

COMMUNICATING WITH HEALTH PROFESSIONALS

WHEN ASSESSING A CLIENT'S TESTAMENTARY CAPACITY

Key points

- Arranging for a health professional to assess a client's mental capacity may help a solicitor to assess the client's testamentary capacity, where that is in issue.
- However, obtaining the assessment should not unduly delay or prevent the client making a will.
- The assessment is more likely to be helpful if an appropriate referral is made, and if the health professional understands the purpose of the referral and what is required.
- The assessment does not remove the need for the solicitor to apply their own judgment in assessing testamentary capacity.
- If there is an arguable case that the client has testamentary capacity, the solicitor should proceed to prepare a will rather than to deprive the client of the opportunity to make one.

Overview

This document provides guidance for solicitors on obtaining medical or other clinical input to assess their client's legal capacity to make a will ("testamentary capacity"). The principles set out below also have relevance if capacity is in issue when taking instructions relating to an enduring power of attorney or enduring guardianship appointment,¹ although the tests to be applied in those instances will be different.

Solicitors should also keep in mind that, even if the requisite testamentary capacity is established, it is also necessary to establish that the will maker brought that capacity to bear on the terms of the will – that there was knowledge and approval of the contents of the will.²

Who assesses testamentary capacity?

First and foremost, responsibility for assessing whether a client has capacity to proceed to make a will rests with the solicitor, rather than any health professional. Of course, only the Court can ultimately determine whether a person, in fact and at law, had capacity to make a particular will.

Legal professionals assess the legal requirements necessary for a client to be able to make a decision and/or enter into a transaction recognisable at law. Health professionals are assessing clinical notions of mental capacity. Legal and mental capacity are fundamentally different concepts.

¹ For further information on assessing capacity, see the Law Society publication: "[When a client's mental capacity is in doubt: A practical guide for solicitors](#)".

² See, for example, *Lewis v Lewis* [2021] NSWCA 168.

Any professional assessment made by a lawyer should have a sound basis. Deciding that a formal clinical assessment is needed is, in itself, forming a judgment about the client's capacity at an informal, or preliminary level. The exercise of that judgment, even if it is merely the incipient awareness that "something is not right", is itself an assessment. However, referring the client to a health professional does not remove the need for the solicitor to exercise their own judgment in assessing legal capacity.

If, with or without medical or clinical input, the solicitor forms a view, based on their own sound assessment, that there is an arguable case that a person has, or may have, testamentary capacity, they should proceed to prepare the will.

The legal test for testamentary capacity

Under common law, there is a presumption that a person has the mental capacity to make all their own decisions.³

Thus, if in doubt, or if obtaining a formal medical or clinical assessment would create undue delay, then, provided the lawyer forms a view that the client *may have* the requisite testamentary capacity, the appropriate course is to prepare a will rather than to deprive the client of the opportunity to make one.

The legal test for testamentary capacity is well-established, having first been articulated in the 1870 decision of *Banks v Goodfellow* (1870) LR 5 QB 549.

The law, applying *Banks v Goodfellow*, is that the test of legal capacity is that the person:

- is aware, and appreciates the significance, of a will;
- is aware, at least in general terms, of the nature, and extent, and value, of his/her estate;
- is aware of those who may reasonably be thought to have a claim upon his/her estate, and the basis for, and nature of, the claims of those persons; and
- has the ability to evaluate, and to discriminate between, the respective strengths of the claims of such persons.

An assessment of testamentary capacity is issue-specific, time-specific, and content-specific:

- issue-specific because a person may be found to have capacity to make a will, but not necessarily to enter into all legal transactions;
- issue-specific because a person may be found to have capacity to make a will, but not necessarily to enter into all legal transactions;
- time-specific because the assessment is contemporaneous with the transaction (the making of the will); and
- content-specific by reference to the complexity of the transaction.

Finally, where testamentary capacity is being assessed with medical or clinical input, the assessment process should be timely. If a medical / clinical assessment is not readily available then, as outlined above, it may be preferable to proceed to prepare a will without it.

In summary, great care should be taken in seeking and applying medical or clinical input for a legal capacity assessment. While the input may directly support or detract from the solicitor's assessment, it will rarely be definitive. Ultimately, the lawyer must make the critical assessment.⁴

³ *Szozda v Szozda* [2010] NSWSC 804 by reference to *Attorney-General v Parnter* [1792] Eng R 2455; (1792) 3 Bro CC 441; (1792) 29 ER 632.

⁴ See *Ryan v Dalton; Estate of Ryan* [2017] NSWSC 1007; *Aleeta Gooley v Brett Gooley* [2021] NSWSC 56 and, in relation to enduring power of attorney appointments, *Szozda v Szozda* [2010] NSWSC 804.

Starting the process – raising the issue with the client

It will often be a sensitive, if not unpleasant, task to suggest to a client that there may be concerns they do not have mental capacity to make their own decisions.

The loss of capacity is frightening and stigmatising to most people, and many clients will be offended, angry and defensive when this issue is raised. However, it may make this task easier if it can be explained to the client in terms of the legal need to make sure that the client's mental capacity is adequate for the task at hand. The formal assessment could be suggested as a precautionary measure to protect against possible future legal challenges to the validity of the document.

If the client agrees to provide instructions to obtain an assessment of their mental capacity, there will be a need to discuss obtaining the client's formal written authority to request the assessment, the likely costs, and most importantly, the time it may take to obtain the assessment. As noted above, if there is likely to be a significant time delay involved, it may be prudent to consider proceeding with making a will ahead of receipt of the assessment.

Who to consult

Before deciding who to consult, the solicitor should determine the client's existing relationships, if any, with treating medical or other clinical practitioners. Some clients may have a very close and long-standing history with their general practitioner (GP) while others may have no consistent dealings with any GP. The latter situation is not uncommon with the prevalence of bulk-billing and large medical clinics.

There is a range of health professionals who undertake mental capacity assessments and who use a variety of methods and tools to complete this task. A solicitor needs to consider the client's particular circumstances and possible disability before making a referral to an appropriate health professional. For example, if the client's circumstances, the will and the estate are relatively straightforward, the opinion of the client's GP may be appropriate. If there are pre-existing mental health conditions and/or a complex estate and correspondingly complex will, specialist opinion may be necessary. The crucial question in making a referral is: what relevant experience does the health professional have in the area of mental capacity assessment of older people or people with a possible mental illness, intellectual disability or acquired brain injury?

In addition to GPs, the following may be able to carry out a mental capacity assessment:

- Psychiatrists - doctors who specialise in the study, treatment and prevention of mental disorders.
- Psychologists - professionals engaged in the scientific study of the mind, mental processes and behaviour. They are not doctors and are not qualified to prescribe medication.
- Neuropsychologists - psychologists skilled in conducting assessments that determine the presence or nature of brain dysfunction, for example after a head injury or where dementia is suspected. The assessment is conducted through interview, observation and psychological testing and generally involves the administration of tests of memory, concentration, other thinking skills and language.
- Psychogeriatricians - psychiatrists who specialises in the diagnosis, treatment and prevention of mental disorders occurring in the aged.
- Geriatricians - doctors specialising in the diagnosis and treatment of disorders that occur in old age, and with the care of the aged
- Neurologists – physicians who specialise in the study of the structure, functioning and diseases of the nervous system.
- Aged Care Assessment Teams (ACATs) - multi-disciplinary teams of health care workers who assess people in their own home to determine the level of assistance the aged person needs to remain living there independently. The teams are also responsible for assessing people for admission into nursing homes. The



teams are comprised of a nurse, social worker, occupational therapist and physiotherapist and may also include a geriatrician or psychogeriatrician. ACATs are attached to major hospitals.

What information to provide in the referral

The solicitor should take great care in drafting the letter referring their client for a mental capacity assessment.

As noted above, an assessment of mental capacity is a different process to the solicitor's subsequent assessment of legal capacity. Nevertheless, it is important that the health professional understands the purpose of their assessment, and it cannot be assumed that they will understand the specific legal tests that the solicitor will be applying. A general request to provide a report about a client's "mental capacity" might elicit a report which addresses whether the client is able to remain at home and attend to their personal care needs, but not the central issue about their capacity to make a particular legal decision.

Therefore, it is crucial that the referral letter sets out: the client's background;

- the reason the client contacted the solicitor;
- the purpose of the referral - what is the legal task or decision being considered;
- the relevant legal standard of mental capacity to perform the task at hand;
- any known medical information about the client;
- information about the client's social or living circumstances, including general information on the size and complexity of their estate; and
- the client's values and preferences, if known.

It may also be useful to invite the health professional to telephone the lawyer for clarification if needed.

What information to request

The level of detail of information requested from a health professional will vary according to the circumstances of the client. However, in general terms, a mere comment to the effect that the client is "of sound mind and fully able to make his own decisions" is unlikely to be adequate to support an assessment of capacity.⁵

The letter could request:

- a summary of the health professional's professional qualifications and relevant experience;
- a summary of the client's relevant medical background, including how long they have been a patient;
- how often the health professional has attended on the client in last two years, and the date of the last visit;
- their opinion on whether there is anything about the client's medical history, treatment or medication that is likely to impair the client's ability to remember, reflect and reason about appointing someone to manage their legal and financial affairs, and do so in a rational way;
- if the health professional is of the opinion that the client's ability may be impaired, their prognosis regarding the impairment, including its likely duration;
- a brief explanation of the basis for their opinion and prognosis, with reference to their observations, relevant tests, studies, etc. (and if they use a MMSE, MoCA, RUDAS or ACE III test, their comments on how the results assisted them in forming their opinion); and
- any other relevant comments concerning the client.

⁵ See *Hans-Egon Bernhard Metzner v Jacqueline Rita Metzner* [2021] NSWSC 1336 at [72(2)] and [75] per Rein J.

Before sending the referral

At a practical level, before sending the referral letter, the solicitor should consider telephoning the health professional to flag the request, explain its purpose and discuss what is involved. This may help to ensure a prompt and helpful response to the written request.