ASSESSING A CLIENT'S CAPACITY TO MAKE A WILL: A LAWYER'S OBLIGATIONS

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With people living longer, the issue relating to a client's capacity to give instructions to make a Will has become a more prevalent problem. Legal practitioners are having to keep up with medical developments on cognitive disabilities to be comfortable making these assessments.

Guidelines on the Law Society's website provide an overview of the law and some practical tools to use. However, nothing is going to assist you more than experience.

The guiding principles are that if the practitioner finds the testator completely lacks capacity, they should not make a Will. If there is no doubt as to capacity of the testator, then the practitioner has a duty to draw up a Will. However, there is a whole area in the middle, where capacity is in doubt or the practitioner does not know how to determine this. Dealing with such clients is complicated but there are some basic principles.

There is a common law presumption that an adult client instructing a legal practitioner has "mental" capacity.[1] However, a practitioner, cannot always rely upon that legal presumption where the circumstances raise doubt as to the competency of the client.

YOUR DUTIES AS A LAWYER

A legal practitioner has a duty to make an initial assessment as to whether a client has the mental/medical capacity to give instructions. To do this, the practitioner should:

- be aware of the warning signs;
- not ignore the signs;
- not quickly presume a lack of capacity;
- ask the correct questions.

After your initial assessment, if doubts arise, seek a clinical consultation or formal evaluation of the client's mental/medical capacity from an expert in cognitive capacity assessment.

Clients may not allow you to obtain such assessments because the costs are prohibitive. If this is the case, confirm your advice in writing. If you can obtain these instructions, then the formal clinical evaluation should be based on the "legal" tests.

With all this in hand, a lawyer must still apply the applicable "legal" principles from the cases to make a final assessment about the "capacity" for that particular transaction i.e. making a Will.

Finally, no matter what your conclusions are, ensure that you keep detailed file notes. These notes will be invaluable in any proceedings where the question of the client's mental capacity is challenged and for risk management.[2]

There is a positive obligation on the legal practitioner to be reasonably satisfied that their client not only has the capacity to give them instructions, but has the capacity at the time of executing a Will. There are some cases that say otherwise, so if this is the issue facing you, do some further research of the cases.

Circumstances or events may flag a warning sign. A client may behave irrationally, seem to forget events or conversations, or show other signs of mental infirmity. To make matters more difficult, a person's capacity can fluctuate.

If there is doubt as to a client's mental or medical capacity after the initial interview or at any further time whilst the legal practitioner is acting, there may be a need to request a formal capacity assessment from a qualified medical practitioner experienced in assessing cognitive capacity. A medical assessment is a clinical opinion in terms of the capacity to make a particular legal decision and just one vital tool upon which a practitioner may rely. The terms of the letter of engagement to the medical assessor should explain that the basis of the legal test needs to be established on the balance of probability.

However, doubts about "mental/medical" capacity do not always equate to "legal" incapacity. Lack of capacity is not automatic just because of mental illness or disability, difficulties in understanding or communicating information, eccentricity or imprudence, or an apparent or intermittent incapacity.

In *Banks v Goodfellow*[3], John Banks was suffering from insane delusions. However, his right to make a Will was upheld. Banks suffered from a delusion that he was being pursued by spirits and that a dead man had come to molest him. It was

held however, that there was no sufficient reason why the testator should be held to have lost his right to make a Will. A *partial* unsoundness of mind not affecting the person's general faculties and not operating on the person's mind in respect to the particular testamentary disposition, will not be sufficient to deprive the person of the power to dispose of their property in a Will.

In *Roche v Roche & Anor*[4], the Hon. Chief Justice Kourakis looked at "testamentary capacity". In this case, the testator was held to have suffered a behavioural variant frontotemporal dementia which affected his executive planning capacity, increased his forgetfulness and his ability to concentrate. Medical evidence distinguished the deficits that would have arisen from that type of dementia, from those of the common Alzheimer's disease where the major brain failure is normally located in the posterior brain.[5]

The court found him uninhibited and his cognitive capacity not compromised from the frontotemporal dementia. It was held that the testator had the "capacity to understand the nature and extent of his estate, to appreciate the relative weight of the competing claims on it and to make a deliberate choice between them."[6] Thus, he was held to have had testamentary capacity.

Lawyers must remember that the question of "capacity" is ultimately a legal question and can only be finally determined by a judge.[7] In certain situations, therefore, it may be outside the lawyer's expertise to make a final assessment about "legal" capacity. However, a legal practitioner still has a duty to make a legal determination about capacity.

The lawyer must satisfy the Court that steps were taken by the practitioner to satisfy themselves as to the question of capacity. Should it ever be questioned, your file notes will be vital in assisting the Courts to make that final determination. Thus, your obligation is to have gathered all the requisite contemporaneous information possible.

Chief Justice Kourakis[8] stated:

> *"I do not place any weight of Ms Perry's view about how common or traditional it is to make testamentary dispositions of the kind made... Nor do I place any material weight on her opinion, or the opinion of any solicitor who spoke to John before, during or after the making of the 2006 Will, as to his testamentary capacity. The test is a legal one and the opinion of a solicitor taking instructions is necessarily much more narrowly based than the evidence ultimately presented to a court. However, I place substantial weight on Ms Perry's contemporaneous record of the exchanges between John and others about the content of the proposed will"*

Ultimately, lawyers must apply the appropriate judicial *tests* and not just determine "mental" capacity.[9] Even though it is recognised that there is an overlap between the two, it is not enough to rely just upon the medical/mental status or report of the client to determine capacity. Medical evidence is only one of many factors to determine capacity. Various other resources and tests also should be applied to assess "legal" capacity.

In determining whether a client has the legal capacity necessary to make a Will, it must be determined that the client has testamentary capacity, which is not defined in s 7(12) of the *Wills Act* SA 1936 in any helpful way. Thus, we turn to the cases for assistance.

The test for testamentary capacity is set out in *Banks v Goodfellow* (1870) LR 5 QB 549 and has been confirmed in many SA Supreme Court cases such as *Wade v Frost* [2014] SASC 162. There are four elements to establish "testamentary capacity".[10] The testator must:

- understand the *nature* of what they are doing and the *effect*.
- understand the *extent of their property* that will form part of their estate.
- comprehend any *claims* of those who might expect to benefit from the testator's Will – i.e. at least be aware of the people to whom it would generally be expected would be receiving gifts under their Will; and
- *not* be suffering *any disorder of the mind* or insane delusion that influences their disposal of their assets (i.e. does not have a mental illness that has influenced the testator in making bequests that he or she would not otherwise have made, if they had not been suffering that mental illness).

The basic elements of *Banks v Goodfellow* have not changed over the years, but the way in which we apply these elements to the determination of testamentary capacity has. For example, our understanding of dementia and mental infirmities has developed.[11]

If the instructions are coherent and the client can satisfy the elements of *Banks v Goodfellow*, then there is a duty upon the legal practitioner to act upon those instructions and prepare that Will. There is also arguably an onus upon the legal practitioner to prepare the Will in urgent circumstances or even if you suspect that the testator does not have the necessary capacity.[12]

It is impossible to provide a comprehensive checklist of things that a legal practitioner should do that would cover all situations when concerned about capacity. Refusing to act is not an option nor is seeking instructions from a client's relative or third party.

Ask many questions and keep notes relating to the client's ability to give you basic information and facts, such as name, address and date of birth. Seek from them other personal information you believe they should reasonably know without unreasonable reference to anyone else. Ask questions testing their knowledge of their own assets and liabilities.

Try to obtain their previous Wills and compare the instructions. Ask why certain beneficiaries are now included or excluded. Record any changes in instructions and the reasons given by the client for the same. Record a client's stated motive for giving instructions or changing them. Keep notes that reflect a client's short term and long-term memory. Keep detailed contemporaneous notes surrounding the execution or signing of any document. Keep notes about whether they are aware of what they are doing and its effect.

If a practitioner has had previous instructions from a client (either recently or in the past) and there is a radical departure from the previous instructions by that client without any plausible explanation, this should make a legal practitioner suspicious enough to investigate capacity.

The types of questions asked should be designed to determine the client's capacity to recall.[13] Ask non-leading questions that do not have to be answered with a simple "yes" or "no". At a later interview, test the client's recollection of their initial instructions[14]. In any event, when dealing with such clients, you need to allow enough time for assessment. The standard appointments will not be long enough and in most instances, nor will the fees you receive for this work.

Even go so far, if necessary, to tape the client's interview when making the assessment and/or have someone independent from your office take the notes verbatim and witness the meetings. Record who came in with them to the appointment, who they refer to, and or who is prevalent in their lives. The meetings with the client should always be done in the absence of anyone that is likely to benefit directly or indirectly from the estate or who may exert influence upon the client. Always meet personally with the client to be able to assess their behaviour and alertness and any changes to the same.

When there is some doubt relating to the client's capacity, seek medical advice from the doctor who is familiar with the client and their particular idiosyncrasies. If necessary, have more than one meeting with the client to ascertain the necessary information.

Where there is doubt concerning whether a client has testamentary capacity, there are two schools of thought as to how a practitioner should proceed:

1. After having applied the above, draw up the Will and allow the court to determine whether the testator had testamentary capacity; or
2. Having applied the above, if you feel the person does not have capacity, then refuse to accept the instructions to draw up the Will – but be very *careful before* taking this path.

In any event, keep reams of notes. Capacity is a complicated issue in legal practice, so seek assistance from more senior practitioners when in doubt. **B**

Endnotes

1 *Masterman-Lister v Brutton & Co* [2003] 3 All ER 162
2 *In the Estate of Vauk deceased* (1986) 41 SASR 242
3 *Banks v Goodfellow* (1870) LR 5 QB 549
4 *Roche v Roche & Anor* [2017] SASC 8
5 Ibid at 131
6 Ibid at 144
7 *Wade v Frost* [2014] SASC 162 at [34]; *Re W, DJ* [2015] SASC 45 at [30]- [31]; *Re G, CL* [2015] SASC 80 at [16]; *Re Corner* [2015] SASC 100 at [27] *In the matter of K, JL* [2016] SASC 53 (21 April 2016) at point 38.
8 *Roche v Roche & Anor* [2017] SASC 8 at 76
9 *Petrovski v Nasev – the Estate of Janakievska* [2011] NSWSC 1275. *Roche v Roche* [2017] SASC 8 at 76.
10 *Banks v Goodfellow* (1870) LR 5 QB 549 at 565; *Hoffmann v Waters* [2007] SASC 273; (2007) 98 SASR 500 at [11]; *Re Pickles* [2013] SASC 175 at [16]- [17]; *Wade v Frost* [2014] SASC 162 at [25]- [26]; *Re W, DJ* [2015] SASC 45 at [24]. *In the Matter of K, JL* [2016] SASC 53 (21 April 2016).
11 *Roche v Roche & Anor*
12 *Knox v Till* (1999) *NZCA 252/98*
13 *Wade v Frost*
14 *In the estate of Tucker deceased* [1962] *SASR 99*