

* Test for mental capacity

When does an individual no longer have the capacity to act for themselves?

The test for mental capacity is now contained in the Mental Capacity Act 2005 (the MCA). The MCA places great weight on the fact that the starting point for all assessments is that the individual does have capacity and it is this starting point that has to be disproved.

There are four key questions which must be considered:

- 1 Can the individual understand information relevant to the decision, including the likely consequences of making, or not making, the decision?
- 2 Can they retain this information long enough to make the decision?
- 3 Can they use and weigh the information to arrive at the choice?
- 4 Can they communicate their decision in any way?

If there is a 'reasonable belief' that the answer to any of these questions is no then the individual does not have the capacity to take action or make a decision. 'Reasonable belief' means that any other reasonable person would have come to the same conclusion.

When it comes to making a Will, however, the test is as follows:

- Does the individual understand the nature of the act of Will-making?
- Does the individual understand the effects of making a Will in the form proposed by the individual?
- Does the individual understand the extent (although not necessarily the value) of the property which they are disposing of under their Will?
- Does the individual comprehend and appreciate the claims of all the people to which they ought to have regard? This includes distinguishing between individuals and reaching a moral judgment, such as whether one child should be preferred over other children because they are less well provided for, more deserving or in need of greater financial assistance because of family responsibilities or state of health.

When it comes to making a Will the test for capacity should be based 'on the balance of probabilities'. In other words, is it more likely that individual is capable or that the individual is incapable? The person undertaking the test, which would generally be the individual's GP or consultant, does not need to be satisfied 'beyond reasonable doubt'.

Further information

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