

Scottish Government submission of 30 November 2023

PE2061/A: Require solicitors to ensure the capacity of vulnerable individuals by having a medical professional co-sign legal documents

The Scottish Government has considered the information provided in the petition and the Scottish Government wish to share their condolences with Mr Johnston's family. While the Scottish Government is sympathetic in this instance, we do not view that the legislative changes sought are necessary or appropriate. The Scottish Government concluded that the rules detailed by the Law Society of Scotland alongside the additional safeguards currently in place are sufficient in protecting the capacity of vulnerable individuals when signing legal documents.

Responsibilities of Solicitors

Assessing a person's testamentary capacity is a legal question, to be considered and assessed by legal professionals and the courts. It is already best practice for solicitors to obtain a medical opinion if there are doubts as to a testator's capacity. This is in line with a solicitor's legal responsibilities, which include a duty to act with integrity. Solicitors are also subject to the Law Society of Scotland's rules on trust and personal integrity, acting in a client's interests, and conflict of interest, among others.

Law Society of Scotland Rules

The Law Society of Scotland rules require a solicitor to have instructions from their client and be satisfied when taking instructions that the client has the capacity to give instructions in relation to that matter.

If there is any doubt as to a client's capacity to instruct in a particular case, input should be sought from an appropriate professional. Whilst the decision on whether or not a client has capacity remains one for the solicitor to satisfy themselves of the answer to, that solicitor must assess the client by appropriate means which should include their own knowledge of the adult and/or the solicitor may take input from a GP, a clinical psychologist or other relevant persons. Solicitors cannot simply rely upon the legal presumption of capacity but must take reasonable steps to

facilitate the exercise of capacity, including in the matter of instructing a solicitor.

Additional Safeguards

In addition to the rules set out by the Law Society of Scotland covering the capacity of an individual client, there are also additional safeguards in respect of the Client Protection Fund and professional indemnity insurance. The Client Protection Fund exists to protect clients who have lost money because of the dishonesty of a solicitor (or a member of their staff). Additionally, Scottish solicitors working in private practice have professional indemnity insurance to cover claims of negligence against them.

'Golden Rule'

The 'golden rule' referred to in the petition applies in England whereby the testamentary capacity of someone who is elderly or suffering from, or has recently suffered from, a serious illness should be assessed by a medical practitioner where that person is seeking to make or change their will. It is not a 'rule' as such, and failure to observe it does not of itself invalidate the will or the change, but it is considered to be best practice in England. The question of the 'golden rule' has been considered by the Scottish courts which ruled that such a strict requirement is not necessary. Assessing whether a person has testamentary capacity is a legal question, to be considered and assessed by legal professionals and the courts. While medical evidence may often be available, and useful, to the courts, the assessment of capacity does not depend solely on medical evidence.

Yours sincerely

Access to Justice Unit