lists a cause of death or some other circumstances exist which may raise apparent doubt about testamentary capacity at the time of making a Will, then when applying for Probate of your Will, your Executor needs to be able to affirm and declare that to the best of their knowledge, information and belief, you had testamentary capacity
- in the event a beneficiary or other person challenges the Will on the grounds of invalidity.

Involving a doctor also assists a solicitor to fulfil their professional and ethical duty to assess a client's testamentary capacity.

When might my solicitor recommend I involve my doctor?

It is not a regular or legal requirement that a doctor be consulted during the making or signing of a Will. It will be recommended when a solicitor considers there is an unacceptable risk that a Will maker's testamentary capacity has the potential to be raised as an issue or doubted at any time during the making of the Will or in the future. Such circumstances include where a client is or may be:

- ill, particularly if suffering a neurodegenerative condition (such as dementia) or any of the numerous underlying diseases or conditions which can cause a neurodegenerative condition
- suffers from a psychotic condition, mood disorder or personality disorder
- affected by an intellectual disability
- affected by drugs or alcohol
- elderly.

The existence of one of these circumstances itself does not necessarily mean that a person lacks testamentary capacity. An affected person may retain the requisite capacity or have sufficiently lucid periods to make an intended Will.

How may my doctor be involved?

The recommended degree of involvement by a doctor will depend on the degree of risk considered to exist regarding a Will maker's testamentary capacity.

In some cases, the solicitor may provide you with a letter to take to your doctor on or close to the day of giving instructions for the preparation of your Will or signing your Will, seeking a written medical opinion from your doctor.

In more extreme cases, such as where a person suffers a condition known to cause them to have lucid and non-lucid periods, the solicitor may require a doctor or medical specialist be present at the time of taking instruction for the preparation of the Will or signing the Will.

If a solicitor has reason to recommend your doctor be involved in the Will making process, they will discuss this with you and provide advice about the most appropriate approach for adequately protecting your interests.

Swanwick Murray Roche policy regarding referral of elderly

Swanwick Murray Roche has implemented a risk management policy that requires our solicitors to always advise our valued clients over 80 years of age to obtain a medical opinion, regarding testamentary capacity, before signing a new Will. Records relating to the assessment of testamentary capacity will be kept with the Will in our safe custody.

Require further information or advice?

For further general information about related topics, browse the range of other information sheets, tools for clients and information updates available on the 'Resources' page of our website.

If you would like:

- to make a Will or power of attorney document
- to review the affect and effectiveness of a current Will
- advice about a court made Will for a person without testamentary capacity
- assistance with the administration of a deceased estate
- advice about your rights and entitlements to a deceased estate

Swanwick Murray Roche can provide timely tailored advice about your circumstances. We have extensive experience in making Wills, succession planning, estate administration and resolving disputes about contested estates.

Please do not hesitate to contact us by phone on 4931 1888, email at enquiries@smrlaw.com.au, via our online enquiry form or by any of the other means detailed on our website www.smrlaw.com.au.

NOTE: The laws relating to the making of Wills and administration of estates varies from State to State.