

**IN THE SUPREME COURT OF VICTORIA
IN ITS PROBATE JURISDICTION**

S PRB [*Application No.*]

In the matter of the deceased estate of [*name*]

Application by:

[*Plaintiff's name*]

Plaintiff(s)

**AFFIDAVIT OF TESTAMENTARY CAPACITY BY THE LAWYER WHO PREPARED AND
WITNESSED THE WILL**

Date of document:

Filed on behalf of the Plaintiff

Prepared by: [*name and
address of lodging party*]

Ref: [*solicitors only*]

CODE: [*solicitors only*]

Tel: [*number*]

E-mail: [*e-mail address*]

Guidance for completing this affidavit

This affidavit should be completed by the lawyer who prepared the will and witnessed its execution.

The affidavit should be based on your own observations of the deceased, your discussions with the deceased and any contemporaneous file notes.

Give specific examples and details of the matters that led you to form the opinion that the deceased had testamentary capacity. Where possible, refer to discussions you had with the deceased rather than providing general statements.

Complete the information requested wherever you see words in square brackets []. Before the document is signed, remove this guidance section and any instructions or examples in the document.

If you rely on contemporaneous file notes you made relevant to testamentary capacity, attach copies of the relevant file notes to the affidavit as exhibits where appropriate. If you do not attach any file notes, you do not need to complete the certificate identifying exhibit attached.

I, [*insert name and address*], [*occupation*] affirm/make oath and say that:

1. I am a lawyer admitted to practise in [*Insert state*] and was, at all material times, practising as a lawyer at [*insert firm name*].

2. I prepared the will of *[insert full name of the deceased]* (“the deceased”) dated *[date]* (“the will”).
3. I took instructions from the deceased for the preparation of the will on *[date]*.
4. I was present when the will was executed on *[date]* and witnessed the deceased sign the will.
5. The instructions for the will were taken *[in person/ by videoconference/by telephone/by email]* at *[location]*.
6. The following persons were present when instructions for the will were taken:
 - (a) *[Name and relationship to the deceased (if any)]* or
 - (b) No other person was present at the time of taking instructions.
7. The following persons were present when the will was executed:
 - (a) *[Name and relationship to the deceased (if any)]* or
 - (b) No other person was present apart from the attesting witnesses.
8. Now produced and shown to me collectively marked “A” are true copies of the file notes I prepared which I consulted in preparing this affidavit: *[provide details or state “I have not attached any file notes”]*.
9. In forming my opinion as to the deceased’s testamentary capacity, I have considered whether the deceased:
 - (a) understood the nature and effect of making a will;
 - (b) understood the general nature and extent of their property;
 - (c) understood the persons who might reasonably be expected to benefit from their estate;
 - (d) was capable of evaluating and weighing competing claims upon their estate; and
 - (e) displayed any condition or disorder of mind that affected the dispositions made in the will.
10. At the time I took instructions for the will, I made the following observations concerning the deceased’s appearance, behaviour, communication, comprehension and ability to answer questions:
 - (a) *[insert details]*.

11. The following matters led me to conclude that the deceased understood the nature and effect of making a will:
 - (a) *[For example, discussions concerning the purpose of the will, revocation of earlier wills, appointment of executors, and the proposed distribution of the estate.]*
12. The following matters led me to conclude that the deceased understood the general nature and extent of their property:
 - (a) *[For example, discussions concerning real property, bank accounts, investments, superannuation, business interests, personal possessions, liabilities and other assets.]*
13. The following matters led me to conclude that the deceased understood the persons who might reasonably be expected to benefit from their estate:
 - (a) *[For example, discussions concerning a spouse, domestic partner, children, stepchildren, former spouses, dependants, other relatives or any person who may have a claim upon the estate.]*
14. The following matters led me to conclude that the deceased was capable of evaluating and weighing competing claims upon their estate and making rational decisions concerning the distribution of their estate:
 - (a) *[For example, explanations given by the deceased for gifts made, gifts withheld, unequal distributions, exclusions of family members or changes from previous testamentary arrangements.]*
15. The following matters led me to conclude that the deceased was not affected by any condition or disorder of mind that influenced the dispositions contained in the will:
 - (a) *[Insert observations relevant to the deceased's decision-making, reasoning, consistency, understanding and presentation.]*
16. Throughout my dealings with the deceased, I observed nothing in the deceased's presentation, communication, behaviour or decision-making that caused me to doubt their testamentary capacity.
17. Based on my direct observations of the deceased, my discussions with the deceased and my contemporaneous file notes (if any), I formed the opinion that the deceased had testamentary capacity when instructions for the will were given and when the will was executed.

18. The facts deposed to in this affidavit are based on matters personally observed by me, matters recorded in my contemporaneous file notes, or matters otherwise within my personal knowledge.

The contents of this affidavit are true and correct and I make it knowing that a person making a false affidavit may be prosecuted for the offence of perjury.

Sworn/affirmed by
the deponent

at [place]
on [date]

Before me:

Witness Full Name

Address

Qualification

A person authorised under section 19(1) of the *Oaths and Affirmations Act 2018* to take an affidavit.

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In the matter of the deceased estate of [*name*]

Application by:

[*Plaintiff's name*]

Plaintiff(s)

CERTIFICATE IDENTIFYING EXHIBIT

Date of document:

Filed on behalf of the plaintiff

Prepared by: [*name and
address of lodging party*]

Ref: [*solicitors only*]

CODE: [*solicitors only*]

Tel: [*number*]

E-mail: [*e-mail address*]

This is the exhibit marked " A " now produced and shown to [*name*] at the time of swearing/affirming their affidavit on:

.....
[Signature of authorised witness]

.....
[Signature of deponent]

[Name, address and statement of
capacity of person taking affidavit]

Exhibit "A"

File Note