THE LAW SOCIETY
OF NEW SOUTH WALES

Our ref: JD:ElderLaw:VK:596253

24 April 2012

Ms Margery Nicoll
Acting Secretary General
Law Council of Australia
DX 5719 CANBERRA

By email: stasia.tan@lawcouncil.asn.au

Dear Ms Nicoll,

Inquiry into Dementia: Early Diagnosis and Intervention

The Elder Law & Succession Committee of the Law Society of NSW (the "Committee") represents the Law Society in the areas of elder and succession law as they relate to the legal needs of people in NSW. The Committee thanks the National Elder Law & Succession Committee for the opportunity to review the Law Council's draft submission to the House Standing Committee on Health and Ageing Inquiry and to provide its contribution.

The Committee generally supports the Law Council's views as set out in the draft submission.

The Committee makes further more specific comments below to provide more detail on the Committee's position where the issues have been considered previously in NSW.

1. Capacity

The Committee notes that in NSW, there is no single legal definition of capacity. Rather, the definition of capacity depends in each case on the type of decision being made, or the type of transaction being considered. Therefore, there are a variety of legal tests of capacity used in NSW. Attached for your convenience is an extract from the Law Society's publication *When a Client's Capacity is in Doubt: A Practical Guide for Solicitors* providing further information about the different tests for capacity in NSW.

The Committee further notes the principles set out in the *Capacity Toolkit* published by the NSW Department of Attorney General and Justice:

- A person should be presumed to have capacity, unless it is established otherwise.
- Capacity is decision-specific.
- Capacity is fluid: it can fluctuate over time or in different situations, such that capacity must be assessed in a decision-specific way.

- Assumptions should not be made because of a person's age, appearance, disability or behaviour.
- Capacity assessments should be made about a person's decision-making ability, not the decision they make.
- Respect a person's privacy.
- Substitute decision-making is a last resort.

The Committee notes also that in the recently released report on Guardianship (the "Guardianship Report") prepared by the Victorian Law Reform Commission (VLRC), the VLRC recommends that the Victorian Government should develop a comprehensive resource about capacity and capacity assessment based on the NSW *Capacity Toolkit* (recommendation 28).

The Committee notes that in NSW, the NSW Standing Committee on Social Issues recommended in 2010 that the NSW Government establish a "single definition of 'capacity' applicable to legislation related to substitute decision-making for people lacking capacity" (recommendation 1 of the Report on Substitute Decision-Making for People Lacking Capacity). The Government has referred this question to the NSW Law Reform Commission.

The Committee supports the development and implementation of a nationally consistent approach to the assessment of capacity.

2. Substitute decision making

As noted above, the Committee's view is that substitute decision-making should be used as a measure of last resort.

The Committee notes that section 4 of the *Guardianship Act 1987* (NSW) requires that anyone exercising functions under that Act is to restrict as little as possible the freedom of decision and freedom of action of a person in need of or under guardianship. The Committee understands that the approach currently taken by the Guardianship Tribunal is to avoid making an order if possible; an approach which is, in a way, a form of assisted decision-making.

The Committee notes the recommendations made by the VLRC in the Guardianship Report that a new range of assisted decision-making arrangements should be introduced. While the Committee is still considering its position in relation to these recommendations, it understands that the "least restrictive" approach is working well in NSW, and the option of *not* making an order is one way of recognising informal arrangements. The Committee's concern in this respect is that a formal system of legalising informal family arrangements may degrade informal arrangements themselves.

The Committee agrees that making personal appointments is the preferred approach. In the Committee's view this highlights the importance of community education about the benefits of utilising the legal instruments available to individuals to ensure that, as far as possible, their wishes are taken into account even when their capacity is diminished.

3. Advance Care Directives

The Committee notes that the National Framework on Advance Care Directives was released in 2011. The Committee supports greater consistency and

recognition throughout the various Australian jurisdictions in relation to advance care directives, but notes that at this point, the National Framework is aspirational in nature rather than prescriptive.

In relation to the question of whether there should be legislative codification in relation to advance care directives, the Committee notes the principles set out in the judgment of McDougall J in *Hunter and New England Area Health Service v* A [2009] NSWSC 761 reflect the law in NSW. An extract of this judgment found in the National Framework is attached for your information.

The Committee's view is that from a legal perspective it is not necessary to go beyond these principles when considering the validity and function of advance care directives.

4. Increased community awareness

The Committee agrees that measures to increase community awareness about the legal instruments available to assist an individual to plan ahead are useful. The Committee's view is that when people are diagnosed with early dementia, they should be made aware of the need to consider power of attorney and enduring guardianship appointments and advance care directives while they still have the capacity to make the relevant decisions. It would be useful if medical practitioners are able to refer patients to further information or to services where they can obtain that information.

The Committee thanks you once again for the opportunity to provide comments. If it can provide any further assistance please contact Vicky Kuek, Policy Lawyer on (02) 9926 0354 or victoria.kuek@lawsociety.com.au

Yours sincerely,

Justin Dowd
President

Attachment 1

APPENDIX A

Different capacity tests

Decision-specific test for capacity

In *Gibbons v Wright (1954) 91 CLR 423,* the High Court (at 437 per Dixon CJ, Kitto andTaylor JJ) defined a decision-specific test for capacity to enter into a contract:

> "The law does not prescribe any fixed standard of sanity as requisite for the validity of all transactions. It requires, in relation to each particular matter or piece of business transacted, that each party shall have such soundness of mind as to be capable of understanding the general nature of what he [or she] is doing by his [or her] participation."

Capacity to give instructions to a solicitor

The *Uniform Civil Procedure Rules 2005* have provisions regarding the appointment and removal of tutors and the manner in which those tutors will represent the person under legal incapacity. Rule 7.18 is the principal provision. It states that any person under legal incapacity may have a tutor appointed by the Court and the Court may remove a tutor and appoint another tutor.

Section 3 of the *Civil Procedure Act 2005* defines "person under legal incapacity" as any person who is under a legal incapacity in relation to the conduct of legal proceedings (other than an incapacity arising under section 4 of the *Felons (Civil Proceedings) Act 1981*) and, in particular, includes:

(a) a child under the age of 18 years, and

(b) an involuntary patient or a forensic patient within the meaning of the *Mental Health Act 2007* , and

(c) a person under guardianship within the meaning of the *Guardianship Act 1987* , and

(d) a protected person within the meaning of the *Protected Estates Act 1983* , and

(e) an incommunicate person, being a person who has such a physical or mental disability that he or she is unable to receive communications, or express his or her will, with respect to his or her property or affairs.

The NSW Court of Appeal considered the need to appoint a tutor for litigation in *Murphy v Doman [2003] NSWCA 249*; (2003) 58 NSWLR 51.

The Court noted (at [35]):

> "The cases do not consider the level of mental capacity required to be a "competent" litigant in person but it cannot be less than that required to instruct a solicitor. It should be greater because a litigant in person has to manage court proceedings in an unfamiliar and stressful situation."

In *Masterman-Lister v Brutton & Co* [2003] 3 All ER 162 Chadwick LJ described the issue when it was necessary to determine the capacity to give legal instructions in these terms:

> "the test to be applied, as it seems to me, is whether the party to legal proceedings is capable of understanding, with the assistance of such proper explanation from legal advisers and experts in other disciplines as the case may require, the issues on which his consent or decision is likely to be necessary in the course of those proceedings. If he has

capacity to understand that which he needs to understand in order to pursue or defend a claim, I can see no reason why the law – whether substantive or procedural – should require the interposition of a next friend or guardian ad litem."

In *Dalle-Molle by his Next Friend, Public Trustee v Manos and Anor* [2004] SASC 102, Debelle J reviewed the common law in this area and noted (at 26):

"The level of understanding of legal proceedings must, I think, be greater than the mental competence to understand in broad terms what is involved in the decision to prosecute, defend or compromise those proceedings. The person must be able to understand the nature of the litigation, its purpose, its possible outcomes, and the risks in costs which of course is but one of the possible outcomes."

Capacity to manage affairs (s13 of the Protected Estates Act 1983 and s 25G of the Guardianship Act 1987)

Justice Powell in *PY v RJS & Ors* (1982) 2 NSWLR 700 at 702 stated that a person is not shown to be incapable of managing his or her own affairs unless, at the least, it appears:

(a) that he or she appears incapable of dealing in a reasonably competent fashion with the ordinary routine affairs of man; and

(b) that by reason of that lack of competence there is shown to be a real risk that either;

  (i) he or she may be disadvantaged in the conduct of such affairs, or

  (ii) that such monies or property which he or she shall possess may be dissipated or lost; it is not sufficient merely to demonstrate that the person lacks the higher level of ability needed to deal with complicated transactions or that he or she does not deal with even simple or routine transactions in the most efficient manner.

In *H v H* (NSW Supreme Court, Young J, 20 March 2000, unreported), Justice Young clarified the scope and meaning of the phrase 'ordinary routine affairs of man' and stated that:

"[T]he ordinary affairs of mankind do not just mean being able to go to the bank and draw out housekeeping money. Most people's affairs are more complicated than that, and the ordinary affairs of mankind involve at least planning for the future, working out how one will feed oneself and one's family, and how one is going to generate income and look after capital. Accordingly, whilst one does not have to be a person who is capable of managing complex financial affairs, one has to go beyond just managing household bills.

The relevant time for considering whether a person is incapable of managing his or her affairs is not merely the day of hearing, but the reasonably foreseeable future.[18]

In *Re GHI* (a protected person) [2005] NSWSC 581 Justice Campbell offers two further factors that are relevant when determining whether a person is "incapable of managing their affairs".

The first is whether or not the person is willing to seek and take appropriate advice.[19] In general, taking advice can "remove the risk that the lack of the abilities will cause

18 *McD v McD* (1983) 3 NSWLR 81at 86.

19 Re GHI (a protected person) [2005] NSWSC 581 at [119] per Campbell J.

the person to be disadvantaged in the conduct of his or her affairs".[20]

The second is whether the person has the ability to identify and deal appropriately with those who may be attempting to benefit from their assets through unfair dealing.[21] In regards to Justice Powell's classic formulation, this factor is relevant since the skill to identify and deal appropriately with exploitation is necessary to carry out the 'ordinary routine affairs of mankind.' The lack of this skill may create a real risk that the person may be disadvantaged or that their estate may be dissipated or lost.[22]

Testamentary capacity

The formula for determining testamentary capacity is stated in the judgment of the Court (Cockburn CJ, Blackburn, Mellor, and Hannen JJ) delivered by Sir Alexander Cockburn in *Banks v Goodfellow* 1870 LR 5 QB 549 at 565 as follows:

> "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."

Capacity to make a power of attorney

In *Ranclaud v Cabban* (1988) NSW Conv R 55-385 at 57,548, Young J noted:

> "A solicitor is not the alter ego of a litigant. Generally speaking, however, a person retains a solicitor to advise one and one reserves to oneself the ultimate power of making decisions after receiving the solicitor's advice ... Further so far as Powers of Attorney are concerned whilst it may be one thing to be aware that a person under a Power of Attorney may act on one's behalf, where the Power, as in the present case, is a general Power under sec. 163B and Sch. VII of the Conveyancing Act 1919. Such a power permits the donee to exercise any function which the donor may lawfully authorise an attorney to do. When considering whether a person is capable of giving that sort of power one would have to be sure not only that she understood that she was authorising someone to look after her affairs but also what sort of things the attorney could do without further reference to her. "

In the English case of *Re K* (1988) 1 Ch 310 at 316, the Court referred to the understanding which a person should have to be capable of making a power of attorney as follows:

> "Firstly, (If such be the terms of the power) that the attorney will be able to assume complete authority over the donor's affairs. Secondly, (If such be the terms of the power) that the attorney will in general be able to do anything with the donor's property which he himself could have done. Thirdly, that the authority will continue if the donor should be or become mentally incapable. Fourthly, that if he should be or become mentally incapable, the power will be irrevocable without confirmation by the court."

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20 Ibid at 120 per Campbell J.
21 Ibid at 123 per Campbell J.
22 Ibid at 125 per Campbell J .

Capacity to consent to medical treatment

The *Guardianship Act 1987* makes provision for substitute consent for medical treatment if an adult (over 16 years of age) is incapable of consenting to that treatment.

Section 33(2) of the *Guardianship Act 1987* states:

> "a person is incapable of giving consent to the carrying out of medical or dental treatment if the person:
>
> (a) is incapable of understanding the general nature and effect of the proposed treatment, or
>
> (b) is incapable of indicating whether or not he or she consents or does not consent to the treatment being carried out."

Capacity to make health-related privacy decisions under the *NSW Health Records and Information Privacy Act 2002* (the HRIPA)

The HRIPA establishes a test for incapacity as follows (section 7 HRIPA):

> "(1) An individual is incapable of doing an act authorised, permitted or required by this Act if the individual is incapable (despite the provision of reasonable assistance by another person) by reason of age, injury, illness, physical or mental impairment of:
>
> (a) understanding the general nature and effect of the act, or
>
> (b) communicating the individual's intentions with respect to the act."

Capacity to consent to marriage

In *Babich & Sokur and Anor* [2007] FamCA 236 (9 March 2007), Justice Mullane stated:

> "the Australian test requiring that for a valid consent a person must be mentally capable of understanding the effect of the marriage ceremony as well as the nature of the ceremony[at 244] ... It is clear from the authorities that the law does not require the person to have such a detailed and specific understanding of the legal consequences [at 249] ... a valid consent involves either a general understanding of marriage and its consequences, or an understanding of the specific consequences of the marriage for the person whose consent is in issue [at 251]. "

Attachment 2

Appendix B: Advance Care Directives and principles for decision-making

Hunter and New England Area Health Service v A [2009] NSWSC 761

Extracted from the decision by Justice McDougall delivered 6 August 2009

Accordingly, to assist those faced with emergency care decisions, I summarise my understanding of the relevant principles (whilst acknowledging that what I say will not apply in every conceivable circumstance):

1. except in the case of an emergency where it is not practicable to obtain consent (see at (5) below), it is at common law a battery to administer medical treatment to a person without the person's consent. There may be a qualification if the treatment is necessary to save the life of a viable unborn child.
2. Consent may be express or, in some cases, implied; and whether a person consents to medical treatment is a question of fact in each case.
3. Consent to medical treatment may be given:
   - by the person concerned, if that person is a capable adult;
   - by the person's guardian (under an instrument of appointment of enduring guardian, if in effect; or by a guardian appointed by the Guardianship Tribunal or a court);
   - by the spouse of the person, if the relationship between the person and the spouse is close and continuing and the spouse is not under guardianship;
   - by a person who has the care of the person; or
   - by a close friend or relative of the person.
4. At common law, next of kin cannot give consent on behalf of the person. However, if they fall into one or other of the categories just listed (and of course they would fall into at least the last) they may do so under the [NSW] Guardianship Act.
5. Emergency medical treatment that is reasonably necessary in the particular case may be administered to a person without the person's consent if the person's condition is such that it is not possible to obtain his or her consent, and it is not practicable to obtain the consent of someone else authorised to give it, and if the person has not signified that he or she does not wish the treatment, or treatment of that kind, to be carried out.
6. A person may make an "advance care directive": a statement that the person does not wish to receive medical treatment, or medical treatment of specified kinds. If an advance care directive is made by a capable adult, and is clear and unambiguous, and extends to the situation at hand, it must be respected. It would be a battery to administer medical treatment to the person of a kind prohibited by the advance care directive. Again, there may be a qualification if the treatment is necessary to save the life of a viable unborn child.
7. There is a presumption that an adult is capable of deciding whether to consent to or to refuse medical treatment. However, the presumption is rebuttable. In considering the question of capacity, it is necessary to take into account both the importance of the decision and the ability of the individual to receive, retain and process information given to him or her that bears on the decision.
8. If there is genuine and reasonable doubt as to the validity of an advance care directive, or as to whether it applies in the situation at hand, a hospital or medical practitioner should apply promptly to the court for its aid. The hospital or medical practitioner is justified in acting in accordance with the court's determination as to the validity and operation of the advance care directive.

9. Where there is genuine and reasonable doubt as to the validity or operation of an advance care directive, and the hospital or medical practitioner applies promptly to the court for relief, the hospital or practitioner is justified, by the emergency principle, in administering the treatment in question until the court gives its decision.
10. It is not necessary, for there to be a valid advance care directive, that the person giving it should have been informed of the consequences of deciding, in advance, to refuse specified kinds of medical treatment. Nor does it matter that the person's decision is based on religious, social or moral grounds rather than upon (for example) some balancing of risk and benefit. Indeed, it does not matter if the decision seems to be unsupported by any discernible reason, as long as it was made voluntarily, and in the absence of any vitiating factor such as misrepresentation, by a capable adult.
11. What appears to be a valid consent given by a capable adult may be ineffective if it does not represent the independent exercise of persons volition: if, by some means, the person's will has been overborne or the decision is the result of undue influence, or of some other vitiating circumstance.

Full judgement available at: http://www.lawlink.nsw.gov.au/scjudgments/2009nswsc.nsf/0000000000000000000000000000000/48dd2b1db7c8987dca257608000a28da?OpenDocument (accessed 7 January 2011).