Where there's a will...

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Case histories are based on actual medical negligence claims, however, certain facts have been omitted or changed by the author to ensure the anonymity of the parties involved.

Wills are sometimes contested on the basis that the person who made the will was not mentally competent to draw up the will in question. This article examines the role of the general practitioner in circumstances in which there is a dispute about a patient's will.

Case history

Mr Eric Smith, 86 years of age, had recently moved in with his daughter because he was no longer able to care for himself at home. Mr Smith's daughter asked her general practitioner if she would look after her father, as his previous GP could no longer visit him. The GP agreed and saw Mr Smith at home a few days later. The GP noted Mr Smith was alert and oriented. His Mini Mental State Examination score was 26/30. He had a long history of ischaemic heart disease and was on a number of medications. The GP arranged for Mr Smith's medical records to be transferred from his previous GP. These records confirmed a history of increasing angina with episodes of pain at rest, despite maximal medical therapy.

A few weeks after taking over the care of Mr Smith, the GP received a phone call from Mr Smith's son who lived in another state. The son said that he was concerned about his father's health and felt that he would be better cared for in a nursing home. He said that he did not believe his sister had his father's best interests at heart. When asked to clarify his comments, the son said that he believed his sister was not giving all of the medications to his father. The GP visited Mr Smith and discussed the son's concerns with him. Mr Smith said there was a longstanding 'family dispute' and that he was quite happy living with his daughter. He confirmed that he was taking all of his medications. The GP subsequently suggested to the son that he discuss his concerns directly with his father and his sister.

Two months later, the GP received a phone call from the local emergency department (ED). The hospital registrar advised the GP that Mr Smith had been brought in by ambulance with chest pain and dyspnoea. Soon after his arrival in the ED, Mr Smith had suffered a cardiac arrest and was unable to be resuscitated. The GP outlined the patient's history of ischaemic heart disease. The registrar said that he would complete a death certificate because he was comfortably satisfied that the cause of death was a myocardial infarct.

Two weeks later, the GP received a letter from Mr Smith's son requesting a report about his late father's 'testamentary capacity'. He also wanted a complete copy of his father's medical records.

Medicolegal issues

The general practitioner was not sure if she should comply with the son's request and sought advice from her medical defence organisation (MDO). She was told that she still owed a duty of confidentiality to the patient, even after death. The GP needed an authority from the executor of Mr Smith's estate before providing any information to the patient's son. The GP replied to the son's letter as follows:

'Dear Mr Smith

Thank you for your letter requesting a report and a copy of your late father's medical records. I would be grateful if you would forward an authority from the executor of Mr Eric Smith's estate so that I may consider your request further.

Yours sincerely...'

The GP subsequently received a letter from the son's solicitors stating that Mr Eric Smith had made a new will approximately 2 months before his death. The son had instructed the solicitors that his father was not of 'sound mind' and did not have the capacity to make a new will at this time. He was contesting his late father's will and the solicitors urgently needed the information in order to progress a claim against the validity of Mr Eric Smith's last will. The GP sought further assistance from her MDO. She was again advised that

an authority from the executor of the estate was required and she should not release the information to the son or his solicitors until an appropriate authority had been received.

Discussion and risk management strategies

The term 'testamentary capacity' can be defined as the legal ability to make a will. If a patient is judged not to have had testamentary capacity at the time of writing a will, the will is judged legally invalid and its provisions have no effect. The legal test for determining whether an individual possesses sufficient testamentary capacity can be outlined as follows:

'It is essential to the exercise of such a power that a testator shall understand the nature of the act, and its effects; shall understand the extent of property of which he is disposing; shall be able to comprehend and appreciate the claims to which he ought to give effect; and with a view to the latter object, that no disorder of the mind shall poison his affections, pervert his sense of right, or prevent the exercise of his natural faculties – that no insane delusion shall influence his will in disposing of his property and bring about a disposal of it which, if the mind had been sound, would not have been made'.[1]

Wills may be contested on the basis that the testator was not mentally competent to draw up the will in question. In this situation, information may be sought from a deceased patient's GP about the mental state of the patient at the time he or she made their will. A GP still owes a duty of confidentiality to a patient after their death. Information about a deceased patient should only be released in response to a valid subpoena or on the authority of the executor of the patient's estate. On receipt of an appropriate authority, it is entirely appropriate for a GP to comment and provide a report about their knowledge and assessment (if any) of a patient's mental state, however, care should be taken not to use legal terms, such as testamentary capacity, or to provide an opinion beyond the practitioner's expertise. General practitioners need to be aware that competence to consent to medical treatment cannot be equated with legal competence to make a will and dispose of property. By following these steps GPs can minimise the possibility of becoming 'piggy in the middle' of this type of dispute.

Summary of important points

- Medical practitioners owe a duty of confidentiality to their patients and this duty exists even after the death of a patient.
- Before the release of information about a deceased patient, authority should be sought from the executor of the patient's estate.
- Competence to consent to medical treatment is not equivalent to legal competence.

Conflict of interest: none.

Reference

1. Banks v Goodfellow (1870) LR 5QB 549 at 565.

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