

# Capacity in Estate Planning

*Understanding testamentary and decision-making capacity is essential to ensure Wills and powers of attorney are valid.*

## Contact Us

If you need further assistance or advice, please do not hesitate to contact our Wills, Estate Planning and Structuring team on (03) 9843 2169.

## Making a Will: Testamentary Capacity

In order for a person to make a Will, it is necessary that the person has testamentary capacity.

This is a legal test, however it is often prudent to obtain a contemporaneous written medical opinion from the person's doctor, to store with the Will.

Under the current law, in broad terms, a Will-maker has testamentary capacity if they:

- understand what a Will is and the implications of making a Will;
- have a general awareness of their assets and liabilities;
- can identify potential beneficiaries of the estate, such as family members and financial dependants; and
- are not suffering from a mental illness or disorder that affects their judgment in relation to the making of their Will.

## Making a Power of Attorney: Decision-Making Capacity

For a person to make an enduring power of attorney and an appointment of medical treatment decision makers, a person must have "decision making capacity". The law presumes that a person has decision-making capacity, unless there is evidence to the contrary.

It is typically a requirement that medical evidence of capacity (or otherwise) is obtained prior to an attorney acting pursuant to a person's enduring power of attorney.

Under the current law, the definition of "decision making capacity" in this context is broadly that the person can:

- understand information relevant to their financial, personal or medical treatment decision and the effect of the relevant decisions;
- retain that information and weigh-up alternatives; and
- communicate their decision in some way (whether that communication is verbal, using gestures or otherwise).