

When a person wishes to make a Will capacity should be present at two stages:

1. When they give instructions for the preparation of the Will; and
2. When the Will is executed

What if the testator (the person making the Will) deteriorates between giving instructions and signing the Will? If the Will was prepared strictly in accordance with the instructions given it may still be valid - even if, at the point of signing, the testator merely recalls giving instructions and believes it complies with those instructions.

The definition of capacity for Wills, set down in the case of *Banks v Goodfellow* 1870, provides several separate tests. The testator must have understood:

 **The nature of the act of making a Will**

- They will die
- The Will comes into operation on their death but not before
- They can change the Will at any time

 **The effects of making a Will**

- Who the executors are
- Why they are choosing the executors
- Who benefits and to what extent
- Whether a gift is absolute or limited or conditional in some way i.e. the beneficiary inherits at a particular age
- Whether they have already made a Will
- If so, how the new Will differs from it
- The reasonably foreseeable consequences of making or not making a new Will

 **The extent of their property which they are disposing**

**For more information, advice or support call 01227 700 702 or email [info@argolifeandlegacy.co.uk](mailto:info@argolifeandlegacy.co.uk)**

The information contained in this document has been provided by Argo Life & Legacy Ltd for use at the Hot Potato Conference on 4 July 2016. Other providers of information and advice can be consulted. It provides background information only and should not be relied upon as an exhaustive list of the legal issues involved.

## FACTSHEET

### Capacity Assessment

#### Making & Revoking Wills

- The extent of the money and property owned solely by them which is capable of being disposed of by a Will
- Jointly owned property may pass automatically to the other joint owner
- If there are benefits payable on death that are unaffected by the terms of the Will i.e. life policy proceeds
- Assets could be sold during lifetime which are given away in the Will
- New assets could be acquired during lifetime
- Assets may increase or decrease in value during lifetime
- If there are any debts which will need to be paid
- Whether there is an Inheritance Tax impact
-  **The claims to which he/she ought to have regard**
- Why are some beneficiaries preferred to others?
- Why are some beneficiaries excluded?

These tests are based on understanding, which involves receiving, believing, evaluating and making a decision on information which is already known to the testator or which could perhaps, to a limited extent, be communicated or explained to him/her by someone else. The final test extends beyond understanding and requires other qualities such as a judgment to discern, distinguish and compare, the inability to reason, moral responsibility, memory, sentiment and affection.

The test for revoking a Will, established in the case of *Re Sabatini Deceased* 1970, confirmed the testator must have the same degree of understanding for revoking a Will as they had when making it