SUPREME COURT
OF QUEENSLAND

The Society of Trust and Estate Practitioners Australia Limited
National Capacity Conference – Opening Address
Monday, 5 June, 2023
Venue – The Star Gold Coast

Helen Bowskill
Chief Justice

Good morning everyone. Thank you to STEP Australia, for the invitation to join you at the start of the STEP Australia National Capacity Conference for 2023. I acknowledge all of you as distinguished guests. I also acknowledge the first owners and custodians of the land and waters across Queensland, and particularly here on the Gold Coast where this conference is being held. I pay my respects to their ancestors and elders, for their patience, courage, wisdom and leadership.

At the outset, I commend the conference organisers for their work in putting together what looks to be an excellent program over the next two days. Even just reading the program for the conference is interesting – you must be coming close to winning the prize for the most creatively named papers at a legal conference – I'm thinking of things like "neither fish nor fowl", "if I lost my mind, would I trust any of you as my attorneys?", "herding the cats" and "the pursuit of lost loot"! Sadly, I have let the team down, because mine is just called "opening address".

In a bid to think of something more interesting, I started with the Oxford English dictionary, wondering if the definition of "capacity" might set me on a train of enquiry. In a way it did – I think the most relevant definition is of "mental or intellectual receiving power; the ability to grasp or take in impressions, ideas, knowledge". But more interesting was the 2022 Word of the Year, "goblin mode", which means to engage in "unapologetically self-indulgent, lazy, slovenly, or greedy" behaviour that typically "rejects social norms or expectations".

Well, none of you are in goblin mode for the next two days. You are all dressed very nicely, have left the house and are taking the opportunity to learn new things, have your thoughts provoked or ideas challenged and generously share your company with others; and, no less importantly, take advantage of this essential opportunity to connect in a personal way with your colleagues, to catch up with old friends, make new ones, share a laugh with someone you otherwise see across the trenches; and just be reminded that you are an important part of something bigger.

Like many of you I expect, I have to do quite a bit of travelling, on planes, which necessitates sitting near people. I find it more difficult to do actual work, because of confidentiality issues.

So I find myself reading, or watching, other things. I don't know if any of you have had this experience, but sometimes it can be a bit embarrassing – I'm speaking of course of the time I was caught out watching Bridgerton on a flight up north – only to discover, when I arrived at the conference I was attending the next day that the person sitting next to me was a barrister who thought it was hilarious the Chief Justice would be doing that. Other times, my source of entertainment, or time passing, is much more sober – like the Productivity Commission reports.

There is some incredibly interesting data to be found in those reports and research papers. Relevantly to your Society is the data about what is called "the great wealth transfer". For example, in a research paper published in November 2021, the Productivity Commission estimates that Australians aged 60 and over will transfer $3.5 trillion, or an average of about $175 billion per year in wealth, in the next two decades. There has been a remarkable increase in the real value of intergenerational inheritances over the past almost 20 years – increasing from $24 billion in 2002 to $52 billion in 2018. The growth is attributed to rising wealth among older age groups, who are living longer; and falling fertility rates, which means that people who die will have fewer children to leave their wealth to. But of course the reality is that the figures are highly skewed – with the majority of inheritances being relatively small, and just a few very large ones. The average value of an inheritance has only increased from $85,000 to $125,000, from 2002 to 2018; and in fact, the median inheritance in 2018 was only $45,000. So this is an area of work that is not going anywhere, but which calls for efficiencies in terms of legal costs, given that although overall it represents a huge sum of money, many estates are actually quite modest.

A review of Supreme Court of Queensland's caselaw database reveals a number of recent decisions in this context, in which capacity has been an issue.

The most recent example in the Court of Appeal is *Campbell v Campbell* [2023] QCA 3. This decision is interesting for its reference to the New South Wales decision of *Ryan v Dalton; Estate of Ryan* [2017] NSWSC 1007, in which Kunc J included, at the end of the judgment (at [107]-[108]), a guide for a solicitor in taking instructions from a client where, by reason of age or circumstances, there might be a concern about capacity. That guide includes the following:

(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.[1]

(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:

    (a) over 70;

[1] I pause to record the very significant contribution Kunc J has made, as a member of the specialist committee appointed by the Judicial Council on Cultural Diversity (now called the Judicial Council on Diversity and Inclusion), which was responsible for preparing the first and second editions of the Recommended National Standards for Working with Interpreters in Courts and Tribunals, and to also commend those Standards to you.

(b) being cared for by someone;

(c) who resides in a nursing home or similar facility; or

(d) 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.

Justice Kunc also emphasised that, in those cases which do come before the court the evidence of the solicitor will be critical, and 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*.

The importance of the contemporaneous evidence of a solicitor, as opposed to retrospective medical opinion evidence, where the question of capacity is in issue, was emphasised in the New South Wales Court of Appeal's decision in *Starr v Miller* [2022] NSWCA 46. MacFarlan J at [62] reiterated a statement he had made in an earlier decision, that the evidence of an experienced solicitor may be entitled to substantial weight in this context.

Returning to *Campbell v Cambell* [2023] QCA 3, one of the points made in that decision is that a challenge to capacity does not present the occasion for scrutinising whether the solicitor has engaged in best practice for a solicitor's taking instructions for a will – but rather involves actually scrutinising the evidence, to determine whether the person had capacity at the relevant time. Nevertheless, it is of course ideal if solicitors do adopt best practice, as this will either identify and avoid an issue, or enable the court readily to determine the issue, if a dispute subsequently arises.

The other point from *Campbell v Campbell* is of course the confirmation of the principle that the fact that a person may be suffering from mild cognitive impairment or mild dementia at the time they make their last will does not necessarily preclude a finding that they had testamentary capacity at that time.[2] The earlier decision of the Court of Appeal, in *Greer v Greer* [2021] QCA 143 is cited – and is a useful one to have in your toolbox, where the issue of capacity is concerned, as it very helpfully summarises – in true Justice Bond style – the relevant principles and authorities.

And of course there are a number of recent decisions from the trial division, which shows that these kinds of matters arise with quite some regularity, and that of course does not account for the many *ex tempore* decisions that are made in matters in the Applications list.

Litigation arising out of wills and estates is a significant part of our Court's work – in particular in the Applications list, but not limited to that. The number of "estate administration"

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[2] Referring to *Frizzo v Frizzo* [2011] QCA 308 at [24] and *Greer v Greer* [2021] QCA 143 at [48].

applications continues to increase. In the year to April 2023, there had been an increase of 16%, compared to the previous year, and an increase of 32% compared to the year 2020-21.

One of the significant frustrations in Queensland courts, and no doubt amongst Queensland practitioners, is the fact that we do not yet have a system of electronic filing. However, over the past two years, the Registry has provided an online facility for lodgement of estate applications, called Objective Connect. However, the figures reveal that the vast majority of applications are stilled filed in paper form. From 1 July 2022 to 31 May 2023, 9,443 paper applications for a grant were filed in Brisbane; and there were 1,474 electronic applications via Objective Connect. There are some limitations with Objective Connect – it is not a truly digital experience, because data still has to be manually entered by Registry staff. And the original Will must still be lodged with the court registry. So this does cause some delay with issuing the grant. But at least it is something – while we patiently, or not so patiently, wait for the courts digitisation project to eventuate. As at 2 June 2023, we have 337 solicitors' firms registered to use Objective Connect. The online facility is not open to a self-represented applicant.

The Registry also has the benefits of many experienced staff, in Brisbane and in the regions, which is particularly important in relation to estate applications. Many Queensland succession practitioners would be familiar with our Probate Registrar – Leanne McDonell – who has occupied this role for over 15 years. Ms McDonell's wealth of knowledge and experience as a specialist in this area means she can provide guidance to Registrars, and registry staff, across the State, as well as parties and legal representatives. Ms McDonell also travels to regional areas from time to time, to assist registries with their workload and practices.

As you may also be aware, we have for the last couple of years been trialling a Wills and Estates List, for case management of more complex proceedings. That has, up until recently, been managed by Justice Boddice. The procedures associated with that were the subject of a "protocol". As we have determined that the Wills and Estates List will continue, I am proposing to issue a Practice Direction in relation to it. Consistent with rule 5 of the *Uniform Civil Procedure Rules*, the purpose of management of a case in accordance with the Practice Direction is to facilitate the just and expeditious resolution of complex cases – not ones that can be dealt with in the Applications list – at a minimum of expense. In the first instance, Justice Williams has taken over management of that List, following Justice Boddice's appointment as a judge of appeal. I have provided a draft of the proposed Practice Direction both to the QLS and BAQ, in case there are any practical matters that practitioners wish to raise with me, before the Practice Direction is issued. So I look forward to receiving that feedback soon.

Well, that is all from me. On reflection, as I was preparing these opening remarks, and pondering whether to embark on season 3 of Bridgerton (on which the jury is still out), and having regard to the title of the next paper, to be presented by Justice Ward ("Legal capacity then and now: the potential repercussions of neuroscientific studies"), I thought perhaps my remarks could have been more creatively entitled "Was King George really mad?".

I wish you all the very best, for what promises to be a most interesting and stimulating conference. Thank you again for the invitation to join you.