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Client Capacity Guidelines

Capacity

The legal practitioner accepts a brief to carry out the instructions of his/her client to put in place their testamentary wishes. These instructions may involve not only putting in place a Will but may also involve putting in place other arrangements.

These Guidelines consider the area of an individual's general capacity to instruct and then discusses specifically the area of "testamentary" capacity.

Testamentary Capacity Overview & Guiding Principle

In relation to "testamentary" capacity, the Guidelines highlight the role of a legal practitioner in *assessing* capacity and then *dealing with any concerns* about capacity and doubt. The experience and skill of each practitioner will differ and so too will their response to any uncertainty they face in relation the capacity of their client to instruct them.

The tools utilised by an individual practitioner will depend upon their experience. Some practitioners have developed through their experience, the ability to ascertain the capacity of a client and make their determination as to capacity more easily. Others, on the other hand, will find this a lot harder.

The guiding principle is that *if* a practitioner finds the testator/client *lacks capacity,* they should not make a Will. Further, where there is *no doubt* as to capacity of the testator/client, then the practitioner has a duty to draw up a Will. However, then there is an area in the middle where *capacity is in doubt* or the practitioner is not sure how to determine this. These Guidelines set up guiding principles and help formulate strategies to assist the practitioner where *capacity is in doubt*.

Thus, the purpose of this Guideline, is to provide practitioners with a starting point. It is not an exhaustive statement of all the relevant ethical obligations or law that might apply to this area of law.

If you need advice that addresses a specific set of facts, please contact Ethics and Practice on 8229 0229.

Introduction

This is also a practical guide to assist legal practitioners when they have doubts about their client's "legal" capacity to give them instructions or to make their own legal decisions. This may be because of illness, intellectual disability, mental illness, dementia or age related cognitive disability etc. This impaired or lack of capacity may be ongoing, limited, temporary and or permanent.

Dealing with such clients is a complex area, however, there are some basic principles that can be applied.

The Guideline focuses on the particular areas of Wills and Enduring Powers of Attorney but can be used by legal practitioners more broadly.

Starting Point

1. There is a common law presumption that an adult client instructing a legal practitioner has "mental" capacity.[1]

2. A practitioner, however, cannot always rely upon that legal presumption where the circumstances raise a doubt as to the competency of the client.

3. The legal practitioner's duty is therefore: -

    3.1. to make an *initial assessment* of whether a client has the mental/medical capacity to give instructions; -

        3.1.1. that is to be aware of and/or to look for warning signs; and

        3.1.2. not to quickly assume a lack of capacity in certain circumstances.

    3.2. if doubts arise, seek a clinical consultation or formal evaluation of the client's *mental/medical* capacity with expertise in cognitive capacity assessment; and

    3.3. then to apply the "legal" principles stated herein;

    to make a final assessment about the "capacity" for the *particular* transaction.

Key Principles

4. A legal practitioner is not an expert in determining the "mental/mental" capacity of their client but they are expected to make an *initial* assessment of their client's requisite "mental/medical" capacity before taking instructions or assisting them to make legal decisions.

5. It will be in rare circumstances, however, that a client comes to you with no capacity whatsoever.

6. If there is doubt as to a client's "mental/medical" capacity after the *initial* interview or at any further *time thereafter whilst* the legal practitioner is acting, then there may be a need to request a formal capacity assessment from a qualified medical practitioner experienced in the methods and tools to make an assessment of cognitive or medical capacity.

7. A medical assessment is a clinical opinion in terms of the *mental/medical* capacity to make a particular legal decision and just ONE vital tool upon which a practitioner may rely.

8. Doubts about "mental/medical" capacity however, do not always equate to "legal" incapacity. Lack of capacity is not automatic just because of: -

    8.1. mental illness or disability;

    8.2. limitations on a client's ability to understand or communicate information;

    8.3. eccentricity or imprudence; or

[1] Masterman-Lister v Brutton & Co [2003] 3 All ER 162

8.4. some apparent incapacity at certain times; or

8.5. their age.

9. Lawyers must remember, that the question of "Capacity" is ultimately a *legal* question and can only be finally determined by a judge.[2]

9.1. In certain situations, therefore, it may be outside the lawyers' expertise to make a *final* assessment about "legal" capacity;

9.2. However, a legal practitioner still has a duty to make a *legal* determination about capacity.

10. Lawyers are officers of the Court and as such, the lawyer's duty is: -

10.1. to go far enough to satisfy *the Court* that steps were taken by the practitioner to satisfy themselves as to the question of Capacity, should it ever be questioned;

10.2. to assist the Courts at a later date to make that final determination by having gathered all the requisite contemporaneous information and keeping clear file notes.

10.3. to do whatever is necessary to provide the Courts with enough information/evidence as to allow the Courts to make the final determination at a later time (if necessary).[3]

11. Ultimately, lawyers should therefore be applying the appropriate *judicial tests* and not just determining "mental" capacity.[4]

Legal Practitioner's Duty: - Legal Capacity Not Just Mental/Medical Capacity

12. So lawyers' obligations are to assess the "legal" capacity & not just the "mental/medical" capacity.

12.1. 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.

12.1.1. Medical evidence is only *one of many* factors to determine capacity.

12.1.2. Various other resources and tests (stated below) should be applied to assess "legal" capacity.

When is the issue of Capacity relevant?

13. There is a positive obligation on the legal practitioner to be reasonably satisfied that their client has the capacity to give instructions: -

13.1. at the time that they are giving those instructions;

13.2. at the time of executing any document; and/or

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[2] *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.

[3] Martin v Fletcher [2003] WASC 59.

[4] .Petrovski v Nasev – the Estate of Janakievska [2011] NSWSC 1275.

13.3. when the circumstances or events flag a warning sign or doubt in the mind of the practitioner e.g. due to the irrational behaviour of client, lack of ability to remember events, mental infirmity, use of drugs or alcohol, undue influence and/or age infirmities, amongst other things.

On that basis, Capacity is decision specific & can fluctuate.

14. Capacity may fluctuate - as clients may lose, regain, have increased or decreased capacity from time to time.

15. A legal practitioner should: -

15.1. *not* make assumptions about a person's "mental" or "legal" capacity due to their age, appearance, ability to communicate, impairment or level of education etc.

15.2. *not* patronise, ignore or dismiss persons with impaired capacities.

15.3. *not* act on the instructions of a 3rd party just because it is easier to obtain instructions from them rather than the apparent impaired client.

15.4. assess the client's capacity based on their ability to make a decision and *not* on the quality of the decision he/she makes. In effect then, a client is entitled to make unwise, reckless, irrational, uninformed decisions if they want and or act against the advice given, without being presumed to lack the necessary "legal" capacity.

16. A legal practitioner should respect the autonomy of the client and their right to pursue their own lawful interest.[5]

17. A legal practitioner is a fiduciary agent and has a duty to act on the client's instructions. Thus they cannot ignore a client's instructions or decide to act upon their own assessment of the client's best interests.

18. It is usually only in extreme & rare circumstances, will a practitioner be entitled to not act on the client's instructions due to incapacity.

What is the "legal" capacity necessary for a client to be able to make a Will?

19. In determining whether a client has the "legal" capacity necessary to make a Will, it must be determined that the client has "*testamentary*" capacity.

What is Testamentary Capacity?

20. "Testamentary capacity" is defined in s 7(12) of the Wills Act SA to mean the capacity to make a Will. However, for the legal practitioner, this is unhelpful so we are required to turn to the cases.

21. "Testamentary capacity" and "knowledge and approval" of one's Will are distinct concepts. The first is necessary but not a sufficient condition for the establishment of the second element. [6]

[5] The Convention on the Rights of a Person with Disabilities: Article 3, principle (a);

[6] CJ Kourakis citing Chadwick LJ in Hoff v Atherton in Roche v Roche & Anors [2017] SASC 8 (8 Feb 2017) at point 536

22. The common law test for "testamentary capacity" is set out in *Banks v Goodfellow* (1870) LR 5 QB 549 and was confirmed in a recent SA case *Wade v Frost* [2014] SASC 162 and are as set out below.

23. The 4 elements of the testamentary capacity test[7] are that a testator must:

    23.1. understand the nature of what they are doing and the effect?

    23.2. understand the extent of the property that will form part of their estate?[8]

    23.3. be capable of comprehending and appreciating any respective claims to which they ought to give effect.[9]

        23.3.1. Does the person have capacity to appreciate, in the sense of understand the relative weights of the competing claims on their estate and to make a deliberative choice between them. [10] Even if they make a badly reasoned or capricious decision to ignore or compromise those claims is fine, as it means they are showing a capacity to understand.[11]

        23.3.2. It is not necessary that the person in fact turn their mind to the extent of their estate, nor recall all who have a claim on it and weight their claims. It is merely necessary that a person have a capacity to do so if they wish.[12]

        23.3.3. To be aware of the people they should properly be leaving gifts to such persons as spouses, children, dependents etc.

    23.4. not be suffering any disorder of the mind or insane delusion affecting any of the above.

    His Honour, CJ Kourakis in the SA Supreme Court, states that the Banks v Goodfellow "no longer reflect modern medical knowledge". His Honour continued to state that, "It is now recognised that there are a broad range of cognitive, emotional and mental dysfunctions, the effect of which are difficult to identify precisely or delineate from the exercise of ones "natural faculties" and the reasoning capacity of the "sound" mind". A testator may have testamentary capacity even if that person's cognitive functioning is impaired because they fall within a very low percentile of the community for that functioning.

What do Practitioners need to do to determine "testamentary" capacity?

24. Again, it may be outside the lawyers' expertise to make a final judgement about testamentary capacity in certain circumstances (unless it is very clear that there is no capacity).

25. It is however the lawyer's duty to be able to assist the Courts at a later date to make that determination by gathering all the requisite information to assist them.

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[7] *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 (21april 2016).

[8] Roche v Roche & Anors [2017] SASC 8 (8 Feb 2017)

[9] Ibid

[10] Roche v Roche & Anors [2017] SASC 8 (8 Feb 2017) at point 33

[11] Roche v Roche & Anors [2017] SASC 8 (8 Feb 2017) at point 28 and 29

[12] Roche v Roche & Anors [2017] SASC 8 (8 Feb 2017) at point 30

25.1. For example, in relation to taking instructions to draw up a Will, if obtaining a doctor's report in relation to "medical capacity" of a client to assist the lawyer to determine *testamentary capacity*, the report should address the 4 elements as set out in Banks v Goodfellow (1870) LR 5 QB 549.

26. There is an obligation on the legal practitioner to be reasonably satisfied that the client has testamentary capacity: -

26.1. at the time when the client gives instructions; and

26.2. again when the client executes the Will.

27. Therefore, in these circumstances, if the instructions are: -

27.1. *coherent;* and

27.2. the client can satisfy the elements of Banks v Goodfellow,

then there is a duty on the legal practitioner to act upon those instructions and prepare that Will.

28. There is arguably an onus upon the legal practitioner to prepare the Will even if you suspect that the Testator may not have the necessary capacity.[13] This is to be contrasted with the situation where the lack of capacity of the Testator is obvious.

28.1. In all these situations, the lawyer should take and keep very detailed notes to assist the Court in determining the "legal" question of capacity at a later time should it arise.

29. Remember that it is arguably outside the lawyers' expertise to make *final judgements* about testamentary capacity unless it is very clear that there is no capacity. Once a prima face case of soundness of mind, memory and understanding with reference to the particular Will, for capacity, then the onus lies upon the party attempting to claim no capacity to show that it ought not to be admitted to proof.[14]

What may a legal practitioner not do when concerned about the client's capacity?

30. A legal practitioner cannot seek instructions from a third party as a legal practitioner is bound by obligations of professional legal privilege and can only act on the instructions of their client.

Practical Guidelines for Lawyers to use when "Legal" Capacity is in question: -

31. It is impossible to provide a comprehensive checklist of things that a legal practitioner should do that would cover any situation.

31.1. The quantum of evidence sufficient to establish testamentary capacity will depend upon the circumstances of each case.

31.2. Courts will look at the nature of the Will itself with regard to the following aspects:[15]

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[13] *Knox v Till (1999) 2 NZ LR 753*

[14] Isaacs J (with whom Duffy and Rich JJ agreed) in Bailey v Bailey, [1924] 34 CLR 558

[15] Isaacs J (with whom Duffy and Rich JJ agreed) in Bailey v Bailey, [1924] 34 CLR 558 at 570.

31.2.1. The simplicity or complexity of the Will;

31.2.2. The rational or irrational provisions;

31.2.3. Its exclusions or non-exclusions of beneficiaries;

31.2.4. The exclusion of persons naturally having a claim upon the testator;

31.2.5. The extreme age, sickness of the persons;

31.2.6. The drawer of the Will; and

31.2.7. Whether any person has a motive and opportunity and/or exercising undue influence and takes a substantial benefit.[16]

31.3. However, it is incumbent on the legal practitioner to take thorough and comprehensive contemporaneous file notes of the process he/she undergoes to determine capacity. These file notes will be invaluable in any proceedings where the question of the client's mental capacity is challenged and or for the firm's risk management.[17]

32. Practitioners should consider keeping on file: -

32.1. detailed contemporaneous notes about the circumstances surrounding the giving of instructions in situations where capacity is or may be an issue;

32.2. notes relating to the client's ability to give you basic information such as name, address, date of birth as well as other personal information you believe that they should reasonably know without regard to any unreasonable reference to anyone else, such as their assets and liabilities and their family details etc.;

32.3. notes that reflect a client's short term and/or long term memory;

32.4. detailed contemporaneous statements surrounding the execution or signing of any document and whether they are aware of what they are doing and its effect;

32.5. details of the questions asked which are designed to determine the client's capacity to recall and record their answers.[18] Ask non-leading question that do not have to be answered with a simple "yes" or "no";

32.6. a later record of the client's recollection of their initial instructions[19] . This checking of their ability to recall should be repeated during the time in which you are acting for them;

32.7. record any changes in instructions and the reasons given by the client for the same;

32.8. record a client's stated motive for giving instructions or changing them e.g. anger, duty, & their demeanour etc.;

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[16] Isaacs J (with whom Duffy and Rich JJ agreed) in Bailey v Bailey, [1924] 34 CLR 558 at 570.
[17] In the Estate of Vauk deceased (1986) 41 SASR 242
[18] Wade v Frost
[19] *In the estate of Tucker deceased [1962] SASR 99*

32.9. if necessary, record the client interview when making the assessment of testamentary capacity; and

32.10. record who came in with them to the appointment, who they refer to, and or are prevalent in their lives etc.

33. Meet personally with the client to be able to assess their behaviour and alertness and any changes to the same.

34. Rules relating to testamentary capacity must recognise and allow for the natural decline in cognitive functioning and mental state which often goes with old age.[20]

34.1. In judging the question of testamentary capacity, the courts recognise that many Wills are made by people of advanced years, and as such, they may be slower, may be ill, feeble and perhaps eccentric.[21] These things are not enough alone to disentitle a person from making his or her Will. Imperfections of memory caused by age or disease may still leave a sufficient understanding for testamentary capacity.[22]

34.2. Partial unsoundness of mind which does not operate on the relevant capacities to appreciate the extent of and dispose of the estate will necessarily deprive the testator of testamentary capacity if it is shown that the Will was signed during a lucid moment. [23]

34.3. A person may freely make their last Will no matter how old they are or. "For it is not the integrity of the body which is relevant, but the integrity of the mind that is required for testamentary capacity".[24]

34.4. To displace a prima face case of capacity mere proof of serious illness is not sufficient. Evidence that the illness so affected a persons' mental facilities as to make them unequal to the task of disposition for their property is however relevant.[25]

35. "Testamentary capacity is not reserved for people who are wise or fair or reasonable or whose values conform to generally accepted community standards."[26]

36. When there is some doubt and uncertainty relating to the client's capacity, seek medical advice/report from the doctor who has been treating the client long term and is familiar with the client and their particular idiosyncrasies (if possible) in relation to their mental capacity to give instructions and understand what they are doing.

36.1. Ensure that any medical report *also* deals with the elements required by the Courts to determine legal capacity as set out in Banks v Goodfellow;

36.2. Ideally, a capacity report should be obtained from a psychiatrist practitioner that specialises in assessing these matters.

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[20] Roche v Roche & Anors [2017] SASC 8 (8 Feb 2017) at point 17

[21] Re Estate of Griffith (Griffith) (1995) 217 ALR 284 at page 295 per Kirby J

[22] Banks v Goodfellow re Cockburn CJ at page 568

[23] Re Estate of Griffith (Griffith) (1995) 217 ALR 284 at page 295 per Kirby J

[24] Swinburne on Will, Part II, sec 5 quoted with approval of Kent C in Van Alst v Hunter and referred to with approval by Isaacs J (with whom Duffy and Rich JJ agreed) in Bailey v Bailey, [1924] 34 CLR 558 at 570.

[25] Isaacs J (with whom Duffy and Rich JJ agreed) in Bailey v Bailey, [1924] 34 CLR 558

[26] Gleeson CJ (with whom Handley JA agreed) in Re Estate of Griffin (1995) 217 ALR 284 at 291

37. Try more than once to assess capacity when a client moves in or out of capacity for whatever reason &/or their capacity is flawed &/or intermittent. If necessary, have more than one meeting with the client.

38. There are many tools online that are available to lawyers to use to assist them to determine capacity that may help and be useful to use as part of your assessment during your meetings with the client.

39. If there are warning signs or suspicious circumstances, then: -

    39.1. a legal practitioner should, if possible, independently verify the information provided to them without waiving legal professional privilege;

    39.2. *if* a practitioner has had previous instructions from a client (either recently or in the distant past) and there is a radical departure from the previous instructions by that client without any plausible explanation, then this should make a legal practitioner suspicious and a legal practitioner should delay acting on those instructions until they have allayed their suspicions in relation to capacity.

40. Where there is doubt concerning whether a client has testamentary capacity, there are two schools of thought in relation to how a practitioner should proceed, namely:

    40.1. Accept the instructions and allow the court to determine whether the testator had testamentary capacity; or

    40.2. In clear cut cases, refuse to accept the instructions – but be very wary of this.

41. Either way, you should ensure you take adequate file notes and ask questions directly relevant to capacity such as the aforementioned to assist the Court in determining the legal question of testamentary capacity at a later time should it arise.

Powers of Attorney & Advance Care Directives

Requirements for an individual to make a Powers of Attorney

42. Basically, to make a valid power of attorney, a legal practitioner must comply with the Powers of Attorney and Agency Act 1984 (SA) that states that the Donor must be: -

    42.1. an adult;

    42.2. capable of making his/her own decisions;

    42.3. understand the nature and effect of what he/she is doing; and

    42.4. be acting freely and voluntarily.

Requirements for an individual to make an Advance Care Directive

43. To be a valid ACD, a person making the ACD, at the time that the direction is made, essentially must be: -

    43.1. a competent adult; &

43.2. have the mental capacity to understand what an advance care directive is;

43.3. understand the consequences of giving an ACD;

43.4. free of undue influence; &

43.5. must have the intention to make an ACD;

43.6. complete an ACD approved form in accordance with the ACD Act.

Understanding and Capacity

44. In order to make an ACD or any Power of Attorney, a legal practitioner also needs to consider the issue of "capacity" and or the "understanding" of the person drawing up the document or making the appointment.

45. These same issues are also considered when the ACD is being used or relied upon by the substitute decision maker to make decisions or the health care provider etc. In the ACD Act, it uses the term "impaired decision-making capacity".

Capacity

46. In the English case of Re K (1988) 1 Ch 310 at 316, the Court referred to the understanding that a person has to have to be able to make a Power of Attorney. It is as follows: -

46.1. The Donor (client) has to have an understanding that an Attorney will be able to assume complete control over the Donor's affairs;

46.2. They have to understand that the Attorney will be able to do anything legally or financially with regard to the Donor's property which they could legally have done themselves;

46.3. (If an Enduring Power of Attorney), that the authority will continue if the Donor should become mentally incapable of conducting their own affairs

46.4. (If an Enduring Power of Attorney), that if they become mentally impaired that the power will become irrevocable without an order of the court.

47. The issue relating to "capacity" is something that a person drawing up the ACD will also need to consider.

48. A good risk management practice is to ensure that when drawing up any of these documents, you speak directly to the person making the appointment and again keep clear file notes.

49. If necessary, apply the same tools and tests as previously discussed for "testamentary" capacity but remember that it is held that the "capacity" required to meet the test for making powers of attorney are a higher standard than those used for making Wills.

50. It is also essential to ensure that there is no undue influence in play (as far as practically possible).

Witnessing the ACD – Section 15

51. The question of capacity and understanding are also relevant when you witness a signing of the Advance Care Directive. The ACD Act is quite clear in terms of the requirements about which a witness has to satisfy themselves. The ACD will not become effective until it has been witnessed in accordance with the ACD Act (s 15) and in accordance with the ACD Regulations (reg 7) and in Schedule 1 to the ACD Regulations.

15—Requirements for witnessing advance care directives*

(1) An advance care directive will only be taken to have been witnessed in accordance with this Act if—

(a) the advance care directive form is witnessed by a suitable witness in accordance with the regulations; and

(b) the suitable witness completes the appropriate parts of the advance care directive form certifying that—

(i) …; and

(ii) he or she explained to the person giving the advance care directive the legal effects of giving an advance care directive of the kind proposed; and

(iii) in his or her opinion, the person giving the advance care directive appeared to understand the information and explanation given to him or her by the suitable witness under this paragraph; and

(iv) in his or her opinion, the person giving the advance care directive did not appear to be acting under any form of duress or coercion; and

(c) any other requirements set out in the regulations in relation to the witnessing of advance care directives have been complied with….

*(*section 15 of the Advance Care Directives Act 2013 (SA))*

Conclusion

52. There may be some instances where it is very difficult to determine a client's capacity one way or the other despite the legal practitioner having gone through the above processes either because their capacity is doubted or because of an urgent situation. In those situations, it is always best to prepare their Will and or Powers of Attorney etc. and keep detailed thorough as stated above so as to assist the court in its future role.

53. In any event, if you determine that a client has capacity or not, it is for the legal practitioner to justify through their file notes and records the position they have come to and why.

54. If you are still having trouble, then we suggest that you speak to someone within the Ethics and Legal Practice division of the Law Society of SA and or a more senior succession lawyer or barrister who practices in the area.

Bibliography

- The Convention on the Rights of a Person with Disabilities: Article 3, principle (a)
- The Law Society of NSW "When a client's capacity is in doubt. A Practical Guide for Solicitors" 2009

Legislation

- *Advance Care Directives Act 2013 (SA)*
- *Advance Care Directives Regulations of 2014* (SA)
- *Consent to Medical Treatment and Palliative Care Act 1995 (SA)*
- *Powers of Attorney and Agency Act 1984 (SA).*

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