LEGAL PRACTITIONERS' DUTIES IN RESPECT OF CLIENT TESTAMENTARY CAPACITY

There is a basic common law presumption that every adult has legal capacity to make decisions and give instructions. However, there may be occasions when it will not be sufficient, as a practitioner, to rely upon that presumption.

What is testamentary capacity?

Testamentary capacity involves three elements:[1]

a. Does the person understand the nature of the Will and its effects?[2]
b. Does the person understand the extent of their property?
c. Does the person comprehend and appreciate the claims to which they ought to give effect and in that regard have no disorder of the mind which poisons their affections, perverts their sense of right, or prevents the exercise of their natural faculties?

The requirement to understand the nature of a Will and its effects does not mean that a person must understand the legal effect of every single clause in the Will. However, the person must understand that the person is executing a Will. A person must also understand the practical effect of the central clauses of the Will; in particular, the dispositions of property.[3]

The requirement to understand the extent of the property the person is disposing does not mean that the person must have specific and accurate knowledge of every item of property the person owns. Rather, the person must have a general knowledge of the state of the person's property and what it consists of.[4]

The ability to comprehend and appreciate the claims to which the person ought to give effect means that the person must understand which person or persons have a claim on the person's bounty and have an ability to weigh those various claims.

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[1] *Banks v Goodfellow* (1870) LR QB 549. Note that all elements need to be present for there to be testamentary capacity.
[2] An affirmative answer to the question "do you understand what this will contains?" is not an adequate reflection of understanding. The client should be asked to explain the effect of what he or she is doing in his or her own words and it is important to record the responses verbatim. See *Nicholson v Knaggs & Ors* [2009] VSC 64 (**Dyke 1**), [384-5].
[3] *Nicholson v Knaggs* [2009] VSC 64 at para 97
[4] *Nicholson v Knaggs* [2009] VSC 64 at para 98

How do I make a preliminary assessment?

Although each situation is different, some enquiries you can make to assist you to make a preliminary assessment of a client's testamentary capacity are:

- Is the client making any significant changes to a previous will? If so, why? Previous wills can demonstrate a pattern which may be being departed from, and such a departure should require explanation. [5]
- Who are the significant people in the client's life? Is anyone mentioned in previous wills that the client has not mentioned now?
- Does the client know their assets?
- Is the client on any medication, and if so the nature of that medication and the dosage?[6]
- What is the client's ability to undertake daily living activities (eg drive, clean, cook)?[7]
- Does the client manage his or her own finances?[8]

No one factor on its own is capable of requiring a conclusion that the client does not have capacity. However, a culmination of factors may be such that they ought to alert a reasonable person to the possibility that the client may lack the requisite legal capacity. [9]

Other practicalities to consider are:

- take instructions directly from the client (not through a third party, such as an accountant);
- see the client on their own - ask family/friends to leave the room whilst instructions are given;
- use open-ended questions rather than yes/no questions;
- have the client describe back to you the nature and effect of the Will; and
- take and keep detailed notes (these will be invaluable if the Will is later challenged).

[5] Dyke 1, [664].
[6] Dyke 1, [290-2].
[7] Dyke 1, [306-324; 349].
[8] Dyke 1, [351].
[9] *Legal Services Commissioner v Ford* [2008] LPT 12, 21-22.

What do I do if I see a 'red flag'?

If there are 'red flags' raising doubts as to capacity, speak to the client about your concerns and suggest he/she is assessed for capacity by a medical practitioner. It can be a delicate subject, so explain why a capacity assessment is needed in terms of protecting the client's best interests and to ensure that the will is validly made.

If you send a client to see their doctor for an assessment, you must write a referral letter which contains the purpose of the referral and the relevant legal standard of capacity to perform the task.[10] You should ask the doctor to provide a written report setting out his/her conclusion about the client's capacity and, importantly, the facts which have led to the conclusion.

It is important to keep in mind that testamentary capacity is a legal test, not a medical test. You should treat the medical report as a source of evidence, but the final legal judgement about capacity rests with you.[11]

What if there is still doubt about capacity?

There may be lingering doubt about capacity where a client refuses to have a medical assessment, or where the medical assessment is not definitive. What are your obligations as a practitioner in such circumstances?

If it is patently clear that a client does not have testamentary capacity, then you may be excused from acting on the client's instructions. But if you are satisfied that the client is capable of giving coherent instructions then, even if there is doubt as to testamentary capacity, you must act on the client's instructions to make the will. [12] The rationale is that a client should not be deprived of an opportunity to make a will which may in fact be valid.[13] In such cases it is vitally important to properly record the process in case the will is challenged.[14]

If a client is unable to give coherent instructions, you should endeavour to advise him or her that you cannot make the will so that they know, as far as they are able to, that their testamentary intentions are not able to be carried out.

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[10] See "When a Client's Capacity is in Doubt – A Practical Guide for Solicitors", Law Society of New South Wales, for an example of a referral letter.
[11] See "When a Client's Capacity is in Doubt – A Practical Guide for Solicitors", Law Society of New South Wales at page 8 under clause 11 "Making the final legal judgment when the clinical capacity assessment is available"
[12] *Fradgeley v Pockington (No 2)* [2011] QSC 355, [28]
[13] *Ryan v Public Trustee* [2000] 1 NZLR 700, 719.
[14] *Brown v Wade* [2010] WASC 367, [142].

In summary, it is important in such matters to take instructions directly from the client, and ask the right questions. If you are still in doubt once all investigations have been carried out (including a medical opinion), then, if the client is capable of giving you coherent instructions, you should proceed to make the will, but you should keep detailed notes of the process.

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