

TO REMEMBER, TO REFLECT AND TO REASON¹ - CAPACITY **Therese Catanzariti, 13 Wentworth Chambers**

There is no single test for capacity under the general law – capacity is decided relative to the specific task – the particular business transacted or the particular legal instrument being executed. It is the capacity to understand the nature of the transaction when it is explained.²

Australia's population is aging. Australia's life expectancy in 2008 was 81 years old.³ It has been estimated that around 45% of people over 85 have been diagnosed with dementia, and more have at least mild cognitive impairment.⁴

There are several different statutory and common law tests of capacity. Capacity to marry depends on real consent that requires that the person is mentally capable of understanding the nature and effect of the marriage ceremony. ⁵A person may have capacity to marry but lack testamentary capacity.⁶

A person may become subject to a financial management order and be deprived to transact financial matters because they are incapable of managing their own affairs because they cannot plan for the future, how to generate income and look after capital.⁷ A person may not have capacity medical decisions and be subject to a guardianship order. However, they may still have testamentary capacity.⁸ For example, in *D'Apice v Gutkovich*,⁹ the testator was subject to a guardianship order by the Guardianship Tribunal and a specialist psycho geriatrician said she probably did not have capacity to execute a power of attorney, but White J held she had testamentary capacity.

A person may be diagnosed with dementia and may still have testamentary capacity. For example, in *D'Apice v Gutkovich*,¹⁰ Mrs Abrahams had been diagnosed with moderately severe Alzheimer's dementia, but White J held she still had testamentary capacity. A person may be depressed, even severely depressed and suicidal, and still have testamentary capacity.¹¹

A person may have delusions, but may have lucid intervals. For example, in *Zorbas v Sidiropoulous*, DeBelle J said¹²

“...although the testatrix may times have suffered delirium or at least severe distress because of the serious nature of her illness and the severity of the particular afflictions from which she suffered, she conducted herself on quite a number of occasions rationally. In particular, I find that on 14 December 2004 she was quite rational and had the capacity to understand the nature and effect of what she was doing”

Testamentary Capacity

¹ from an article by Myers J writing extra-judicially, Australian Bar Gazette, 1967 Vol 2, p3

² *Gibbons v Wright* (1954) 91 CLR 423 at 437–8 per Dixon CJ, Kitto and Taylor JJ; *Guthrie v Spence* [2009] NSWCA 369 per Campbell JA at 174

³ World Bank, World Development Indicators 2010, extracted from Google public data

⁴ *Austlaw Presentation 15 July 2011, Dr Tuly Rosenfeld, Associate Professor UNSW School of Medicine, Austlaw Presentation*

⁵ section 23B(1), Marriage Act 1961 (Cth)

⁶ *Estate of Park; Park v Park* [1954] P 89

⁷ *PY v RJS* [1982] 2 NSWLR 70, *H v H* (unreported, NSW Supreme Court, Young J, 20 March 2000)

⁸ financial management order - *Perpetual Trustee Company Ltd v Fairlie-Cunnighame* (1993) 32 NSWLR 377; guardianship order - *D'Apice v Gutkovich – Estate of Abraham* (No 2) [2010] NSWSC 1333

⁹ *D'Apice v Gutkovich – Estate of Abraham* (No 2) [2010] NSWSC 1333

¹⁰ *ibid*

¹¹ *King v Hudson* [2009] NSWSC 103; *Estate of Paul Hodges; Shorter v Hodges* (1988) 14 NSWLR 698; *NSW Trustee and Guardian v Pittman; Estate of Kolai* [2010] NSWSC 501

¹² *Zorbas v Sidiropoulous; Estate of Kriezis* [2008] NSWSC 1041 at para 79

A person's power to dispose of their assets is the last of a person's great powers and freedoms, and a court will not lightly interfere

“The power freely to dispose of one's assets by will is an important right, and a determination that a person lacked (or, has not been shown to have possessed) a sound disposing mind, memory and understanding is a grave matter.”¹³

The classic test of testamentary capacity was set out by Cockburn CJ in *Banks v Goodfellow*¹⁴

“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 the 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.”

This was formulated by Rich ACJ in the High Court in *Timbury v Coffee*¹⁵

“The factors of competency are that the party must know what he is about, have sense and knowledge of what he is doing and the effect his dispositions will have, knowledge of what his property was, and who those persons were that then were the objects of his bounty”

In *King v Hudson*, Ward J analysed the evidence by posing five questions¹⁶

- Was the deceased able to understand the nature of the act of executing and publishing a will and the effect of the instrument?
- Was the deceased able to call to mind the property it was in his power to dispose of in that will?
- Was the deceased able to call to mind the persons who may have claims upon his testamentary bounty?
- Was the deceased able to weigh the relative claims of those persons?
- Was the deceased's mind possessed of a delusion that influenced the disposition of his property which, if his mind had been free of that delusion, would not have been made?

able to understand the nature of the act

The testator must appreciate the nature of the act, that is, that they are executing a will which would direct who would receive her property after the testator's death.¹⁷ For example, in *Tobin v Ezekiel*,¹⁸ Mrs Ezekiel had said to her grandson that she had just made a will, and she told her rabbi that she had made a will leaving her house to her two sons.

able to appreciate the nature of property

In *Banks v Goodfellow*, Cockburn CJ said that the testator should understand the extent of their property. More recently, the courts have taken a more flexible approach. When *Banks v Goodfellow* was decided, many testators property holdings were relatively simple – a house, perhaps some land, perhaps some shares in a family company. Today's testator may have mutual

¹³ *Estate of Griffith; Easter v Griffith* (Court of Appeal, 7 June 1995, unreported) per Gleeson CJ

¹⁴ *Banks v Goodfellow* (1870) LR 5 QB 549 at 565 per Cockburn CJ

¹⁵ *Timbury v Coffee* (1941) 66 CLR 277 at 280

¹⁶ *King v Hudson* [2009] NSWSC 1013 at para 58 - 59

¹⁷ *D'Apice v Gutkonich* supra n6 at para 102

¹⁸ *Tobin v Ezekiel; Estate of Lily Ezekiel* [2011] NSWSC 81

funds, superannuation, a portfolio of publicly listed shares, a network of bank accounts, units in unit trust and a number of investment properties. In *Kerr v Badran*, Windeyer J explained¹⁹

“In dealing with the *Banks v Goodfellow* test it is, I think, necessary to bear in mind the differences between life in 1870 and life in 1995. The average expectation of life for reasonably affluent people in England in 1870 was probably less than 60 years and for others less well off under 50 years: the average life expectation of males in Australia in 1995 was 75 years. Younger people can be expected to have a more accurate understanding of the value of money than older people. Younger people are less likely to suffer memory loss. When there were fewer deaths at advanced age, problems which arise with age, such as dementia, were less common. In England in 1870, if you had property it was likely to be land or bonds or shares in railway companies or government backed enterprises. Investment in ordinary companies was far less common than now. Older people living today may well be aware that they own substantial shareholdings or substantial real estate, but yet may not have an accurate understanding of the value of those assets, nor for that matter, the addresses of the real estate or the particular shareholdings which they have. Many people have handed over management of share portfolios and even real estate investments to advisers. They may be quite comfortable with what they have; they may understand that they have assets which can provide an acceptable income for them, but at the same time they may not have a proper understanding of the value of the assets which provide the income. They may however be well able to distribute those assets by will. I think that this needs to be kept in mind in 2004 when the requirement of knowing “the extent” of the estate is considered. This does not necessarily mean knowledge of each particular asset or knowledge of the value of that asset, or even a particular class of assets particularly when shares in private companies are part of the estate.”

For example, in *D’Apice v Gutkovich*,²⁰ Mrs Abrahams knew she had some flats in Maroubra (she owned a block of flats), and sometimes she remembered she also had an investment property in Coogee, said she owned a car but was not confident of the make of the car, and did not know the name of her bank (she had accounts with Westpac and BT). However, she was still held to have testamentary capacity.

The geriatrician distinguished between the testator’s functional comprehension and structural comprehension of the extent of the testator’s assets and how they are managed, She was unable to give details about the income generated by the assets and would need assistance to function, that is, to manage the assets in a reasonable fashion. She had little functional comprehension. However, this did not mean that she was not able to understand the broad nature and extent of her assets.

identify and evaluate claims of persons who may have a claim on the testator’s testamentary bounty

The testator should be able to identify persons who may have a claim on their bounty, and be able to evaluate their claims.

This does not mean that the testator must bequest them with something – the testator may identify persons but decide to exclude them. For example, in *Tobin v Ezekiel*,²¹ the testator’s daughters argued that the testator did not have testamentary capacity because she forgot to include them in her will. Brereton J held that the testator did not forget the daughters – she was aware of the daughters’ claims but she elected to exclude them.

was the testator’s mind poisoned by a delusion

¹⁹ *Kerr v Badran; Estate of Badran* [2004] NSWSC 735 at para 49

²⁰ *D’Apice v Gutkovich* supra n6

²¹ *Tobin v Ezekiel* supra n15

A person may be able to appreciate that they are executing a will, the extent of their property and the claims on their bounty, but may be suffering from a delusion or such other disorder that poisons them against a potential beneficiary, so that the testator is unable to properly evaluate the competing claims on her bounty. For example, the testator who wrongly thinks that a son or carer is stealing from the testator, and so the testator excludes them from the will.

In *Virginie-Pitel v Campbell*,²² the testator had three daughters. She had lived with one daughter Kathleen for some time and had given her the bulk of her estate in earlier wills, but she completely excluded Kathleen in the final will and gave the estate to her other two daughters. Slattery J accepted the expert's evidence that the testator was suffering from a disorder of the mind, consequent upon cerebrovascular disease, that she was unable to weigh, identify, evaluate and discriminate between the respective strengths of the claims of persons on her testamentary bounty, her daughters.

In *King v Hudson*,²³ the testator had excluded his ex-wife from his will. She argued that the testator was suffering from delusions, including delusions that she was "out to get him". Ward J noted the expert's evidence describing a delusion as a false unshakeable belief that is out of context with the person's social and cultural background. Notably, it is only a delusion if it is challenged and yet persists and is unshakeable. It is not a delusion if it is merely a mistaken belief or an overvalued idea. Further, it is not a delusion if there is a rational basis for the deceased's concern. Ward J held that the testator was not suffering from a delusion because there were reasons why the testator may have considered that his ex-wife may betray him, and other reasons why he may have excluded her from his will.

In *NSW Trustee and Guardian v Pittman*,²⁴ the testator was severely depressed and there was evidence that when she was in a down mood she was irrational and couldn't be reasoned with. Further, she was drunk on a bottle of whisky and perhaps had taken other drugs when she prepared the informal testamentary document. White J held she did not have capacity, as she would not be able to rationally weigh the claims of persons who were potential objects of her testamentary bounty.

In contrast, in *D'Apice v Gutkovich*,²⁵ the testator revoked her gifts to her carer because she said that the previous carer had stolen her car. White J considered the evidence and held that this was not a delusion, that the carer had in fact had the car that the testator bought registered in the carer's name and the carer took the car when she left the testator's house.

Onus and Standard of Proof

Testamentary capacity is a question of fact. The onus of proof is on the person propounding the will to show testamentary capacity. However, in *Timbury v Coffee*, Dixon CJ noted that the evidential burden may shift²⁶

"If a will rational on the face of it is shown to have been executed and attested in the manner prescribed by law, it is presumed, in the absence of any evidence to the contrary, that it was made by a person of competent understanding. But if there are circumstances in evidence which counterbalance that presumption, the decree of the court must be against its validity, unless the evidence on the whole is sufficient to establish affirmatively that the testator was of sound mind when he executed it"

²² *Virginie-Pitel v Campbell; Campbell v Virginie-Pitel* [2010] NSWSC 1440

²³ *King v Hudson* supra n13

²⁴ *NSW Trustee and Guardian v Pittman; Estate of Koltai* [2010] NSWSC 501

²⁵ *D'Apice v Gutkovich* supra n6

²⁶ *Timbury v Coffee* (1941) 66 CLR 277 at 283,

For example, in *Zorbas v Sidiropoulous*, DeBelle AJ said that the will appeared rational on its face, gave gifts that were explainable as the testator gave her estate to her closest living relative and was drawn up and witnessed by a solicitor. Similarly, in *Tobin v Ezekiel*, the will was rational on its face even though it excluded the daughters – the testator provided for her surviving spouse and then for her sons who were needier than her daughters.

Extreme age or grave illness may displace the prima facie presumption.

The onus of proof is on the balance of probabilities – it is a grave matter, but it does not require the absence of doubt²⁷

A doubt being raised as to the existence of testamentary capacity at the relevant time, there undoubtedly rested upon the plaintiff the burden of satisfying the conscience of the court that the testatrix retained her mental powers to the requisite extent. But that is not to say that he was required to answer the doubt by proof to the point of complete demonstration, or by proof beyond a reasonable doubt. The criminal standard of proof has no place in the trial of an issue as to testamentary capacity in a probate action. The effect of a doubt initially is to require a vigilant examination of the whole of the evidence which the parties place before the court; but, that examination having been made, a residual doubt is not enough to defeat the plaintiff's claim for probate unless it is felt by the court to be substantial enough to preclude a belief that the document propounded is the will of a testatrix who possessed sound mind, memory and understanding at the time of its execution

Evidence

Testamentary capacity cases are very expensive to commence and to defend because they are so fact intensive and there may be a *Jones v Dunkel*²⁸ inference if certain evidence is not provided. For example, in *Zorbas v Sidiropoulous*, the plaintiff tendered evidence from the plaintiff about his observations and expert evidence from a geriatrician. DeBelle J held that this was not enough – there was no evidence from those who knew the testator, from any doctors at the hospital, or from the testator's general practitioner.

A prudent practitioner taking instructions on a will should create reliable contemporaneous evidence.

solicitor

First, the solicitor should ask questions to satisfy themselves of their client's capacity, and make detailed contemporaneous file notes and be ready to give evidence if required. In *D'Apice v Gutkovich*, the solicitor taking instructions on the will was Richard D'Apice, one of the senior partners of Makinson & D'Apice who had over 30 years of experience in preparing wills. White J quotes extensively from his oral evidence and evidence of his contemporaneous file notes of the questions that he asked the testator – it is worth reading as a guide to what a prudent practitioner should do when taking instructions from a client who may have capacity issues. He records that she is orientated in time and space, attentive and able to concentrate, her answers were responsive to the question, she knew her husband was deceased she had no children and she had cousins in London, that she understood why he was there and why she wanted a new will. He read out parts of her previous wills and asked her if she wanted to retain the bequests – he was satisfied that she was able to evaluate the competing claims because she decided to change some and leave others. When he returned to her home to execute the will, he again asked similar questions.

²⁷ *Worth v Claohm* (1952) 86 CLR 439 at 453

²⁸ *Jones v Dunkel* (1959) 101 CLR 298

White J said that Mr D'Apice's opinion that she had capacity was "of no small weight" because of his experience and because he did all he could to satisfy himself that she had capacity.

Similarly, in *Zorbas v Sidiropoulous*, DeBelle AJ was also persuaded by the fact that the solicitor had capacity, even though the expert geriatrician gave evidence that he did not consider that she had capacity.

A prudent solicitor should make detailed contemporaneous file notes of their observations that made them comfortable that the testator had capacity – the solicitor should be conscious that the solicitor may not be available if there is a later dispute about the will, and so the only evidence will be the file note. The solicitor should use "active listening" – ask the testator to repeat back to the solicitor the testator's understanding of the gifts and structure of the will. The solicitor should also engage the testator to explain why certain beneficiaries have been given generous gifts and certain other beneficiaries limited gifts or been excluded from the will – this will assist the solicitor confirming that there are no delusions distorting the testator's intentions.

The solicitor should also confirm if the testator is taking any medication and record a list of the medication. The medication may have adverse effects on the brain function.

attesting witnesses

A witness does not need to know the testator, and does not need to know that the document that they are attesting and signing is a will.²⁹ However, the attesting witnesses are in a unique position to give lay evidence of the testator's condition and demeanor at the time the will was executed.³⁰

In *Tobin v Ezekiel*, the attesting witness was one of the testator's friends who knew her well and so was able to give evidence of the testator's demeanour.

general practitioner and other specialists

In *Zorbas v Sidiropoulous*, and in *Revie v Druitt*³¹ the plaintiff was criticized for not calling the treating doctor. The testator's general practitioner may have been treating the testator for some time, so they can give evidence about any cognitive decline.

Sometimes, the estate is fortunate that the testator visited the doctor shortly before or after the will is executed – in *Tobin v Ezekiel*, the testator visited her GP the day after executing the will with a bout of whooping cough. The treating doctor knew the testator and had experience in dealing with elderly people and she had personally observed the testator at the relevant time. Some solicitors go further and require the testator to provide the solicitor with a doctor's certificate that the doctor considers that they are of sound mind before the solicitor takes instructions for the will. In *D'Apice v Gutkovich*, the solicitor required the testator to visit a psycho geriatrician before he took instructions on the will.

The doctor's medical notes may also include useful information. It may include MMSE test results. It may also include that the testator suffered from certain illnesses that may have affected the testator – for example, a testator who may appear to have dementia may have a temporary condition caused by urinary tract infection. In *Tobin v Ezekiel* and *Zorbas v Sidiropoulous*, the court noted that the medical records did not suggest any cognitive defect. However, when a person is in hospital or being treated for a particular issue (such as cardiac issues or diabetes), the treating

²⁹ section 7, Succession Act 2006

³⁰ which led to the riddle in Alan Carstairs's dying words in Agatha Christie's "*Why Didn't They Ask Evans*" (1934) – they didn't ask the parlour-maid Evans to witness the testator's will because she knew the testator and would have recognized that the person signing the will wasn't the testator

³¹ *Revie v Druitt* [2005] NSWSC 902

doctors and nurses are not looking for cognitive defects – they are focused on the issue that they are treating. This may explain why there are no notes about cognitive defects. Further, the doctors and nurses may not have any training in recognizing cognitive defects.

people who knew the deceased

The testator’s family knows the testator well, and is in a good position to observe their mental condition. However their evidence may not be reliable. The courts may be more persuaded by disinterested evidence. For example, in *Tobin v Ezekiel*, the testator had a number of conversations with the rabbi who observed she was “the same Mrs Ezekiel as I knew her before, no change, no difference”.

In *Zorbas v Sidiropoulous*, the plaintiff appealed on the basis that the trial judge had preferred the lay evidence to the geriatrician’s evidence. Young AJ said³²

“In a probate suit, the vital evidence is very often not given by medical experts, but is given by experienced lay observers. I have said more than once in deciding probate cases at first instance, that the most valuable evidence is usually given by the experienced solicitor who witnessed the will as opposed to a very highly qualified psychiatrist whose evidence is based not on any personal observation of the testator, but who has reasoned his or her opinion from medical and hospital notes. Furthermore, it is not true to say that the evidence of lay people as to another person’s condition of health is valueless. If a matter is of common occurrence and people in their ordinary life are accustomed to make assessments of that fact, then they are able to give evidence of it.”

Similarly, in *Revie v Druitt*, Windeyer J said³³

“.....lay evidence of the activities, conversations, family circumstances and relationships of the deceased and evidence from doctors, often general practitioners who were treating doctors during the lifetime of the deceased, usually is of far more value than reports of expert specialist medical practitioners who have never seen the deceased.

expert geriatrician

An expert geriatrician may be able to review the medical notes and give an opinion on testamentary capacity.

Sometimes, the geriatrician can form an opinion because of the extensive records that are available. For example, in *Virginie-Pitel v Campbell*, the testator had MRI scans around the time she executed the will and had seen a psychologist. The expert geriatrician was able to use this material to form an opinion on the testator’s capacity. Slattery J accepted the expert’s evidence that the testator had a disorder of the mind.

In contrast, in *Zorbas v Sidiropoulous*, DeBelle AJ was not willing to accept the geriatrician’s opinion. He said that the geriatrician never treated the testator and had merely read the medical records and “it borders on the presumptuous” for a medical practitioner who has not seen a patient to assert he was able to make a diagnosis that the other medical practitioners missed. He said that the plaintiff needed to call the general practitioner or other medical staff who had actually treated the testator at the relevant time.

Similarly, in *Tobin v Ezekiel*, Brereton J was not willing to accept the evidence of the expert geriatrician who had not actually met the testator.

³² *Zorbas v Sidiropoulous (No 2)* [2009] NSWCA 197 at para 89 - 91

³³ *Revie v Druitt* [2005] NSWSC 902 at para 34

In a recent presentation,³⁴ Dr Tuly Rosenfeld, Associate Professor in Geriatric Medicine from the UNSW School of Medicine suggested the following as a forensic assessment of capacity

- information about previous relationships
- patterns of decision making with regard to the document in question
- medical notes and history, preferably contemporaneous with execution of document
- does decision making appear reasonable or in character with the history and character of previous decision making, or is it eccentric or only explainable on the basis of impairment in thinking.

Revoke a gift

If a testator does not have testamentary capacity to make a will, they may still have capacity to revoke a gift.

In *D'Apice v Gutkovich*, the solicitor's back-up plan was that the testator signed a statement written on the previous will that she revoked the gifts to the carer in the previous will. This was not ultimately relied on, because White J held that she had capacity to make the will. However, he noted that a testator who revokes a gift does not need to have capacity to appreciate the general nature and extent of their estate or weight the claims of all persons who have claims on her bounty. It is enough that she is capable of judging whether the person deserves to be excluded.³⁵

Undue Influence

Even if the testator has testamentary capacity, it may be possible to show that the testator's mental capacity made them vulnerable to undue influence. The burden of proving undue influence is borne by the persons impugning the will.³⁶ However, it is a very heavy burden because it is a serious allegation.

It is necessary to show that the testator's will was overborne and the will was produced as a result, that the act was contrary to the testator's wishes. It is not enough that the testator was bullied, was frightened and fearful, or had been threatened,³⁷ or that the person had appealed to the testator's emotions. Undue influence claims rarely succeed – in *Tobin v Ezekiel*, Breerton J noted that the only successful NSW case was *Callaghan v Myers* in 1880.³⁸

Power of Attorney

If a person does not have capacity to grant the power of attorney, then the court may review the power of attorney and declare that the person did not have the mental capacity to grant it and may declare that the power of attorney is invalid.³⁹ However, in *Szozda v Szozda*⁴⁰ Barrett J held that the Act was not an exclusive code and the court may review outside the scope of the Act.

The onus is on the person alleging incapacity - there is a "presumption of sanity", that a person of full age is capable of managing his or her affairs.⁴¹ This is in contrast with wills and probate, where the person propounding the will has the onus of proving capacity (albeit with the assistance of presumptions).

³⁴ Austlaw Presentation 15 July 2011, Dr Tuly Rosenfeld, Associate Professor Geriatric Medicine, UNSW School of Medicine

³⁵ *D'Apice v Gutkovich* at para 96

³⁶ *Boyce v Rossborough* [1857] Eng R 299

³⁷ *Tobin v Ezekiel*

³⁸ *Callaghan v Myers* [1880] 1 NSWLR 351

³⁹ section 36(3)(a) and (b)(i), Powers of Attorney Act 2003

⁴⁰ *Szozda v Szozda* [2010] NSWSC 804

⁴¹ *Attorney-General v Parnter* (1792) 3 Bro CC 441; (1792) 29 ER 632; *Murphy v Doman* (2003) 58 NSWLR 51 at [36]; *Szozda v Szozda*

The relevant caselaw was recently considered by Barrett J in *Szozda v Szozda*. He referred to *Ranclaud v Cabbar*⁴² where Young J considered the test for capacity for a general power of attorney and said

“Such a power permits the donee to exercise any function which the donor may lawfully authorise an attorney to do. When considering whether a person is capable of giving that sort of power one would have to be sure not only that she understood that she was authorising someone to look after her affairs but also what sort of things the attorney could do without further reference to her.

He referred to *Ghosn v Principle Finance Pty Ltd (No 2)*⁴³ where Forrest J said that it was not sufficient that the donor had an understanding of the purport of the power of attorney, but the court also needed to be satisfied that the donor had “a more intricate understanding of the consequences of the powers of attorney, and in particular the actions that could be taken by [the attorney] in relation to the companies and the trust properties”.

He referred to *Re K*⁴⁴ where Hoffmann J said

“first, if such be the terms of the power, that the attorney will be able to assume complete authority over the donor’s affairs; second, if such be the terms of the power, that the attorney will in general be able to do anything with the donor’s property which he himself could have done; third, that the authority will continue if the donor should be or become mentally incapable; fourth, that if he should be or become mentally incapable, the power will be irrevocable without confirmation by the court.”

Barrett J summarised the principles in a colourful example – a guide to the types of suggestions that should be made to the prospective donor to explain the significance of what they are doing⁴⁵

“The central concept is thus one of complete and lasting delegation to a particular person, albeit with the ability to put an end to the delegation while capacity to do so remains. That concept of empowering another person to act generally in relation to one’s affairs raises two basic questions. First, is it to my benefit and in my interests to allow another person to have control over the whole of my affairs so that they can act in those affairs in any way in which I could myself act — but with no duty to seek my permission in advance or to tell me after the event, so that they can, if they so decide, do things in my affairs that I would myself wish to do (such as pay my bills and make sure that cheques arriving in the post are put safely into the bank) and also things that I would not choose to do and would not wish to see done — sell my treasured stamp collection; stop the monthly allowance I pay to my grandson; exercise my power as appointor under the family trust and thereby change the children and grandchildren who are to be income beneficiaries; instruct my financial adviser to sell all my blue chip shares and to buy instead collateralised debt obligations in New York; have my dog put down; sell my house; buy a place for me in a nursing home? Second, is it to my benefit and in my interests that all these things — indeed, everything that I can myself lawfully do — can be done by the particular person who is to be my attorney? Is that person someone who is trustworthy and sufficiently responsible and wise to deal prudently with my affairs and to judge when to seek assistance and advice? The decision is one in which considerations of surrender of personal independence and considerations of trust and confidence play an overwhelmingly predominant role: am I satisfied that I want someone else to be in a position to dictate what happens at all levels of my affairs and in

⁴² *Ranclaud v Cabbar* [1988] NSW Conv R 55-385

⁴³ *Ghosn v Principle Finance Pty Ltd (No 2)* [2008] VSC 574 at [68]

⁴⁴ *Re K* [1988] Ch 310 at 313, approved by the English Court of Appeal in *Re W* [2001] Ch 609

⁴⁵ *Szozda* at para 34

relation to each and every item of my property and that the particular person concerned will act justly and wisely in making decisions?”

Barrett J was not comfortable with the solicitor’s explanations of the power of attorney to Mrs Szozda, an interesting counterpoint to White J’s positive comments about the solicitor in *D’Apice v Gutkovich*. Barrett J said⁴⁶

“Each of Mr Marsh and Mr Eriksen explained to Mrs Szozda in broad terms the general nature of the general and enduring power of attorney — in essence, that Barbara (or, in default, Mr Marsh and Mark together) would have authority to do anything and everything that Mrs Szozda herself could do. Each received from Mrs Szozda a generalised statement of acceptance or understanding of what was said to her. Neither, however, referred to any particular things that the attorney could do or to particular aspects of the family companies and family trusts in relation to which the attorney could act; nor did either probe Mrs Szozda by, for example, asking her to repeat what had been said to her or putting questions about aspects of her property and affairs answers to which might have formed a basis for specific questions or comments designed to ensure that an informed understanding had been received and was held.

Financial Management Order

A financial management order deprives a person of their capacity to deal with their own financial affairs. It may be made by the Guardianship Tribunal⁴⁷ or the Supreme Court.⁴⁸

The Supreme Court will only make the order if they are satisfied that the person is incapable of managing his or her affairs.⁴⁹ The Guardianship Tribunal will only make the order if has considered the person’s capability to manage his or her own affairs and is satisfied that⁵⁰

- a. the person is not capable of managing those affairs, and
- b. there is a need for another person to manage those affairs on the person’s behalf, and
- c. it is in the person’s best interests that the order be made.

In *PY v RJS*⁵¹, Powell J considered the phrase “incapable of managing affairs” and said

“It is my view that a person is not shown to be incapable of managing his or her own affairs unless, at the least, it appears:

- (a) that he or she appears incapable of dealing, in a reasonably competent fashion, with the ordinary routine affairs of man; and
- (b) that, by reason of that lack of competence there is shown to be a real risk that either:
 - (i) he or she may be disadvantaged in the conduct of such affairs; or
 - (ii) that such moneys or property which he or she may possess may be dissipated or lost

...it is not sufficient, in my view, merely to demonstrate that the person lacks the high level of ability needed to deal with complicated transactions or that he

⁴⁶ *Szozda* at para 119

⁴⁷ section 25E, Guardianship Act, although section 25K provides that the Guardianship Tribunal can only make interim financial management orders if the question of the person’s capacity to manage their affairs is already before the Supreme Court, and section 25L provides that the Tribunal may refer the matter to the Supreme Court

⁴⁸ section 41, NSW Trustee and Guardian Act

⁴⁹ section 41(1)(a), NSW Trustee and Guardian Act

⁵⁰ section 25G, Guardianship Act

⁵¹ *PY v RJS* [1982] 2 NSWLR 700, quoted with approval in *Guthrie v Spence* [2009] NSWCA 369 by Campbell JA (Basten JA and Handley JJA concurring)

or she does not deal with even simple or routine transactions in the most efficient manner”

However, the person must know more than how to pay a bill. In *H v H*,⁵² Young J said

“The ordinary affairs of mankind do not just mean being able to go to the bank and draw out housekeeping money. Most people’s affairs are more complicated than that, and the ordinary affairs of mankind involve at least planning for the future, working out how one will feed oneself and one’s family, and how one is going to generate income and look after capital. Accordingly, whilst one does not have to be a person who is capable of managing complex financial affairs, one has to go beyond just managing household bills”

⁵² *H v H*, unreported, 20 March 2000

Further Resources

“Client capacity guidelines: civil and family law matters”, Law Society Journal, September 2003, p 50;

Jenna MacNab, “Assessing decision-making capacity: a practical guide for lawyers”, Law Society Journal, June 2008, p 68;

“When a Client’s Capacity is in Doubt: a practical guide for solicitors”, Law Society of NSW 2009, available on the Law Society’s website, www.lawsociety.com.au; and

The Capacity Toolkit of New South Wales Attorney General's Department, accessible on the Lawlink website, www.lawlink.nsw.gov.au.