

With dementia becoming an ever increasing reality for many clients, how do you protect yourself and the testator from attack on the grounds there was cognitive impairment?

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# Dementia

- Statistics:
- 850,000 now, 1 million by 2025
  - 0.1% of people below 65
  - 6% of people over 65 years old
  - 20% of people over 80 years old
  - 80% of people in residential/nursing homes

# Dementia

- What is it?
  - Brain disorder
  - Loss of brain function, especially
    - Memory
    - Language
    - Recognition
    - Abstract thinking and planning
    - Progressive and irreversible

# Assessing dementia

Not easy!

- Mild → still have capacity
- Severe → probably not have capacity
- Moderate → may or may not have capacity
  - Ability to display social graces often preserved

# Testing for capacity

Mini Mental State Examination (MMSE) → memory test mainly

- Scores open to different interpretation
- 27/30 can lack capacity
- 15/30 may have capacity

Other tests but not as common – MMSE cheap and easy

- General Practitioner Assessment of Cognition
- Hodkinson abbreviated mental test score
- CoPs
- Montreal Cognitive Assessment

# Taking Instructions

- Face to face
- No-one else present
- Open questions
- Proper dialogue → family assets, ask where they bank etc, previous Wills, any changes?
- Detailed attendance note
- Consider the Golden Rule
- Video meeting? Anyone doing that?

# The Golden Rule

For aged/ill testator = Will ought to be witnessed or approved by a medical practitioner.

- Rarely followed in practice
- GP's busy/not expert
- Timing issues, i.e. getting a report
- If in doubt, execute (as claim for negligence less likely)
- Court slow to sanction solicitors who don't follow the rule

# Instructing an expert

- Tell testator it will reduce chances of a challenge (rather than “I’m not sure you have capacity!”)
- Old age psychiatrist generally better than GP
- Ensure *Banks v Goodfellow* test highlighted to them (see ACTAPs pro-forma letter)
- Keep chasing them if they are slow

# Some comfort!

- Capacity time and event specific
- Solicitor taking instructions best placed to assess
- Easier to satisfy court of capacity where easy, straightforward Will
- Courts don't want uncertainty or people dying intestate
- The courts should not too readily upset, on the grounds of lack of mental capacity, a Will that has been drafted by an experienced independent lawyer (*Hawes v Burgess 2013* and *Elliott v Simmonds 2016*)

# thank you



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