DEALING WITH CLIENTS WITH POTENTIALLY IMPAIRED MENTAL CAPACITY

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In *Ryan v Dalton; Estate of Ryan* [2017] NSWSC 1007, Justice Kunc gave a salutary reminder to the legal profession about the need for continuing legal education on questions of capacity. He provided a detailed checklist described as a "at least a starting point for dealing with this increasingly prevalent issue" (extracted in Appendix 1). It is likely his "postscript" may come to be seen as a baseline of a solicitor's standard of reasonable care.

It is important to exclude other conditions that may be masquerading as impaired capacity.

There may be *impaired literacy*. The reason that the client does not understand your document or reply to your email may not be because they lack capacity but because they are functionally illiterate, or are not computer literate, or may speak English as a second language. These issues may be revealed by bad spelling or bad grammar, requests for someone to read the document or email to them, saying it would be easier if someone else completed the form, or saying that they don't have access to a computer or to email.

There may be *impaired hearing*. One of the effects of normal aging is a loss of high frequency hearing (presbycusis). Some consonants, such as T, K and CH are high frequency. The solution is not to talk louder, but to rephrase the question. It may be useful to use hearing loops or personal sound amplifiers.

Or the person may merely have a *difficult personality*. A person may be capricious, irrational, careless, unfair or cruel because that's just the way they are, and not because of any impaired capacity.

It is also important to distinguish between *permanent* capacity issues and *temporary* capacity issues. There may be permanent capacity issues because of a genetic condition, an acquired injury such as car accident, normal cognitive aging, or dementia. However, the capacity issues may be temporary – it may be because the person is under the influence of medication or other drugs such as morphine, oxycontin, endone or other opiods, has an infection such as a urinary tract infection, or suffering from high stress such as separation or divorce, or grief after death of a close companion. The person may ultimately recover their capacity.

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. In *Guthrie v Spence* [2009] NSWCA 369, Campbell JA noted the different thresholds of capacity for marriage, for powers of attorney, for commencing litigation and for executing a will. Therefore, a person may not be able to manage their financial affairs and have a financial management order but may still have testamentary capacity.[1]

Capacity is the capacity to understand the nature of the transaction when it is explained.[2] It is not sufficient for the practitioner to explain the transaction, or to demonstrate that the practitioner has read the document aloud. The practitioner needs to be satisfied that the client has capacity to understand and has actually understood the transaction. It may be that the practitioner may only be able to be satisfied *from the client's own responses.*

If the person has impaired capacity, it is necessary to determine the nature of the impaired capacity and map the person's cognitive abilities and limitations of the impaired capacity to the elements of the transaction or the legal criteria.

For example, in relation to powers of attorney, in *Szozda v Szozda* [2010] NSWSC 804, Justice Barrett said that the central concept of a power of attorney is a complete and lasting delegation to a particular person,

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1 *Perpetual Trustee v Fairlie Cunninghame* (1992) 32 NSWLR 377

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

albeit with ability to terminate whilst the principal has capacity.[3] He considered that the principal needed to be able to understand

1 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

2 is it to my benefit and in my interests that all these things can be done by the *particular person* who is to be my attorney?

In relation to testamentary capacity, in *Banks v Goodfellow* (1870) LR 5 QB 549, Cockburn CJ said[4]

> "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 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."

More recently, in *King v Hudson*, Ward J analysed the evidence by posing five questions[5]

1. Was the deceased able to understand the nature of the act of executing and publishing a will and the effect of the instrument?

2. Was the deceased able to call to mind the property it was in his power to dispose of in that will?

3. Was the deceased able to call to mind the persons who may have claims upon his testamentary bounty?

4. Was the deceased able to weigh the relative claims of those persons?

5. 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?

A person with impaired capacity may be lucid or may be orientated as to time and space, and may have a reasonable MMSE. However, this may have nothing to do *with testamentary capacity*. In *Hobhouse v Macarthur Onslow* [2016] NSWSC 1831, there was medical evidence that Lady Macarthur Onslow did not know the day and date but did know the month and the year, was oriented with respect of place although she did not realise she was on the seventh floor, and could not perform serial sevens or spell world backwards or recall three common objects after several minutes. Justice Robb said that the medical evidence did not explain the significance of these observations *to the testator's actual cognitive ability to dispose of her estate by her will.*[6]

The most relevant issues for testamentary capacity may be frontal lobe functions such as executive function including abstract reasoning, problem solving and insight; and temporal lobe function such as memory including holding multiple relevant information in mind, as these impact whether the testator

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[3] *Szozda v Szozda* [2010] NSWSC 804 at [34]

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

[5] *King v Hudson* [2009] NSWSC 1013 at [58] to [59] per Ward J

[6] *Hobhouse v Macarthur Onslow* [2016] NSWSC 1831 at [557]

can comprehend, appreciate and weigh competing claims, "to remember reflect and reason"[7], and whether there is any delusion.

These issues may not be revealed by casual conversation, and may only be revealed by testing, such as questions to test memory, questions to test the testator's ability to weigh up claims or clinical testing.

Using these analyses as a template, in order to determine whether the client has capacity to understand the particular transaction, it is necessary to frame the transaction.

First, what are the steps or elements of the transaction.

Second, what are the issues in each step of the transaction.

Third, what are the relevant facts for each step of the transaction

Fourth, what are the options and choices for each step of the transaction.

Fifth, what are the consequences for each option or choice for each step of the transaction.

The practitioner should then consider how the client's cognitive abilities and limitations impact on the framework of the transaction. If the practitioner seeks a medical opinion, it should explain the nature of the transaction and ask how the particular client's cognitive abilities and limitations impact on the framework of the transaction.

The practitioner needs to select the appropriate person to give the medical opinion – if the client has a terminal illness, then the appropriate person to give the opinion may be a specialist in the particular illness who is familiar with the effects of the illness on a patient's cognition, rather than a geriatrician or a neuro-psychologist.

More generally, when working with older clients, the practitioner should anticipate that the client may have impaired capacity including impaired executive function or at the very least normal cognitive aging.

The client may need additional time to consider and respond

The practitioner should focus on one question at a time

The practitioner should avoid leading questions

The practitioner should ask the client to repeat their understanding of the question

The practitioner should re-frame the question if the client if the client doesn't respond to question

The practitioner should require the client to answer the question, not the client's carer, spouse or child

The practitioner should not expect the client to retain large quantities of information

The practitioner should not give the client too many choices

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

Appendix 1 – *Ryan v Dalton; Estate of Ryan* [2017] NSWSC 1007,

[106] Questions of testamentary capacity are necessarily fact sensitive. No rule or procedure will cover every case to avoid the possibility of litigation. Nevertheless, the effort involved in paying attention to questions of capacity at the time instructions for a will are taken and the will is executed (including, where necessary, obtaining an assessment of the client where it is thought one is called for) pales into insignificance with the expense, delay and anxiety caused by litigation after the testator's death. Bearing that in mind, and without wishing in any way to derogate from, for example, the desirability of all solicitors being familiar with the guidelines, the recent experience of the Court suggests that proposing some basic rules of thumb (which, as such, are necessarily arbitrary) may be of assistance.

[107] It seems to me that the following is at least a starting point for dealing with this increasingly prevalent issue:

1 The client should always be interviewed alone. If an interpreter is required, ideally the interpreter should not be a family member or proposed beneficiary.

2. A solicitor should always consider capacity and the possibility of undue influence, if only to dismiss it in most cases.

3. In all cases instructions should be sought by non-leading questions such as: Who are your family members? What are your assets? To whom do you want to leave your assets? Why have you chosen to do it that way? The questions and answers should be carefully recorded in a file note.

4. In case of anyone:

    1. over 70;

    2. being cared for by someone;

    3. who resides in a nursing home or similar facility; or

    4. about whom for any other reason the solicitor might have concern about capacity

    the solicitor should ask the client and their carer or a care manager in the home or facility whether there is any reason to be concerned about capacity including as a result of any diagnosis, behaviour, medication or the like. Again, full file notes should be kept recording the information which the solicitor obtained, and from whom, in answer to such inquiries.

5. Where there is any doubt about a client's capacity, then the process set out in sub-paragraph (3) above should be repeated when presenting the draft will to the client for execution. The practice of simply reading the provisions to a client and seeking his or her assent should be avoided.

[108] I emphasise that the foregoing is offered only as suggested basic precautions which may identify problems which need to be addressed. In many cases which do come before the Court the evidence of the solicitor will be critical. For that reason, it is essential that solicitors make full, contemporaneous file notes of their attendances on the client and any other persons and retain those file notes indefinitely.