Assessing mental capacity

By Sue Field

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This article explores some of the issues facing legal practitioners who are retained by older clients. Not the least important of these issues is whether the older client has the requisite mental capacity to give instructions, and the consequences of taking instructions when the client does not have capacity.

POPULATION DEMOGRAPHICS

Australia's population as at 19 March 2008 was 21,097,100.[1] As a result of the increased number of births between 1946 and 1964 (the cohort generally known as 'the baby-boomers'), advances in medical science, improved living conditions and a decrease in the number of births in recent years, our population demographics are changing, and most of us are living longer.

DEMENTIA AND LEGAL CAPACITY

A myriad of physical changes impose themselves upon us (often unannounced!) as a consequence of living longer. However, the changes associated with ageing are not only physical, they can be mental as well. Alzheimer's Australia estimates that the average rate of moderate-to-severe dementia among Australians is about one in fifteen for those people aged 65 years and older. However, the figure rises to one in nine among those in the 80 to 84 age group, and to one in four for those people aged 85 years and older.[2]

There are currently 227,300 people with dementia in Australia, and Alzheimer's Australia estimates that, without any medical breakthroughs, this number will reach 731,000 by 2050.[3] While these figures demonstrate that the number of people suffering from dementia is, in one form or another, >>

increasing in the older population, it should be remembered that dementia is not a normal part of the ageing process.[4] This explains the presumption that everyone has capacity – a presumption that can, of course, be rebutted.

The legal presumption is that everyone has mental capacity. In fact, in some jurisdictions, this presumption is enshrined in legislation. For example, in Queensland, Part 1, Schedule 1 of the *Powers of Attorney Act* 1998 states, 'An adult is presumed to have capacity for a matter'. However, the statistics just quoted make it clear that the legal practitioner dealing with older clients may, or will, come across situations where the mental capacity of a client could be in doubt.

ELDER LAW

The main legal issues that face older people are the same as those that face younger persons – that is, where to live; how to manage one's finances; to whom to leave one's assets (although it could be argued that this is not such a priority for many young people); who can make decisions when we are unable to make them ourselves (once again, the difference here may well be that the older person may consider the issue because of a health-related matter, whereas a younger person may consider it only in the context of an overseas trip).

The chief difference when acting for an older client occurs in the timing. For example, as we age we do not have time on our side to recoup financial losses. Nor do we generally have the physical, emotional or mental stamina – or even the financial resources – to confront a situation that may have gone terribly wrong. So, in effect, an older client may well place greater emphasis than their younger counterpart on substitute decision-making or will-making, and the need to get it right in the first instance. Why some people procrastinate in addressing the subjects of enduring powers of attorney/guardianship and will-making is not entirely clear. Perhaps making a will or appointing an enduring attorney/guardian in one's 40s or 50s is, in effect, a sign of one's impending mortality and therefore something to be deferred! Whatever the reason, it is not uncommon for people to put off these important aspects of their financial and estate planning until 'later in life'.

SPECIFIC INSTANCES WHERE CAPACITY IS REQUIRED

Two particular instances will generally bring an older client into a solicitor's office. The first is the appointment of a substitute decision-maker – in other words, the appointment of an enduring power of attorney, and/or an enduring guardian – and the second is the making of a will. In both situations, the mental capacity of the client could well be challenged by family or friends (not least because both situations involve money in the form of a future or immediate inheritance.)

SUBSTITUTE DECISION-MAKING

Legislation has been enacted in each Australian state and territory to enable the appointment of another person or persons to make financial and/or personal and health decisions on behalf of another individual. Where no financial substitute decision-maker has been appointed, then someone has to make an application to the relevant Guardianship Tribunal, or court, to have themselves or someone else appointed as the incapacitated person's administrator – a legal requirement that is not well known within the community. In fact, a common misconception is that a spouse/partner will automatically take over an incapacitated person's financial affairs, or that parents will take responsibility for their adult children or, even, in some situations, that the oldest child will automatically take over the financial affairs of their parent/s.[5]

Problems often arise when choosing whom to appoint to make those financial decisions when we are unable to make them for ourselves. Obviously, the three most important factors to take into consideration when appointing an enduring power of attorney are:

- the integrity of the proposed attorney;
- the financial acumen of the proposed attorney; and
- the availability of the proposed attorney.

In recent years, 'elder abuse' has received considerable publicity, and the popular media have regaled their readers with stories of vulnerable older persons who have lost their homes and life savings through the unscrupulous actions of the person they appointed to be their attorney. How can this happen?

It may well be that the older person has been subject to emotional pressure from a family member not only to appoint them, but also to part knowingly, or unknowingly, with their assets. It may also be that the older person did not possess the requisite degree of mental capacity at the time they appointed the attorney and did not fully understand the implications of their actions.

INDICATORS THAT THE CLIENT MAY LACK CAPACITY

Notwithstanding the presumption of capacity, a solicitor acting for an older client should always be alert to indicators that the older person may not have mental capacity.

Queensland is one jurisdiction where the legislation actually defines capacity (for the purpose of appointing an attorney). That is, that the person is capable of:

- understanding the nature and effect of decisions about the matter;
- freely and voluntarily making decisions about the matter; and
- communicating the decisions in some way.[6]

Signs that the client does not fully understand the nature and effect of the matter can be as simple as the client constantly repeating themselves; asking questions which bear little, if any, relevance to the matters being discussed; appearing vague or confused, unaware of their surroundings, or unable to focus; being totally inappropriate dressed (for example, wearing winter woollies on a hot summer day), or even having a completely unkempt appearance. The person may have a history of mental incapacity or a mental disorder. Careful questioning may initially indicate that all is

not as it should be with the client. But it is important to note that a number of reasons may explain many of the above behaviours. For example, the person may be uncomfortable in the presence of a lawyer; they may be on medication; they may have a medical condition; or their level of education is such that they are unable to answer questions worded in unnecessary legal terminology. A word of caution: never mistake ignorance for lack of capacity.[7]

ENDURING POWERS OF ATTORNEY

To assist practitioners in this area, most law societies have published guidelines for solicitors witnessing powers of attorney. For example, the *Law Society of NSW Guidelines*, published in 2003, address the following areas:

1. Solicitor's obligations under the *Powers of Attorney Act* 2003
2. Who is the client?
3. Taking instructions
4. Capacity to make an Enduring Power of Attorney
5. Advice to donor
6. The powers and duties of the attorney
7. Solicitor-attorneys
8. Drawing up and executing the Enduring Power of Attorney[8]

The Appendix provides further guidance by addressing the matter of 'Assessing Competence for Granting an Enduring Power of Attorney'. It cites the well-known joint judgment of Dixon CJ and Kitto and Taylor JJ in the case of *Gibbons v Wright*,[9] where it was held that:

> '[T]he mental capacity required by the law in respect of any instrument is relative to the particular transaction which is being effected by means of the instrument and may be described as the capacity to understand the nature of that transaction when it is explained.'[10]

So mental capacity must be assessed in the context of the matter at hand, and it cannot usually be assumed that incapacity in respect of one instrument means that the client lacks capacity for all matters. This point is elaborated upon by Darzins et al who, in their examination of the issue of capacity, look at the evolution of capacity assessments.[11] For example, capacity may be a global concept (an-all-or nothing-approach – that is, someone who is unconscious, or severely mentally impaired); domain-specific (that is, they can make decisions in certain areas or domains – for example, health or finances); and decision-specific (perhaps in relation to money or health matters). The point is that the person must understand what is required at that particular time and for that particular matter.

WHO ASSESSES MENTAL CAPACITY?

While the above definitions and guidelines provide guidance to practitioners, the question remains as to who actually assesses mental capacity. The solicitor who meets the client makes the first assessment. If the solicitor, based on careful questioning, is satisfied that the client has the requisite mental capacity to understand the nature and effect of the matter at hand, it could be argued that there is no problem.

However, if the solicitor has any doubts, then it is prudent to seek a second opinion, preferably that of a medical practitioner experienced in these matters, or else a general practitioner who has attended the client over a considerable period of time.

> The legal presumption – that everyone has mental capacity – is enshrined in legislation in some jurisdictions.

This raises the question of what the solicitor should ask of the medical practitioner. To ask merely, 'does my client have capacity?' will surely elicit a response from the medical practitioner along the lines of, 'capacity for what?' A better approach is to seek a medical opinion as to a client's capacity to appoint an enduring power of attorney that asks the following, specific questions:

'In your opinion does my client have the mental capacity to understand the following:

- that this document is effective only while my client is alive and has no effect after their death;
- that the client can revoke (cancel) the power at any stage, as long as they have mental capacity;
- that the power that the client is giving another person (the attorney) will extend after the client has lost the mental capacity to revoke the enduring document;
- that if the client does revoke the enduring document, they must notify the attorney otherwise the attorney can continue to act in good faith;
- that my client must appoint the attorney of their own free will, and without any undue influence on the part of a third party;
- that s/he is giving power to another person to manage their financial affairs, and that this power includes, but is not limited to:
  - buying and selling property on the client's behalf (including the client's own home);
  - depositing and withdrawing money from the client's account/s; and
  - buying and selling shares with the client's money; and
- finally, that if the attorney abused the power they could leave my client destitute. While this is illegal, there is the potential for this to happen and recovery of the money/property may be difficult to achieve.'[12]

However, should the person's capacity be challenged in a court or tribunal, it will ultimately be the court/tribunal that makes the decision on capacity. Capacity is, therefore, a legal and not a medical concept. The solicitor must ensure not only that the evidence they tender is based on fact and not assumption, but that they adhere to professional guidelines on this issue. >>

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TESTAMENTARY CAPACITY

Will-making is the other area where the issue of a client's mental capacity may well be challenged.

The classic case of *Banks v Goodfellow*[13] is generally relied upon by solicitors when taking instructions from a client for the purpose of preparing a will. The words of Cockburn CJ have stood the legal fraternity in good stead for well in excess of a century:

> '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.'[14]

However, is this test really as good an indicator of testamentary capacity in today's modern, complex society? While solicitors are only too aware of what a will is, many people in the community confuse a will with an enduring power of attorney, and believe that if they have one document then it is unnecessary to expend further money to prepare another.[15] Based on the first principle in *Banks v Goodfellow*, such clients would seem to fail this elementary test!

It should also be remembered that Cockburn CJ uttered his immortal words at a time when people's financial affairs were typically far less complex than they are today. Many people today would be unable to provide a satisfactory answer to the second principle in the case without the assistance of their accountant or financial adviser – 'the extent of the property of which [they] are disposing'.

Equally significant is the modern trend towards having a number of relationships over a lifetime. Such relationships may produce potential heirs to an estate, and may leave behind a number of spouses, defacto and/or legal. The importance of extremely comprehensive history-taking in respect of estate-planning therefore cannot be overemphasised. Capacity questionnaires, such as the Baird Brown Legal Capacity Questionnaire (based on the underlying principles of *Banks v Goodfellow*) will help practitioners to establish whether or not the client possesses the level of mental capacity necessary to prepare their testamentary intentions.[16]

Regardless of the guidelines a practitioner uses to satisfy themselves that their client possesses mental capacity, they should always bear in mind whether the client has the capacity for the transaction at hand. Questions relating to the date/time/current politicians bear little relevance to whether a client can successfully meet the test set in *Gibbons v Wright*.

Where practitioners are uncertain about their clients' mental capacity and have taken the precaution of obtaining a medical opinion, what should they do if the medical opinion states that their client lacks capacity? The prudent practitioner would be wise to consider the Law Society of NSW's *Guidelines*, referred to earlier. Although specifically addressing the witnessing of EPAs, they are arguably equally relevant when assessing whether the client possesses testamentary capacity.

> 'Any solicitor with knowledge of an unfavourable capacity assessment, cannot in good faith certify that the client appeared to understand the enduring power of attorney which is being executed.'[17]

Surely it is better for the practitioner to counter the cry 'my mother/father/grandmother/grandfather couldn't possibly have had capacity when they signed that document' by adhering to professional guidelines, and keeping assiduous file notes of capacity questioning, than for the matter to end up in court? ■

Notes: **1** Australian Bureau of Statistics at http://www.abs.gov.au/, accessed 30 March 2008. **2** Alzheimer's Australia 'Australian Statistics' at http://www.alzheimers.org.au/content.cfm?infopageid=956&CFID=4811425&CFTOKEN=48545388, accessed 17 April 2008. **3** *Ibid.* **4** *Ibid.* **5** ACT – *Powers of Attorney Act* 2006; NSW – *Powers of Attorney Act* 2003; NT – *Powers of Attorney Act*; QLD – *Powers of Attorney Act* 1998; SA – *Powers of Attorney and Agency Act* 1984; TAS – *Powers of Attorney Act* 2000; VIC – *Instruments Act* 1958 Part XI and XIA; WA – *Guardianship and Administration Act* 1990 Part 9. **6** Schedule 3, *Powers of Attorney Act* 1998 (Qld). **7** Further examples of triggers can be found in the excellent new publication, 'Capacity Toolkit', recently launched by the NSW Attorney-General's Department, which can be accessed at http://www.lawlink.nsw.gov.au/diversityservices. **8** 'Guidelines for Solicitors Preparing an Enduring Power of Attorney' at http://www.lawsociety.com.au/uploads/filelibrary/1076364307703_0.2017245 7268152505.pdf, accessed 21 April 2008. **9** (1954) 91 CLR 423, 438. **10** As cited in 'Guidelines for Solicitors Preparing an Enduring Power of Attorney', see above n7, Appendix A. **11** P Darzins, W Molloy, D Strang (2000), *Who Can Decide: The Six Step Capacity Assessment Process*, Memory Press, Adelaide. **12** Sample letter prepared by the author some years ago and used in numerous presentations on 'mental capacity'. **13** (1870) LR 5 QB 549. **14** At 565. **15** This view is based on questions asked by large numbers of those in the community when the author has given community presentations. **16** Baird Brown (1992), *'The Legal Capacity Questionnaire – Manual for Use'*, **17** See above, n7.

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