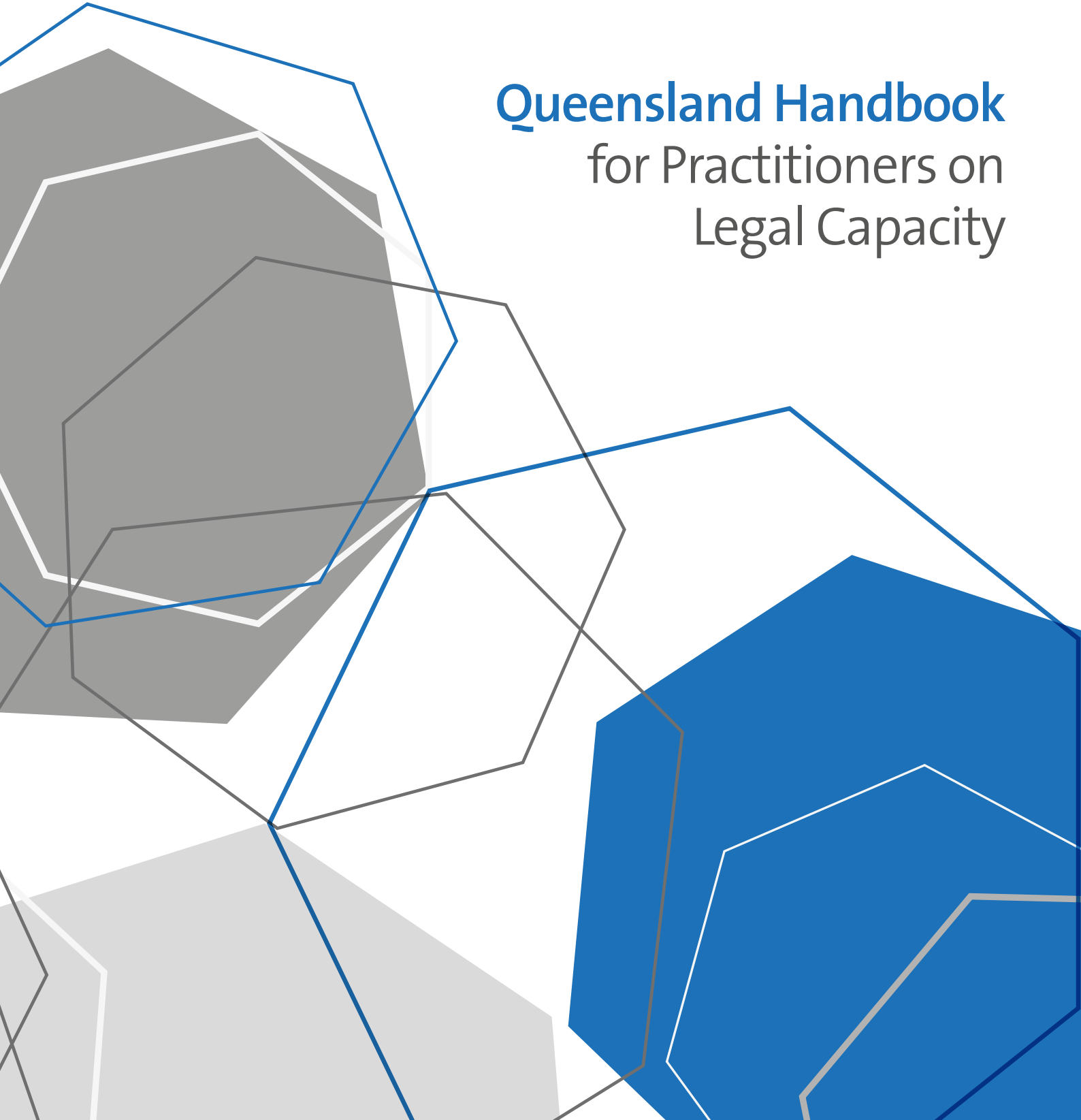


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Queensland Handbook for Practitioners on Legal Capacity



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- (b) solicitors from the Queensland Law Society's Ethics Centre;
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Endorsement

The Queensland Law Society endorses this Handbook for use by Queensland solicitors.

Definitions and Interpretation

Unless the context otherwise requires, in this Handbook any reference to:

- (a) **capacity** is a reference to legal capacity;
- (b) **diminished capacity, impaired capacity, lacking capacity** or any similar expression is a reference to diminished capacity, impaired capacity or a lack of capacity *for that particular decision at that particular time* (as capacity is domain-specific, decision-specific and time-specific);
- (c) **lawyer** is a reference to both barristers and solicitors who are admitted to practise in Queensland (however, the terms ‘barrister’ and ‘solicitor’ are used in some cases where it has been necessary to distinguish between the two);
- (d) **QLS** is a reference to the Queensland Law Society;
- (e) **substituted decision maker**, unless otherwise specified, is a reference to a person appointed under an enduring power of attorney, appointed as a guardian or administrator under the *Guardianship and Administration Act 2000* (Qld), or a litigation guardian; and
- (f) **Tribunal** is a reference to the Queensland Civil and Administrative Tribunal.

Disclaimer

This Handbook is provided for your information and interest only. It does not constitute and must not be relied on as legal advice. You must seek specific advice tailored to your circumstances.

This Handbook is dated 1 July 2014. It is based on the law of Queensland and the Commonwealth of Australia relevant to legal capacity as in force on 1 July 2014. Neither Allens nor Queensland Advocacy Incorporated undertake any obligation to update this Handbook for any changes in relevant laws, guidelines or practice on or after the date of this Handbook.

1

Executive Summary

1.1 What is the purpose of this Handbook?

This Handbook seeks to provide Queensland lawyers with a sound conceptual framework for assessing whether a client has capacity to give legal instructions. It also details the various steps lawyers can take when their client's capacity is in doubt. The Handbook covers issues of capacity relevant to elderly clients and clients with mental illness, intellectual disability, cognitive impairment and acquired brain injury. The Handbook does not cover issues of capacity relevant to minors.

Underpinning the development of the Handbook is the belief that if lawyers better understand issues of capacity, and are presented with specific steps to undertake in certain circumstances where the capacity of a client seems likely to be called into question, there will be fewer instances in which lawyers refuse to act out of fear that the client lacks capacity. In this way, the Handbook will contribute to ensuring that the most vulnerable members of our society are still able to access legal advice and representation.

1.2 Australian Law Reform Commission report on barriers to legal capacity

The Australian Law Reform Commission is currently preparing a report to be released in August 2014 on Commonwealth laws and legal frameworks that 'deny or diminish the equal recognition of people with disability as persons before the law and their ability to exercise legal capacity', which will include recommendations on changes that could be made to such laws and frameworks.¹ As the law and best practice on issues of capacity are constantly changing, it is recommended that lawyers obtain a copy of the report, once released, to ensure they are aware of the latest developments in this rapidly evolving area.

¹ Australian Law Report Commission, *Equality, Capacity and Disability in Commonwealth Laws*, Issues Paper No 44 (November 2013) 3 <http://www.alrc.gov.au/sites/default/files/pdfs/publications/whole_ip_44.pdf>.

1.3 Summary of steps for assessing capacity

What follows is a summary of Chapters 3 to 7, which outline the steps a lawyer should take to assess whether their client has capacity to make a particular decision and provide competent instructions in relation to it. Lawyers may find it useful to refer to Figure 1 (two pages below) which provides a flowchart of this process.

1.4 Fundamentals of lawyers and capacity (Chapters 3 and 4)

At all times when assessing whether a client has capacity to provide competent instructions in relation to a particular decision, lawyers should remain cognisant of the following fundamental ethical duties that are relevant to capacity:

- (a) the duty to follow lawful, **competent** and proper instructions;
- (b) the paramount duty to the court and administration of justice;
- (c) the duty to act in the client's best interests (including to respect client autonomy);
- (d) the duty to be honest and courteous in all dealings;
- (e) the duty not to engage in conduct which constitutes discrimination; and
- (f) the duty of confidence to the client.

Lawyers should also bear in mind the following basic principles of law regarding capacity:

- (a) **all adult persons are presumed to have capacity** to make all decisions unless there is evidence to rebut the presumption;
- (b) capacity is time-specific, domain-specific and decision-specific, meaning at a given time a client may have capacity for some decisions but not others;
- (c) the capacity to make a decision must be distinguished from the content of the decision itself, meaning 'bad' decisions are not indicative of impaired capacity;
- (d) capacity should not be assessed solely on the basis of appearance, age, behaviour (including communication style), disability or impairment;
- (e) capacity may be increased with appropriate support; and
- (f) substituted decision making is a last resort.

Finally, lawyers must remember that when assessing a client's capacity they are **not making a determination of the client's capacity that will be final and binding** on the client or any relevant third parties. Determining whether the client has capacity to perform particular tasks is ultimately a matter for the courts.

1.5 Practical process for assessing client capacity (Chapter 5)

It is imperative that lawyers recognise that every client is unique. It follows that the approach a lawyer takes in dealing with issues associated with a client's capacity may need to be tailored to the client's individual circumstances. Recognising this, what follows is a general conceptual framework on how to assess capacity and deal with capacity issues in practice.

- (a) **Identify the client.** In most cases, the client will be the person seeking to make the decision. Where a substituted decision maker has been appointed to or by the client, it may be the substituted decision maker and not the client who has the exclusive ability to provide the lawyer with instructions. In some cases, the substituted decision maker may be the lawyer's client. In all cases, the lawyer cannot accept instructions from third parties such as family, friends and carers.
- (b) **Identify the particular decision** the client is seeking to make and the **relevant legal test for capacity** that applies to that decision. The specific legal tests for different types of decisions are listed in Schedule 2.
- (c) Consider whether there is **any reason to question whether the client has capacity**. Various 'red flag' circumstances that could (but do not necessarily) indicate that a client lacks capacity are listed in Schedule 1. If there are no 'red flags' and the client displays no indicia of impaired capacity, the lawyer can act on the client's instructions.
- (d) **Determine whether a substituted decision maker has been formally appointed for the client** (such as a guardian or administrator, or litigation guardian). Review the terms of the document effecting any such appointment to ensure the appointment is still in force and the decision to be made falls within its scope. If so, instructions must be taken from the substituted decision maker.
- (e) If 'red flags' or indicia of impaired capacity are present and no substituted decision maker has been appointed, **take steps to maximise the client's capacity**. What steps are appropriate will invariably depend on the particular client, but in general the following steps are recommended:
 - (i) meet with client in person and alone;
 - (ii) focus on the client as an individual and consciously put to one side biases and assumptions based on age, mental health, intellectual impairments, emotional distress or eccentricities;

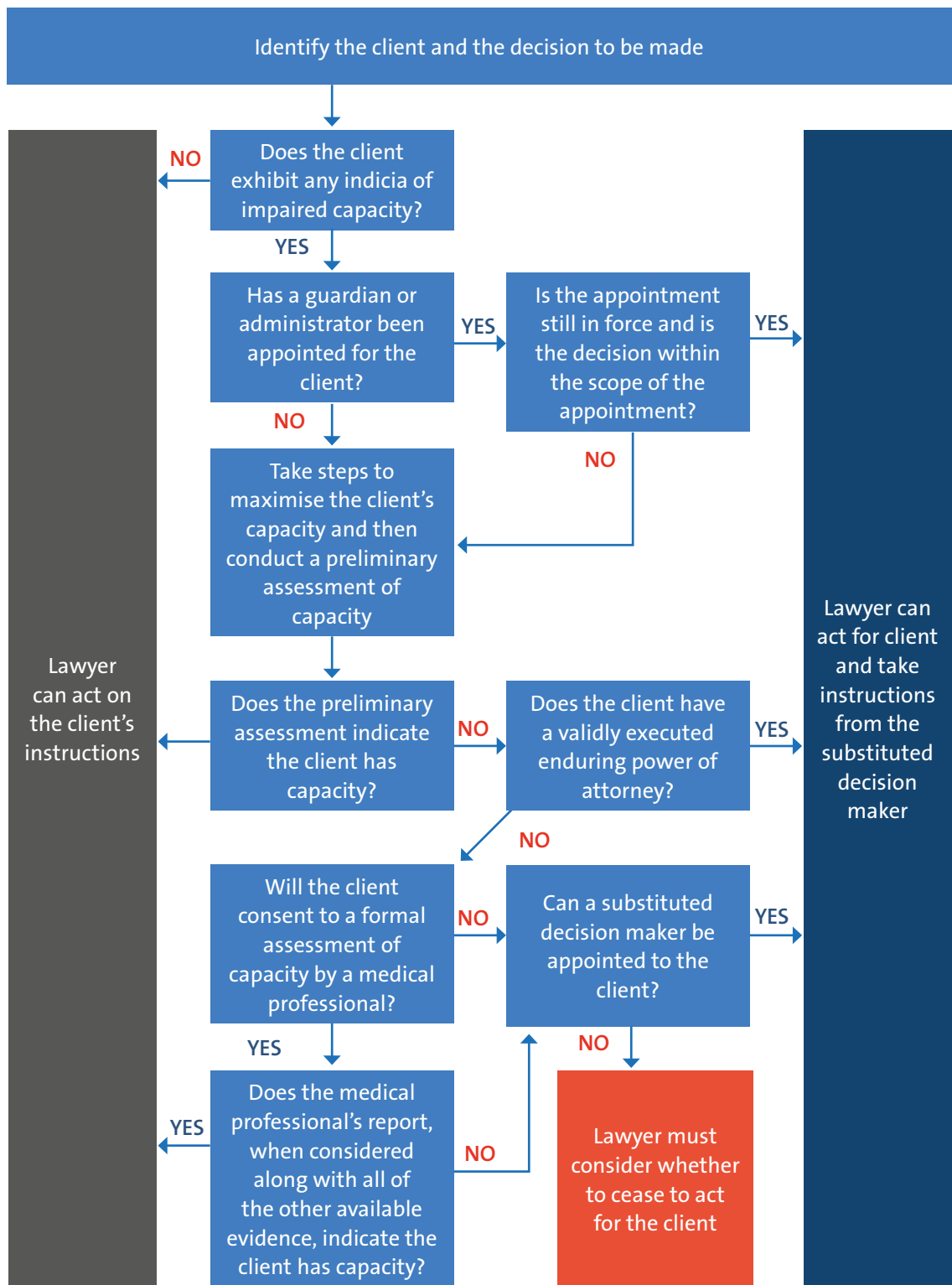


Figure 1: Diagram showing step-by-step general conceptual framework for lawyers to assess client capacity and deal with capacity-related issues in practice.

- (iii) establish the client's trust and confidence by emphasising the duties that the lawyer owes to the client, in particular the duties of loyalty and confidence;
 - (iv) adapt your communication style to the client (deal with simple issues first, take breaks, allow the client time to think, ask open-ended questions, provide memory cues and explain matters exhaustively);
 - (v) ensure any necessary interpreters, non-verbal communication tools, visual and auditory aids are available for the client to use;
 - (vi) ensure the meeting environment is quiet, well-lit, comfortable and familiar to the client (the lawyer may consider 'dressing down');
 - (vii) consider the timing of decision making (eg, a morning appointment may better suit the client) and whether gradual decision making (over a series of meetings) or delayed decision making (to a time when the client is lucid) would increase capacity; and
 - (viii) seek the assistance of third parties such as friends, family or caregivers **but only with the prior consent of the client.**
- (f) Once the client's capacity has been maximised, **conduct a preliminary assessment of the client's capacity** having regard to the relevant legal test to be applied (see Schedule 2). This will usually involve asking the client questions (tailored to their circumstances) that seek to establish whether the client:
- (i) understands the facts and issues underlying the decision, the different options available to them (including making no decision) and the consequences and implications of those options for the client and others;
 - (ii) has the ability to manipulate that information to make an informed decision and can articulate a reasoning process behind the conclusions and decisions they make;
 - (iii) expresses consistent and stable desired outcomes, conclusions and decisions; and
 - (iv) is aware of their own abilities and limitations.
- (g) In instances of doubt, it may be useful to have a second lawyer attend the preliminary assessment. In all cases, lawyers should **maintain thorough, comprehensive and contemporaneous file notes** of any consultation with the client and relevant interactions with third parties (such as medical professionals and information volunteered by third parties).

1.6 Where client has capacity (the presumption of capacity is not rebutted) (Chapter 6)

If the preliminary assessment reveals that the client does have capacity, record the reasons for this and then proceed to act on the client's instructions. Consider the possibility of putting in place arrangements to deal with any future loss of capacity by the client.

1.7 Where capacity remains in doubt (Chapter 7)

- (a) **Consider whether there is an enduring power of attorney** under which the lawyer can take instructions from the attorney appointed. Errors on the face of an enduring power of attorney or improper execution would warrant further and more detailed investigations.
- (b) If no substituted decision maker has been formally appointed, **seek the client's consent to undergo a formal assessment of capacity by a medical professional**. There can be no assessment without the client's consent; lawyers do not have the power to force a client to undergo a formal assessment. If the assessment, when considered along with all the other available evidence, indicates the client has capacity, the lawyer may proceed to act on the client's instructions.
- (c) If the client refuses to consent to a formal assessment, or the assessment does not indicate that the client has capacity, **consider whether a substituted decision maker can be appointed to the client**. It is preferable if the client, a family member, friend, social worker or health care professional makes the application to the Tribunal or court. In a very narrow set of circumstances, it may be that lawyers can make the application provided that they meet the relevant standing requirements and take the steps required by the courts to ensure that they do not breach their ethical obligations.
- (d) Only if the client has impaired capacity for the matter and a substituted decision maker cannot be appointed should the lawyer consider ceasing to act. Lawyers should always remember that capacity is time-specific so it may be likely that the client could recover capacity at some point in the future. If the lawyer does decide to cease to act, they must give the client reasonable notice and it is recommended that they provide the client with a letter setting out their reasons for ceasing to act, the direct and indirect consequences for the client and the options and support available to the client (both legal and non-legal).
- (e) In cases of doubt, solicitors can obtain guidance from the QLS Ethics Centre.

2

Introduction

2.1 What is legal capacity?

Legal capacity is, at the highest level of abstraction, the ability of a person to make decisions for themselves and deal with their legal affairs. Generally, the requirements of capacity for an adult include 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.² An adult is presumed to have capacity for a matter unless it can be shown otherwise.

2.2 Why is legal capacity important?

Clients must have capacity to give lawful, competent and proper instructions to lawyers. Lawyers have legal and ethical duties to ensure that they do not accept instructions from a client who lacks capacity. Further, whether or not a client had or has capacity to make a particular decision may impact upon the legal outcome of a case. For instance, a person who is not fit to stand trial for a criminal offence may be eligible to have their matter stayed.³ Alternatively, a contract entered into by a person with impaired capacity may be void or voidable (with significant consequences for counterparties and third parties).⁴

Importantly, capacity is domain-specific, decision-specific and time-specific and the relevant test to apply in determining whether a client has capacity depends on the particular decision the client is attempting to make. Conditions that impair a client's capacity may also vary in severity and over time:


When the statutory definition of 'disability' is considered (intellectual impairment, mental disorder, brain injury, physical disability or dementia: section 3(1) [of the *Guardianship and Administration Act 1986* (Vic)]), it can be recognised immediately that disability can be mild, moderate or severe. So too can the impact of the disability on a person's cognitive or decision-making capacity be mild, moderate or severe.... When it is also considered that the person's condition can be static, progressive, fluctuating or improving it will be obvious that, as the legislation requires, an administration order should never be made 'once and for all' but should be reassessed later on.⁵

2 See, eg, *Guardianship and Administration Act 2000* (Qld) sch 4 (Dictionary); *Powers of Attorney Act 1998* (Qld) sch 3 (Dictionary).

3 See, eg, *Mental Health Act 2000* (Qld) ss 280-83.

4 See, eg, *Bergmann v Dengiz* [2010] QDC 18 (10 February 2010) [15]-[16].

5 *XYZ (Guardianship)* [2007] VCAT 1196 (29 June 2007) [48]-[49] (Billings DP) (emphasis added).



This necessarily means that whether a client has capacity can be a complex issue. As Lord Cranworth LC famously put it in *Boyse v Rossborough*:

But between such an extreme case [of ‘a raving mad man’] and that of a man of perfectly sound and vigorous understanding, there is every shade of intellect, every degree of mental capacity. There is no possibility of mistaking midnight for noon; but at what precise moment twilight becomes darkness is hard to determine.⁶

Given this complexity, it is imperative that lawyers have a strong framework for assessing whether a client has capacity. Not only does the application of such a framework fulfil the lawyer’s duties, but it also gives the client the best chance of retaining control over decisions that affect them:

Capacity is a complex issue and requires careful consideration and balancing when making decisions about how to proceed. There is a risk that a person’s right to make their own decisions will be interfered with inappropriately or excessively. There is a countervailing danger that failure to take action to protect a client might leave them exposed to physical or financial harm or abuse. In addition, any course of action that interferes with a person’s decision-making autonomy, whether for good or ill, risks damaging the relationship between solicitor and client. It is important that solicitors assisting these clients have the tools necessary to enable them do the job and are not discouraged from assisting the most vulnerable of clients by the ethical and legal framework in which they must operate.⁷

Unfortunately, the combination of the strict legal and ethical duties imposed on lawyers and the inherently complex ‘medico-legal’⁸ nature of capacity encourages lawyers to abdicate responsibility for assessing capacity and to refuse to take instructions where any indicia of impaired capacity are present:

Lacking training in capacity assessment or other aspects of mental health, the average practitioner may argue that, as lawyers, we do not and should not perform capacity assessments. Instead, we should refer cases of questionable capacity to mental health professionals. The assertion is true as far as it goes, but it only goes so far. To decide whether a formal assessment is needed, the lawyer is already exercising judgment about the client’s capacity on an informal or preliminary level. The exercise of judgment, even if it is merely the incipient awareness that “something is not right,” is itself an assessment. It is better to have a sound conceptual foundation and consistent procedure for making this preliminary assessment than to rely solely on ad hoc conjecture or intuition.⁹

6 (1857) 10 ER 1192, 1210.

7 Andrew Taylor, ‘Representing Clients with Diminished Capacity’ (2010) 48 (February) *Law Society Journal* 56, 56.

8 Nick O’Neill and Carmelle Peisah, *Capacity and the Law* (Sydney University Press and the Australian Legal Information Institute, 2011) 1.

9 Charles Sabatino, ‘Representing a Client with Diminished Capacity: How Do You Know It And What Do You Do About It?’ (2000) 16 *Journal of the American Academy of Matrimonial Lawyers* 481, 483.

3

Ethical Duties and Guiding Principles

3.1 Ethical duties relevant to capacity

- (a) Duty to follow lawful, competent and proper instructions

Rule 8.1 of the *Australian Solicitors Conduct Rules* states that, '[a] solicitor must follow a client's lawful, proper and competent instructions.'¹⁰ The *2011 Barristers' Rules*, in comparison, while containing a similar ethical duty to that in the *Australian Solicitors Conduct Rules*, is phrased slightly differently:

A barrister must seek to assist the client to understand the issues in the case and the client's possible rights and obligations, sufficiently to permit the client to give proper instructions, including instructions in connection with any compromise of the case.¹¹

Clearly there is a connection between a client being able to 'understand the issues' and their capacity, just as the ability to 'give proper instructions' is analogous to the ability to give 'competent' instructions (as required by the *Australian Solicitors Conduct Rules*). Thus for all lawyers, the ability to assess and determine whether a client has capacity – and knowing what steps to take should that capacity be in doubt – are vital parts of legal practice.

- (b) Paramount duty to the court and administration of justice

Rule 3 of the *Australian Solicitors Conduct Rules* provides that '[a] solicitor's duty to the court and the administration of justice is paramount and prevails to the extent of inconsistency with any other duty.'¹² Similarly, rule 25 of the *2011 Barristers' Rules* provides that '[a] barrister has an overriding duty to the Court to act with independence in the interests of the administration of justice.'¹³ The relevance of capacity to a lawyer's duty to the court was stated explicitly by Bell J in *Goddard Elliott (a firm) v Fritsch* in relation to litigation:¹⁴

10 Queensland Law Society, *Australian Solicitors Conduct Rules* (at 1 June 2012) r 8.1; *Legal Profession (Australian Solicitors Conduct Rules) Notice 2012* (Qld).

11 Bar Association of Queensland, *Barristers' Conduct Rules* (at 23 December 2011) r 39; *Legal Profession (Barristers Rules) Notice 2011* (Qld).

12 Queensland Law Society Law Society, *Australian Solicitors Conduct Rules* (at 1 June 2012) r 3.1; *Legal Profession (Australian Solicitors Conduct Rules) Notice 2012* (Qld).

13 Bar Association of Queensland, *Barristers' Conduct Rules* (at 23 December 2011) r 25; *Legal Profession (Barristers Rules) Notice 2011* (Qld).

14 [2012] VSC 87 (16 March 2012) [548]-[549], quoting *Borchert v Terry* [2009] WASC 322 (6 November 2009) [69] (Kenneth Martin J).

The commencement of proceedings on behalf of a client implies the solicitor, as an officer of the court, is reasonably satisfied the client has that capacity. It is the same when a barrister represents a client at court. In most cases, there will be nothing suggesting the matter should be considered and the lawyer can presume their client has mental capacity. In others, however, the lawyer will be on notice that the issue requires active consideration.... The mental capacity of a client to instruct is a reflection of that mental capacity which the client must have to participate in the legal proceeding. As a lawyer is an officer of the court, it is their 'primary responsibility' to be reasonably satisfied that the client has the mental capacity to participate in the proceeding and to instruct.

This statement was quoted with approval by Dixon J in *Pistorino v Connell*, where his Honour noted that as officers of the court, 'legal practitioners have a clear and unambiguous duty to raise with the court the issue of [their client's] capacity to conduct ... litigation' so as to discharge 'their fundamental obligation, their duty to the court.'¹⁵ His Honour's reasons also implied that the duty to the court may require a lawyer to have regard to the interests of other affected parties.

(c) Duty to act in client's best interests (including to respect client autonomy)

One of the fundamental ethical duties of lawyers is their duty to each of their clients. Rule 4.1.1 of the *Australian Solicitors Conduct Rules* provides that '[a] solicitor must ... act in the best interests of a client'.¹⁶ Similarly, the *2011 Barristers' Rules* provide that '[a] barrister must promote and protect fearlessly and by all proper and lawful means the client's best interests.'¹⁷

In so far as it does not conflict with a lawyer's paramount duty to the court – which includes strict adherence to time limits and rules relating to diligent maintenance and prosecution of a case – the lawyer is obliged as an inherent part of their duty to the client to allow that client to make their own decisions. This will necessarily be done on the basis of the lawyer's advice, but it is important that the lawyer's decision is not substituted for that of the client in the interests of 'efficiency'.

Senior Member Clare Endicott, who has oversight of the Human Rights Division of the Tribunal, has made it clear that although it may be tempting, it is inappropriate for a lawyer to assume responsibility for a variety of smaller decisions which the client may take slightly longer to complete:

Capacity should be assessed for the level of complexity of the matters about which a decision has to be made always with the principle in mind that a *person who is capable of making simple decisions for themselves should not be denied the right to make those decisions*.¹⁸

Therefore, while it may at times seem more efficient for the lawyer to 'speed up' the decision making process by prompting a particular decision on the part of the client, this is in reality a highly inappropriate response.

15 [2012] VSC 438 (25 September 2012) [4], [6].

16 Queensland Law Society, *Australian Solicitors Conduct Rules* (at 1 June 2012) r 4.1.1; *Legal Profession (Australian Solicitors Conduct Rules) Notice 2012* (Qld).

17 Bar Association of Queensland, *Barristers' Conduct Rules* (at 23 December 2011) r 37; *Legal Profession (Barristers Rules) Notice 2011* (Qld).

18 Clare Endicott, 'Client Capacity and Professional Standards' (Paper presented at Queensland Law Society Elder Law Conference, 17 July 2009) 3 <<http://ethics.qls.com.au/sites/all/files/Client%20Capacity%20&%20Professional%20Standards%20-%20Clare%20Endicott%20QLS%20Elder%20Law%20Conference%202009.pdf>>. Ms Endicott was also the former Deputy President of the Guardianship and Administration Tribunal.

(d) Special duties in respect of clients with disabilities or impairments

Clients with disabilities or impairments may require a greater degree of assistance with some aspects of their matter than persons without disabilities or impairments. It is important that lawyers keep uppermost in their minds the ethical duty to provide equality of treatment to all clients. In addition to the general ethical duty to ‘be honest and courteous in all dealings’ with such a client,¹⁹ solicitors also have a specific ethical duty not to engage in conduct which constitutes discrimination, which may require the solicitor to take positive steps to reasonably accommodate the client’s disability and maximise the client’s capacity.²⁰ This is particularly the case in light of the obligations imposed on Australia by the *Convention on the Rights of Persons with Disabilities*.²¹ As Jonathan Wells QC has written:²²

People with disabilities – especially the mentally ill or disabled – are often patronised, ignored, unheard and dishonoured. Our commitment as lawyers is to honour unconditionally their ‘inalienable preciousness’ as human beings; to pay attention to them, helping to overcome their invisibility in the community; to listen to them, and to hear them.

(e) Duty of confidence

Rule 9.1 of the *Australian Solicitors Conduct Rules* mandates that a lawyer ‘must not disclose any information which is confidential to a client and acquired by the solicitor during the client’s engagement’²³ except to other lawyers engaged in the case and employees of the legal practice. This is a strict duty that is owed to the client. Only the client can consent to the disclosure of confidential information. It means that it is necessary for a lawyer to obtain the client’s consent before discussing any matter related to that client’s capacity with a medical professional.²⁴

This duty does not prevent lawyers from making generic health-related enquiries of family, friends or carers (for example, enquiring about the best time of day to seek instructions from a client if he or she is elderly or questioning whether the client has recently changed medication) provided the lawyer does not divulge confidential information not already known by the third party (specifically, a discussion of the lawyer’s concerns regarding the client’s capacity). More importantly, the information obtained by such enquiries is pertinent to the lawyer-client

19 Queensland Law Society, *Australian Solicitors Conduct Rules* (at 1 June 2012) r 4.1.2; *Legal Profession (Australian Solicitors Conduct Rules) Notice 2012* (Qld).

20 Queensland Law Society, *Australian Solicitors Conduct Rules* (at 1 June 2012) r 42.1.1. Steps lawyers can take to maximise a client’s capacity are discussed in further detail at Chapter 5.3 below.

21 *Convention on the Rights of Persons with Disabilities*, opened for signature 30 March 2007, 999 UNTS 3 (entered into force 3 May 2008) arts 3(a), 12(2). Article 3(a) provides that a general principle of the Convention is ‘[r]espect for inherent dignity, individual autonomy including the freedom to make one’s own choices, and independence of persons’, while article 12(2) obliges Australia to ‘recognize that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life.’

22 Jonathan Wells, ‘Lawyers’ doubts about client capacity: an ethical framework’ (2014) 36(5) *Law Society Bulletin (South Australia)* 38, 39.

23 Queensland Law Society, *Australian Solicitors Conduct Rules* (at 1 June 2012) r 9.1; *Legal Profession (Australian Solicitors Conduct Rules) Notice 2012* (Qld).

24 Cf Queensland Law Society, *Australian Solicitors Conduct Rules* (at 1 June 2012) r 9.2.3, which provides an exception allowing disclosure by a solicitor in a confidential setting for the sole purpose of obtaining advice in connection with the solicitor’s legal or ethical obligations. In some circumstances, it may be arguable that this exception would apply in relation to any enquiries relating to a client’s capacity made of a doctor in his or her professional capacity, given that doctor also owes general duties of confidence.

relationship. However, lawyers should always be cognisant of the fact that the third party's interests and wishes may not be exactly the same as those of the client, to whom the duty is always owed.

3.2 Consequences of failure to comply with the ethical duties

Failure to comply with these ethical duties may produce various consequences, in particular where a lawyer continues to act on the instructions of a client who lacks capacity when that lawyer knows (or should have known) of that lack of capacity. Failure to comply with the *Australian Solicitors Conduct Rules* or the *2011 Barristers' Rules* may amount to professional misconduct or unsatisfactory professional conduct,²⁵ rendering the lawyer liable to professional discipline.²⁶ In addition, the lawyer may have costs awarded against them on an indemnity basis²⁷ and the further conduct of that matter by the lawyer is likely to be stayed.²⁸ Aside from the possibility of legal sanctions, there are also practical consequences which flow from the lawyer failing to comply with their ethical duties and deal with issues of capacity as soon as they arise. These include:

- (a) increased costs to the client and any relevant counterparties;
- (b) increased emotional strain on the client and their family and friends; and
- (c) unnecessary matters that are not in the interests of justice going before the Tribunal or the courts leading to an increase in the cost of administering justice.

3.3 The role of the lawyer

Unlike in the United States of America,²⁹ the professional conduct rules for lawyers in Queensland do not contain specific provisions mandating how a lawyer should act when they have concerns, or have confirmed that their client lacks capacity. This leaves the general ethical duties outlined above to guide the lawyer in such situations. These duties require the lawyer to ensure their client has capacity before taking instructions. As always, the lawyer should approach the particular situation with the overarching principles which underlie the various ethical duties in mind, rather than adopt a pedantic, legalistic analysis of whether the situation falls within or beyond the reach of a specifically enumerated professional conduct rule.

Ultimately, a lawyer will comply with their legal and ethical obligations provided that they:

- (a) direct their mind to the issue of whether their client has capacity to instruct according to the relevant legal test;
- (b) make a thorough and honest assessment of whether the client has capacity to instruct;
- (c) produce a detailed record of the assessment process, the lawyer's reasoning and their ultimate conclusions.


25 *Legal Profession Act 2007* (Qld) s 227(2).

26 *Ibid* ss 456, 458.

27 *Yonge v Toynbee* [1910] 1 KB 215, 228 (Buckley LJ); *Goddard Elliott (a firm) v Fritsch* [2012] VSC 87 (16 March 2012) [550] (Bell J).

28 *J (by her next friend) v J* [1953] P 186, 191 (Collingwood J); *Richmond v Branson* [1914] 1 Ch 968, 974 (Warrington J); *Goddard Elliott (a firm) v Fritsch* [2012] VSC 87 (16 March 2012) [550] (Bell J).

29 See, eg, American Bar Association, *Model Rules of Professional Conduct* (at 2013) r 1.14.



More detailed information about these issues is provided in Chapters 5 to 7 below.

It cannot be emphasised enough that in conducting this assessment, **the lawyer is not making a determination of whether the client has capacity to make that decision that will be final and binding on the client or any relevant third parties.** It is not the lawyer's role to make such a determination; only a court can do that. However, the distinction between the lawyer's role and that of the court is not appreciated by all lawyers. As Bell J held in *Goddard Elliott (a firm) v Fritsch*:³⁰

The final decision on the mental capacity of the person engaged in the transaction or the litigation rests not with the lawyers, not with the doctors, not with the client or party but with the court. *Only the court can finally determine whether the person has sufficient understanding of the particular matters which are at issue so as to have the capacity to engage in the transaction or participate in the proceeding.* The standard of capacity which is required is context and issue specific and only the court can be the judge of that context and those issue. If that principle has been understood by those acting for Paul in the proceeding in the Family Court, this judgment would not have had to be written.

Whether or not a court reaches a contrary conclusion about the client's capacity in subsequent proceedings is irrelevant. It is **the process, not the ultimate conclusion**, that is important. As Wells writes: '[t]here are few right answers; there is only earnest endeavour and conscientious engagement.'³¹

30 [2012] VSC 87 (16 March 2012) [562] (emphasis added).

31 Wells, above n 22, 40.

4

Basic Principles of Legal Capacity

4.1 Presumption of capacity

All adult persons are presumed to have capacity to make all decisions unless there is evidence to the contrary that can rebut the presumption. The presumption of capacity has long been recognised at common law.³² It has also been given statutory force by various Acts legislated by the Queensland Parliament. For instance, the presumption has been given statutory force in the context of criminal laws,³³ evidence laws,³⁴ intellectual disability and mental health laws,³⁵ guardianship and administration laws,³⁶ and laws regarding powers of attorney.³⁷ It has also been given statutory force by the Commonwealth Parliament.³⁸

4.2 Capacity is time-specific

Capacity fluctuates over time.³⁹ A person may lack capacity for a particular decision temporarily, for a short period of time or for a long period of time. If a person lacks capacity in relation to a particular decision, they may regain and even increase their capacity in relation

32 See, eg, *Borthwick v Carruthers* (1787) 1 TR 648; *R v McNaughten* (1843) 10 Cl & Fin 200, 210 (Tindal CJ); *Re Cumming* (1852) 42 ER 660, 668 (Knight Bruce LJ); *Boughton v Knight* (1873) LR 3 P & D 64, 71 (Hannen J); *Cosham v Cosham* (1899) 25 VLR 418, 428-9 (Madden CJ, Holroyd and Hood JJ); *Re Hodges; Shorter v Hodges* (1988) 14 NSWLR 698, 706; *Re Bridges* [2001] 1 Qd R 574, 575-6 (Ambrose J); *Dalle-Molle v Manos* (2005) 88 SASR 193, 197 (DeBelle J); *Lawrence v Federal Magistrate Driver* [2005] FCA 394 (15 April 2005) [12] (Moore J); *L v Human Rights and Equal Opportunity Commission* [2006] FCAFC 114 (12 July 2006) [26]; *SA v Manonai* [2008] WASCA 168 (15 February 2008) [2], [23] (Pullen JA); *Tobin v Ezekiel* [2011] NSWSC 81 (1 March 2011) [24] (overturned on appeal, but not on the point regarding testamentary capacity); *Frizzo v Frizzo* [2011] QSC 107 (12 May 2011) [23]-[24], affd [2011] QCA 308 (1 November 2011) [24]; *Goddard Elliott (a firm) v Fritsch* [2012] VSC 87 (16 March 2012) [546]; *Pistorino v Connell* [2012] VSC 438 (25 September 2012) [14]; *Anderson v Anderson* [2013] QSC 8 (22 February 2013) [45], [52].

33 *Criminal Code 1899* (Qld) s 26.

34 *Evidence Act 1977* (Qld) ss 9-9D.

35 *Mental Health Act 2000* (Qld) s 8(1)(b)(third bullet point); *Forensic Disability Act 2011* (Qld) s 7(1)(e)(third bullet point).

36 *Guardianship and Administration Act 2000* (Qld), ss 7(a), 11, 34(1), sch 1 general principle 1.

37 *Powers of Attorney Act 1998* (Qld) s 76, sch 1 general principle 1.

38 See, eg, *National Disability Insurance Scheme Act 2013* (Cth) ss 17A, 4-5.

39 See, eg, *Jones v Jones* [2012] QSC 113 (27 April 2012) [31]; *Re Griffith; Easter v Griffith* (1995) 217 ALR 284, 295 (Kirby P). Kirby P was in dissent in the result, but not on this point.

to that decision (as a result of, for example, abatement of passing illness, taking new medication, being assisted by new technology or acquiring new skills). This means that capacity must be assessed every time a person is going to make a decision.

4.3 Capacity is domain-specific

There is no single test for capacity; the test depends on the subject matter of the decision to be made.⁴⁰ A 'domain' refers to the general category of subject matter that the decision falls into. The courts impose more stringent capacity requirements for some domains than others. For example, it has been held that because the making of a testamentary disposition is 'substantially more complex and require[s] a greater sophistication of thought' than giving informed consent to medical treatment; a 'clear distinction' can be drawn between the capacity necessary to do each.⁴¹ Similarly, the capacity required to make a testamentary disposition has long been recognised as requiring a degree of mental soundness higher than that required to consent to marriage, enter into a contract or be held criminally liable.⁴² The entire structure of the *Guardianship and Administration Act 2000* (Qld), *Powers of Attorney Act 1998* (Qld) and *Public Guardian Act 2014* (Qld) recognises that a person may only have impaired capacity for one 'matter', but at the same time may retain capacity in relation to every other 'matter'.⁴³

4.4 Capacity is decision-specific

Even within a domain, the standard of mental competence required to have capacity to make a particular decision depends on the nature and complexity of the decision in question. The more complex the decision, the higher the standard of mental competence required to make it. Parliament has acknowledged that 'the capacity of an adult with impaired capacity to make decisions may differ according to ... the type of decision to be made, including, for example, the complexity of the decision to be made'.⁴⁴

This means that, at any given time, a client may not have capacity to make some decisions within a domain, but may still have capacity to make others within the same domain. For instance, a client may not have capacity to sell their house, but may have capacity to manage their pension payments. In such a case, the client would have capacity to make simple decisions within the domain of managing their financial affairs, but would not have capacity to make more complex decisions within that same domain.

4.5 Capacity to decide must be distinguished from the decision itself

While there is an obvious relationship between a person's capacity and the decisions that person makes, whether a person has capacity should not be determined purely by examining the content of their decisions. Just because a person makes decisions that seem 'bad', 'unwise', 'reckless' or 'wrong' does

40 *Gibbons v Wright* (1954) 91 CLR 423, 437-8; *Dalle-Molle v Manos* (2005) 88 SASR 193, 198 (Debelle J).

41 *Jones v Jones* [2012] QSC 113 (27 April 2012) [30].

42 See, eg, *Boughton v Knight* (1873) LR 3 P & D 64, 71 (Hannen J).

43 See, eg, *Guardianship and Administration Act 2000* (Qld) s 12, sch 2 (list of matters); *Powers of Attorney Act 1998* (Qld) s 32, sch 2 (list of matters).

44 *Guardianship and Administration Act 2000* (Qld) s 5(c)(ii).

not mean the person lacks capacity to make those decisions. Capacity does not require a person to always make decisions that are 'objectively' correct or in their own 'best interests' or in the 'best interests' of certain others.⁴⁵ Young J has emphasised that:⁴⁶

One cannot be too paternalistic. People have the right to manage their affairs, unless they fall below the level that is prescribed by the Act... There is no room in the legislation for benign paternalism. A person is allowed to make whatever decision she likes about her property, good or bad, with happy or disastrous effect, so long as she is capable.

In relation to testamentary dispositions, Gleeson CJ (with whom Handley JA agreed) noted that:⁴⁷

Testamentary capacity is not reserved for people who are wise, or fair, or reasonable, or whose values conform to generally accepted community standards. A person may disinherit a child for reasons that would shock the conscience of most ordinary members of the community, but that does not make the will invalid.

Ignoring the content of decisions when determining capacity also follows from the fact that every person has their own individual values, beliefs, interests and relationships that provide a unique matrix within which they make decisions. All people at times take risks when making decisions or make decisions which, with the benefit of hindsight, are 'bad'. To this end, Parliament has acknowledged that 'the right to make decisions includes the right to make decisions with which others may not agree'.⁴⁸

4.6 No assumption of incapacity due to appearance, age, behaviour or disability

Capacity should not be assessed solely on the basis of a person's appearance, their age, the manner in which they behave and communicate or any (physical or intellectual) disability or impairment they may have. While Parliament has acknowledged that the nature and extent of an impairment is relevant to capacity,⁴⁹ the mere fact that a disability or impairment exists does not warrant an automatic conclusion that the person lacks capacity to make particular decisions. Neither extreme age nor illness are, of themselves, conclusive evidence of a lack of capacity.⁵⁰

Importantly, Kirby P has emphasised that:

In judging the question of testamentary capacity the courts do not overlook the fact that many wills are made by people of advanced years. In such people, slowness, illness, feebleness and eccentricity will sometimes be apparent – more so than in most persons of younger age. But these are not ordinarily sufficient, if proved, to disentitle the testator of the right to dispose of his or her property by will.⁵¹

45 See, eg, *L v Human Rights and Equal Opportunity Commission* [2006] FCAFC 114 (12 July 2006) [34]: 'we would observe that the fact that a litigant has put forward a case that reveals no reasonable cause of action may say nothing at all about the litigant's capacity to present such a case. The presumption that an adult person is capable of managing their own affairs is hardly likely to be displaced merely because a case has been commenced that has no prospect of success.'

46 *Re C (TH) and the Protected Estates Act* [1999] NSWSC 456 (3 May 1999) [10], [17].

47 *Re Griffith; Easter v Griffith* (1995) 217 ALR 284, 291 (Gleeson CJ), 302 (Handley JA).

48 *Guardianship and Administration Act 2000* (Qld) s 5(b).

49 *Ibid* s 5(c)(i).

50 *Pates v Craig* [1995] NSWSC 87 (19 October 1995) 6 (Santow J); *Ruskey-Fleming v Cook* [2013] QSC 142 (3 June 2013) [58].

51 *Re Griffith; Easter v Griffith* (1995) 217 ALR 284, 295; *Frizzo v Frizzo* [2011] QSC 107 (12 May 2011) [22]; *affd* [2011] QCA 308 (1 November 2011) [24].

4.7 Capacity may be increased with appropriate support

The support available to a person and the environment they are in are factors that may influence their capacity from time to time.⁵² Furthermore, given that capacity is time-specific and decision-specific, a person may have capacity to make a particular decision at a particular time so long as they are provided with sufficient support and an environment that assists them to make that decision. For this reason, Parliament acknowledges that ‘an adult with impaired capacity has a right to adequate and appropriate support for decision making.’⁵³ The various steps that lawyers can take to maximise their clients’ capacity are discussed in Chapter 5.3 below.

4.8 Substituted decision making is a last resort

A substituted decision maker is a person who makes decisions on behalf of an adult with impaired capacity. Substituted decision makers include:

- (a) an informal decision maker (eg, family members or friends);
- (b) a statutory health attorney, automatically appointed under the *Powers of Attorney Act 1988* (Qld) for health care matters only;
- (c) an attorney appointed by the person (when they had capacity to do so) under an Enduring Power of Attorney or Advance Health Directive;
- (d) a guardian or administrator formally appointed by a court or tribunal, including by the Tribunal (this can be the Public Guardian, as a guardian of last resort, or the Public Trustee as an administrator);
- (e) a person consenting to act as and/or (depending on the jurisdiction) appointed by order of a court to act as litigation guardian.

Persons should be free to make their own decisions. Parliament has acknowledged that ‘the right of an adult with impaired capacity to make decisions should be restricted, and interfered with, to the least possible extent’.⁵⁴ This naturally flows from the fact that the right to make decisions is fundamental to a person’s inherent dignity.⁵⁵ In most cases, before a substituted decision maker can be appointed or exercise powers under the relevant Act, the adult must first have ‘impaired capacity’. Even if a substituted decision maker is appointed, that decision maker should continue to take into account the wishes of the person to whom they are appointed to the maximum extent possible.⁵⁶ Failure to take into account a person’s wishes and include their support network in decision making can lead to removal of the substituted decision maker by the Tribunal.

52 *Guardianship and Administration Act 2000* (Qld) s 5(c)(iii).

53 *Ibid* s 5(e).

54 *Ibid* s 5(d).

55 *Ibid* s 5(a).

56 *Ibid* s 34(1), sch 1 general principle 7.

Case Study: Basic principles in practice

Will is a homeless man in his mid-50s who lives in his car. He presents to an outreach service run by a community legal centre in a dishevelled state. He instructs the lawyer that he has bi-polar affective disorder (and on this basis has previously been the subject of involuntary treatment orders), is suffering from advanced terminal kidney disease and would like advice on whether he is eligible to withdraw his entire superannuation balance to purchase a new car in which to live.

After asking Will further questions to establish that he understands the nature of a superannuation account, the options available to him and the consequences of his choice, the lawyer concludes that Will has capacity to provide her with instructions in relation to his superannuation affairs. In reaching that conclusion, the lawyer notes that:

- Will is presumed to have capacity to manage his financial affairs. The fact that Will has mental and physical illnesses does not displace the presumption, although the existence of bi-polar affective disorder made the lawyer cognisant of the issue of capacity and alert to any other 'red flag' indicia of impaired capacity.
- The facts that Will is homeless and presents in a dishevelled state are irrelevant to his capacity.
- Will's previous ITOs relate to his capacity (in the past) to consent to treatment for mental illness; they provide little to no guidance on his capacity to manage his financial affairs at the present.
- While withdrawing his entire superannuation balance and spending it on a rapidly depreciating asset (car) may not be an 'objectively' rational decision, this is irrelevant to Will's capacity.
- Will appears to understand the purpose and nature of a superannuation account (ie, it cannot be accessed unless certain criteria are satisfied), and gives the lawyer logical and coherent instructions.

5

Practical Matters to Consider in Taking Instructions

5.1 Who is my client and what is the decision to be made?

The first thing a lawyer must do is identify their client.⁵⁷ A lawyer may determine that the person with questionable capacity is the client; or they may determine that a family member, friend, carer or other person who supports the person is the client.

In cases of the former, while others may accompany a client to provide support and assistance to the client and background information to the lawyer, the lawyer must only take instructions from the client and not from the support persons. This is unless, of course, the support person is also a legally appointed substituted decision maker whose appointment extends to legal matters, either generally or in relation to the particular decision to be made.

Case Study: Identifying the client

George is appointed as his mother Cathy's guardian, for all personal matters. The Tribunal will soon review this appointment. George seeks legal advice in relation to preparing for the Tribunal review. Both he and Cathy wish for the current arrangements to continue. After making multiple unsuccessful attempts to contact Cathy directly, it becomes apparent to the lawyer managing his case that she will be unable to obtain any instructions from Cathy directly.

The lawyer concludes that George is her client. George is the only person with whom the lawyer has had contact for this matter. Further, he is not instructing the lawyer to appear on Cathy's behalf (this would mean that Cathy would be the client).

The advice to George should emphasise the duties that he owes his mother, in particular his duties to give her all necessary support, access to information and opportunities to participate in decisions that affect her.

⁵⁷ Sabatino, above n 9, 487.

Focus: Substituted decision makers

- Even if a person (the *principal*) has appointed a substituted decision maker or has had a substituted decision maker appointed to them, the principal remains the lawyer's client. In some cases, however, the substituted decision maker may be the lawyer's client (particularly where the lawyer is engaged directly by the substituted decision maker and the lawyer was not previously acting for the principal).
- Where a matter is within the scope of a substituted decision maker's appointment, only the substituted decision maker can provide a lawyer with lawful, proper and competent instructions for that matter. But the substituted decision maker can only provide the lawyer with instructions in relation to a particular decision to be made on behalf of a principal if their appointment extends to legal matters (either generally or in relation to that particular decision). If the substituted decision maker's appointment does not extend to legal matters, they cannot instruct the lawyer.
- In all cases, including where the substituted decision maker is the lawyer's client, the substituted decision maker must give the principal all necessary support, access to information and opportunities to participate in decisions that affect the principal. They must also take into account the principal's views and wishes to the greatest extent possible and exercise their powers in the way least restrictive of the principal's rights.
- See Chapter 7.2 for more information about substituted decision makers.

Before a lawyer can act on a client's instructions, the lawyer must be satisfied that the client has the requisite capacity to make the *particular* decision at that *particular* time. Given the domain-specific and decision-specific nature of capacity, this requires the lawyer to identify the particular decision the client is seeking to make and the relevant legal test for capacity that applies to that decision. The specific legal tests for different types of decisions are outlined in Schedule 2.

Case Study: Challenging a guardianship or administration decision

Henry is an elderly man who seeks to remove the Public Guardian as his guardian and the Public Trustee as his administrator. His recent application for a declaration of capacity was dismissed by the Tribunal and he seeks advice on his prospects of an appeal. Henry has obtained a medical report from his general practitioner stating that he has capacity in relation to the matters for which the guardian and administrator are appointed.

For the purposes of the appeal proceedings, Henry is presumed to have capacity and has a right to be represented. The lawyer is able to obtain logical and coherent instructions from Henry in relation to seeking reasons for the decision and drafting submissions for the appeal. The lawyer concludes that Henry has capacity to instruct and is thus able to act on his instructions. The fact that he may previously have lacked capacity to make decisions in relation to certain personal and financial matters is not relevant to Henry's decision to appeal.

However, the contract to retain the lawyer's services will need to be signed by the Public Trustee as his administrator, unless the lawyer is acting on a pro bono basis.

Similarly, if Henry had sought the assistance of a lawyer in relation to a property settlement, the lawyer would be required to take instructions from the Public Trustee as Henry's administrator, unless and until that appointment has been revoked.

See Item 9.2 of Schedule 2 for further discussion.

5.2 Is there a reason to question my client's capacity?

In many cases, there will be no reason to doubt a client's capacity to give legal instructions. However, lawyers should always be cognisant of the fact that some clients with impaired capacity may present extremely well despite their impairment or actively seek to hide their impairment. Schedule 1 lists various 'red flag' circumstances that **could (but do not necessarily)** indicate that a client lacks capacity.

As a preliminary screening tool, lawyers may wish to question clients about whether they:⁵⁸

- (a) have been diagnosed with a mental illness, intellectual disability, acquired brain injury, learning disability or other cognitive impairment;
- (b) experienced difficulties with learning or went to a special school or received additional learning support;
- (c) receive the disability support pension;
- (d) receive support for day-to-day activities either from family, friends or through paid support workers;

58 Susan Hayes, *Hayes Ability Screening Index Record Booklet* (University of Sydney, 2000); Legal Aid Queensland, Legal Aid Queensland, *Criminal Law Duty Lawyer Handbook* (5th ed, 2012) 206-7 <<http://www.legalaid.qld.gov.au/publications/Practitioners-service-providers/Documents/duty-lawyer-handbook/criminal-law-duty-lawyer-handbook.pdf>>.

- (e) have lived in institutions or disability-funded accommodation or have been admitted to a mental health unit; or
- (f) have ever been the subject of a guardianship or administration order, an involuntary treatment order or a forensic order.

If the client is the subject of a current guardianship or administration order that extends to ‘legal matters’, the lawyer must seek to obtain and act on the guardian’s or administrator’s instructions. Refer to Chapter 7.2 for further details.

However, if the lawyer has no reason to question the client’s capacity, then they should proceed to take and act on their client’s instructions. In the absence of any indicia of impaired capacity, the lawyer is entitled to rely on the presumption that the client has capacity.

5.3 What can I do to maximise my client’s capacity?

‘Capacity deserves to be judged under the best circumstances possible.’⁵⁹ Further, lawyers have ethical and legal duties to act in the best interests of their clients and not to discriminate against their clients. This means that lawyers should take all reasonably available, positive steps to maximise their client’s capacity.⁶⁰ There are various techniques lawyers might use to enhance and maximise a client’s capacity. What works best will in every case depend on the particular client; every client is, of course, unique.

- (a) Meet with the client in person and alone

In many cases, it will be practically impossible for the lawyer to determine whether a client has capacity without meeting the client **in person**; in particular, in relation to wills and powers of attorney, telephone conferences and receiving instructions through support persons will not suffice.⁶¹ It is imperative that the initial interview include **one-on-one** time between the lawyer and the client. This not only allows the lawyer to develop rapport with the client and ensure that the client understands the lawyer’s role and the nature of the lawyer-client relationship, but also affords the lawyer an opportunity to assess the client’s capacity and whether the client is subject to undue influence from any support person.⁶²

59 Sabatino, above n 9, 487.

60 Client Capacity Committee of the Law Society of South Australia, *Statement of Principles with Guidelines* (2012) 16-7 <<http://www.lawsociety.sa.asn.au/PDF/ClientCapacityGuidelines.pdf>>.

61 Endicott, above n 18, 1. One exception could be where the client is already well-known to the lawyer. See also Office of the Public Guardian, *Guidelines for Witnessing Enduring Documents* (2014) Department of Justice and Attorney General, 3 <http://www.publicguardian.qld.gov.au/__data/assets/pdf_file/0009/269307/OPG-Fact-Sheet_Guidelines-for-Witnessing-Enduring-Documents.pdf>.

62 Sabatino, above n 9, 487; Public Guardian, above n 61, 3; Lindy Willmott and Benjamin White, ‘Solicitors and enduring documents: current practice and best practice’ (2008) 16(3) *Journal of Law and Medicine* 466, 486; Client Capacity Sub-Committee, *Client Capacity Guidelines: Civil and Family Law Matters* (2009) Law Society of New South Wales, item 11 <<http://www.lawsociety.com.au/ForSolicitors/professionalstandards/Ethics/Protocolsguidelines/Clientcapacityguidelines/index.htm>>.

(b) Focus on the client as an individual

At the outset, the lawyer should discard all personal biases and prejudices that may have a subconscious effect on their assessment of whether a client has capacity.⁶³ Ethnic, cultural or religious barriers to communication should be recognised and conscientiously put to one side when assessing capacity.⁶⁴ If the client has some form of disability or impairment, the lawyer should ask the client if the client (or a third party) can tell the lawyer how the lawyer can best accommodate the disability or impairment and make the client as comfortable as possible.

It should not be assumed that:

- (i) elderly clients have physical or intellectual impairments or that persons with physical or intellectual impairments lack capacity;⁶⁵
- (ii) clients with mental illness or subject to an involuntary treatment order lack capacity as ‘incapacity is not “status” or diagnosis bound’;⁶⁶
- (iii) symptoms of emotional distress, physical fatigue, anxiety, depression and inebriation constitute a lack of capacity (in any case, the difficulties presented by such situations may simply be dealt with by delaying the decision);⁶⁷ or
- (iv) eccentricities, aberrant character traits or taking high risk decisions connotes impaired capacity.⁶⁸

Having said that, where a lawyer is aware (or reasonably considers) that a client is elderly or has a diagnosed medical condition relevant to their capacity, the lawyer should ‘take extra care’ to assess and ensure that the client has capacity before the lawyer proceeds to act on their instructions.⁶⁹

Getting to know the client in more depth will help to reveal the client’s true motives for seeking legal assistance. Without considering issues from the client’s subjective personal *frame of reference*, there may be a greater tendency for lawyers to see the client as lacking capacity.

Lawyers should be open to the fact that their perspective on the client’s capacity may change once they get to know the client. Where appropriate, lawyers may enquire about and seek to understand the client’s values, historical behaviour and cultural factors that influence the client’s decision making.⁷⁰

(c) Establish trust and confidence through the lawyer-client relationship

Establishing a relationship of trust and confidence with a client is vital to enhancing that client’s capacity. The lawyer should ensure that the client knows that the lawyer is working for the sole and constant purpose of

63 Law Society of New South Wales, *When a client’s capacity is in doubt: A Practical Guide for Solicitors* (2009) 18 <<http://www.lawsociety.com.au/cs/groups/public/documents/internetcontent/023880.pdf>>.

64 Ibid.

65 James Gallagher and Cara Kearney, ‘Representing a Client with Diminished Capacity: Where the Law Stands and Where It Needs to Go’ (2003) 16 *Georgetown Journal of Legal Ethics* 597, 604.


66 O’Neill and Peisah, above n 8, 4. See also *Re HE* [2013] QCAT 488 (20 August 2013) [27].

67 Law Society of South Australia, above n 60, 14.

68 Sabatino, above n 9, 486; Wells, above n 22, 38.

69 Public Guardian, above n 61, 3. See further Chapter 5.4 below.

70 Sabatino, above n 9, 489.



helping the client achieve a positive outcome and, to this end, owes the client duties of loyalty and confidentiality. Explaining in detail the nature and extent of these duties will, in some cases, be imperative to gaining the client's trust and confidence.

Some clients may fear that their lawyer is acting for some ulterior purpose (or generally that the lawyer is part of 'the system' working against them). Any such fears should be immediately dispelled by frank explanation of the lawyer's duties to the client. In particular, the lawyer should ensure that the client understands the relationship is confidential and that the client may divulge information freely without fear of it being shared with others without prior consent.⁷¹ The lawyer should emphasise that, except in extremely rare circumstances, the lawyer cannot reveal anything the client tells them to any third party (including mental health and disability services).

(d) Adapt your communication style to the client

Clear, simple and direct communication with a client will help them to understand information, thereby bolstering their capacity. Begin all interviews with simple questions and answers; move on to more complex questions later. Engage in sensitive exploration of the client's story and actively listen to the client, acknowledging and responding directly to the client's thoughts, feelings, words and actions. This will help the client to feel respected, valued, and immersed in the decision making process; it also enhances the client's trust and confidence in the lawyer.⁷²

Proceed slowly, take breaks (if necessary) and allow the client extra time to formulate responses. Be willing to explain the nature and effects of options exhaustively (repeating, paraphrasing and summarising information where necessary) and allow the client plenty of time to digest all the relevant information. Just because a client has difficulty processing and comprehending information does not mean that they are unable to do so.

Asking the client **open-ended questions** (including asking them to explain in their own words what they know and what they have learnt) is also a useful method of testing the client's capacity to understand, retain, recall and communicate relevant information.⁷³ Provide cues to assist the client's recall and if the client cannot answer such questions correctly or accurately, gently explain the correct answers.⁷⁴ Later on during the meeting, ask the same questions and see whether the client can accurately remember and communicate the previous explanation.⁷⁵

As Wells notes, '[i]n all but a handful of rare cases, careful exploration and communication will often allay any doubts about capacity to instruct.'⁷⁶

71 Law Society of New South Wales, above n 63, 19.

72 Law Society of New South Wales, above n 63, 18-19.

73 Willmott and White, above n 62, 486.

74 Law Society of New South Wales, above n 63, 19-20.

75 Public Guardian, above n 61, 4.

76 Wells, above n 22, 40.

(e) Interpreters

Interpreters may be used to overcome communication barriers arising from hearing impairment, language or culture.⁷⁷ Where the lawyer and client will be meeting multiple times, it is useful to have the same interpreter present at all meetings. Depending on the nature of the client's matter, the interpreter may need to be accredited to a certain level.

It is advisable to ask the interpreter to directly translate the interactions (that is, not to amend questions and responses in any way) so that the lawyer can gauge whether there are any concerns with the client's capacity, and to ensure that the client's instructions are not inadvertently altered by the translation process.

As far as practicable, the matters discussed in Chapter 5.3(j) below in relation to seeking third party assistance should also be kept in mind when an interpreter is involved in a client interview. Legal professional privilege applies to communications between the lawyer and client through the medium of the interpreter, but will not apply to information the client confides solely in the interpreter.⁷⁸ It is important that the interpreter is made aware of the legal and confidential nature of the discussion.

(f) Ensure the meeting environment is comfortable and/or familiar

Meeting with a lawyer may be intimidating or stressful to a client, reducing their comfort level, confidence and overall capacity. Try to ensure that meetings are as comfortable and familiar as possible. A lawyer may 'dress down' for meetings to help clients feel more at ease. Meetings may be arranged in locations familiar to the client or which put the decision in context (for example, visiting a particular location).⁷⁹ In many cases, home visits may be 'especially conducive to optimal decision-making'.⁸⁰

(g) Communication tools

Where the client uses non-verbal communication (for example, writing, typing or using assisted communication devices), the lawyer should ensure the client has access to relevant materials and equipment.⁸¹

(h) Accommodate visual and auditory impairments

A client's capacity may be drastically improved by taking positive steps to accommodate visual and auditory impairments. What steps are useful will invariably depend on the particular client, but in general, meetings should be conducted in well-lit areas with minimal background noise. The furniture should be arranged so as to facilitate direct communication, provide clear pathways and minimise glare (face the client away from windows).⁸²

77 Law Society of South Australia, above n 60, 18.


78 Kathy Laster and Veronica Taylor, *Interpreters and the Legal System* (Federation Press, 1994) 223-4. See also *Total Trading SRL v Nastri* [2007] VSC 313 (31 August 2007) [54].

79 Law Society of South Australia, above n 60, 18.

80 Sabatino, above n 9, 489.

81 The use of facilitated communication to receive instructions, that is, a third party enabling a person to communicate by assisting them to point at objects, pictures, symbols, words or letters, continues to be a contentious issue and is beyond the scope of this Handbook.

82 Sabatino, above n 9, 488; Law Society of New South Wales, above n 63, 19-20.



To accommodate auditory impairments: minimise background noise, look at the client when speaking (this allows lip-reading), speak slowly and enunciate, do not over-articulate or shout, sit close to the client, have auditory amplifiers available, ensure the client has access to any hearing aids they normally use and prepare written advice and written summaries (which the client can also use later to refresh their memory).⁸³

To accommodate visual impairments: increase lighting, reduce glare, use matte (not glossy) paper, use large font, allow the client additional time to read, allow the client additional time to refocus when switching between reading and discussion, use alternative formats such as braille or text to speech, be aware that clients may have a narrowed field of vision and have reading and magnifying glasses available.⁸⁴

- (i) Consider the timing of decision making and facilitate gradual or delayed decision making

Meeting the client regularly will help the client become more familiar with their lawyer, enhancing the client's comfort, confidence and trust in the lawyer. Multiple meetings also allow lawyers to obtain a more long-term understanding of the client's capacity and any temporal variations in that capacity.⁸⁵ With such an understanding, a lawyer may better adapt to the client and will be in the best position to act in the client's best interests. Fatigue may be avoided by scheduling multiple shorter meetings at times when the client is most alert (this is commonly in the morning).⁸⁶

Information and decisions may be broken down into component parts, particularly if the client is overwhelmed by the enormity of the process. Breaking decisions down into discrete steps and proceeding step-by-step may assist the client to order their thoughts and better communicate their wishes. Addressing a single issue at a time avoids divided attention and confusion. Some clients may find it useful to be provided with written summaries (including key issues, decisions and documents to bring to the next meeting). Flow charts may also be useful for explaining the steps involved in a decision.⁸⁷

Many people who have mental illness may experience temporal fluctuations in their capacity. Many symptoms of mental illnesses will not be readily apparent and may arise or subside with the passing of time. Medication may have a significant positive or negative impact on a client's capacity (for instance, long-term 'depot' antipsychotic injections) and lawyers should seek to understand the nature and effect of a client's medication regime on their capacity. Delaying meetings or arranging follow-up meetings with the client for a time when they are in a more lucid state may significantly enhance their capacity.⁸⁸

83 Law Society of New South Wales, above n 63, 19.

84 *Ibid* 19-20.

85 Sabatino, above n 9, 488; Law Society of New South Wales, above n 63, 20.

86 Sabatino, above n 9, 488; Law Society of New South Wales, above n 63, 21.

87 Law Society of New South Wales, above n 63, 20-1; Law Society of South Australia, above n 60, 18.

88 Sabatino, above n 9, 489; Law Society of South Australia, above n 60, 18.

Case Study: Maximising a client's capacity

Joan is admitted to hospital on an involuntary treatment order. A social worker refers Joan to a lawyer for advice and assistance, concerned that Joan has spent a long time in hospital and is receiving treatment she does not wish to have.

At the first face-to-face appointment with the lawyer, Joan is affable and compliant but is unable to recall basic advice the lawyer provides her with. In a follow up telephone call, Joan is terse and terminates the call early.

In the next conversation, the lawyer leaves the client his phone number and invites the client to contact him should she have any questions. The following week, Joan contacts the lawyer for a further discussion. The lawyer is mindful to keep the conversation to no longer than 5 minutes.

Over the course of 4 more conversations, the lawyer is able to establish a rapport with Joan; Joan is able to remember the lawyer, recalls earlier conversations they have had and is consistent in what she would like to happen. On this basis, the lawyer is satisfied that she has capacity to give instructions in relation to a Mental Health Review Tribunal review hearing.

(j) Seek third party assistance (subject to client consent)

Clients may initially feel uncomfortable speaking with a lawyer alone. Invite the client to bring a support person (friend, family or other caregiver) for a portion of the meeting (especially during the introductory phase).⁸⁹ Apart from putting the client at ease, support persons may be able to provide the lawyer with extensive background information on the client (including any impairment he or she has) and also assist the client to understand their options and explain the consequences of each option in light of the client's specific familial, social, financial and medical situation.⁹⁰

However, **extreme caution** should be exercised when consulting third parties. Third parties should only be consulted with the client's express consent. Failure to obtain consent would constitute a breach of the lawyer's duty of confidence. Further, the client should always retain control of the decision making process and be present at any meeting with third parties, in case they decide to withdraw consent. Once third parties have been consulted, the lawyer should always confirm any information provided by the third party as well as the client's instructions with the client **alone**.⁹¹ It is also important that lawyers do not become reliant upon third parties for information.

Lawyers should be alive to any undue influence the third party exercises over the client (or any advantages or benefits they seek to achieve) and immediately ask the third party to leave the room where they consider

89 Law Society of New South Wales, above n 63, 19.

90 Law Society of South Australia, above n 60, 19, 22.

91 Ibid 20, 23.

such influence is being exercised (or such an advantage or benefit is going to be obtained).⁹² Lawyers should also ensure that third parties do not become de facto substituted decision makers. This can be achieved by expressly confirming with the third party at the start of any meeting that their role is to assist the client in making the client's own decisions, not to impose their own views on the client as to what decision is in the client's best interests.⁹³

Carers are often a wealth of information on how a client's capacity can be maximised.⁹⁴ They may provide information on the best time of day to meet with a client, the timing of medication and its effects and the best methods of communicating with a client.⁹⁵ While it is obviously best to obtain consent before seeking such information from carers, failure to do so would arguably not constitute a breach of duty provided that such enquiries did not disclose any confidential information to the carer (such as any concern the lawyer may have about the client's capacity or the client's instructions).

5.4 How do I assess my client's capacity?

Having identified the relevant legal test and sought to maximise the client's capacity, the lawyer must then conduct a preliminary assessment of the client's capacity bearing in mind the presumption of capacity. In some cases, it will be clear that a client lacks capacity (for example, where they are completely disoriented in time and space or unable to comprehend anything that is said to them or unable to communicate).⁹⁶ However, in most cases capacity will not be so clear-cut.

In order to conduct this preliminary assessment, the lawyer must ask the client a series of questions and carefully observe the client's responses. Given the domain-specific and decision-specific nature of capacity, the questions will depend on the particular person, the particular decision they seek to make and the test for legal capacity to be applied (see Schedule 2). However, in general, the lawyer should ask the client questions that will give an indication of the following:⁹⁷

- (a) Does the client have a basic understanding of the relevant facts and issues and sufficient knowledge of the world to make decisions such as the one in question?
- (b) Does the client have the cognitive ability to manipulate that information so that they can make an informed decision?
- (c) Is the client aware of their own abilities and limitations, any memory loss and its impacts, and any (possibility of) exploitation?
- (d) Does the client understand the different options available and can they compare the likely consequences of each of those options?

92 Willmott and White, above n 62, 486; Law Society of South Australia, above n 60, 22.

93 Law Society of South Australia, above n 60, 21, 23.

94 However, practitioners should be alive to issues of conflicts of interests when speaking with paid support workers.

95 Barbara Hamilton and Tina Cockburn, 'Capacity to make a Will and Enduring Power of Attorney: Issues new and old' (2008) 38 *QLS Journal* 14, 18; Law Society of South Australia, above n 60, 20.

96 Law Society of New South Wales, above n 63, 4.

97 Sabatino, above n 9, 496; Endicott, above n 18, 4-5.

- (e) Does the client understand the likely consequences (for them and for others) of their decisions or failure to make decisions?
- (f) Does the client have the ability to clearly articulate a reasoning process behind their decisions?
- (g) Are the client's desired outcomes stable or do they vary over time or depending on who is present? Can the client remember prior decisions?
- (h) Are the client's conclusions and decisions consistent with the client's previous decisions, prior behaviour, core beliefs and values and stated or inferred goals?
- (i) Is the decision substantively fair or will it lead to the injury or exploitation of the client or a third party?
- (j) Is the decision irreversible? If so, does the client attach appropriate significance to the decision?

There are a number of standardised screening tests used by medical professionals to assess cognitive ability (such as the Mini Mental State Exam).⁹⁸ However, lawyers should exercise caution when relying on standardised screening tests, particularly if they are not administered by an appropriately qualified medical professional. In relation to the use of the MMSE to establish testamentary capacity, Mullins J has commented:⁹⁹

The result of the MMSE may be an indicator of cognitive impairment, but *it is a blunt instrument* and must be considered in conjunction with other evidence of the testator's capacity at the time of making the will.

While these tests may be used as starting points to assist a lawyer in determining whether their client has capacity, it is important to remember that they 'provide only a crude global assessment of cognitive functioning' and '[f]urther inquiry is still necessary' given the domain-specific and decision-specific nature of capacity.¹⁰⁰

In cases where the lawyer has significant doubts about a client's capacity, it may be useful to have a second lawyer attend interviews and witness the client's capacity.¹⁰¹ The attendance of such a person is not a breach of the duty of confidence, but good practice and common courtesy would favour obtaining the client's consent first.¹⁰²

5.5 What records of capacity assessment should I keep?

Where a client's capacity is in issue, it is vital that thorough, comprehensive and contemporaneous file notes are taken of any consultation with the client and any relevant interactions with third parties.¹⁰³ Parliament has recognised the importance of maintaining accurate records in relation to lawyers who witness

98 See, eg, William Molloy and Doug Drummond, *Standardized Mini-Mental State Examination (SMMSE)*, Ministry of Health, Province of British Columbia <<http://www.health.gov.bc.ca/pharmacare/adi/clinician/pdf/ADTI%20SMMSE-GDS%20Reference%20Card.pdf>>.

99 *Ruskey-Fleming v Cook* [2013] QSC 142 (3 June 2013) [65] (emphasis added).

100 Sabatino, above n 9, 493.

101 See, eg, *Sharp v Adam* [2006] EWCA Civ 449 (28 April 2006).

102 Queensland Law Society, *Australian Solicitors Conduct Rules* (at 1 June 2012) r 9.1.1; *Legal Profession (Australian Solicitors Conduct Rules) Notice 2012* (Qld).

103 Law Society of New South Wales, above n 63, 6; The Bar Council (UK), *Client Incapacity* (February 2014) 5 <<http://www.barcouncil.org.uk/for-the-bar/professional-practice-and-ethics/client-incapacity/>>.

powers of attorney; a note to section 41(2) of the *Powers of Attorney Act 1998* (Qld) provides that 'it is advisable for the witness to make a written record of the evidence as a result of which the witness considered that the principal understood [the matters listed in section 41].'¹⁰⁴

Such file notes will be invaluable:

- (a) in any subsequent legal proceedings (which may occur many years after having taken the instructions) where the issue of capacity is in dispute and must be the subject of a final and binding determination by the court;
- (b) for refreshing the lawyer's and client's memory and preventing any unnecessary hindrances in the client's progress; and
- (c) in assisting medical professionals who are subsequently consulted regarding the client's capacity in gaining a more longer-term view of the client's capacity.

At a minimum, a lawyer's file notes should include the following details:¹⁰⁵

- (a) the date, time, length and location of all interviews with the client;
- (b) the persons who were present for the interview (including the times at which they entered and exited the interview room);
- (c) the steps the lawyer took in assessing the client's capacity (including all questions and the client's answers to those questions); and
- (d) details of any information relevant to a client's capacity that a lawyer has gained from another source (for example, assessments of the client's capacity conducted by a medical professional at the request of the lawyer or information about the client's capacity volunteered to the lawyer by any third party).

Finally, detailed file notes will also assist to show that the lawyer complied with their legal and ethical obligations. For instance, in *Ruskey-Fleming v Cook*, a lawyer engaged in extensive questioning of his elderly client, made comprehensive diary notes of the questions and answers and subsequently prepared a memorandum outlining the meeting.¹⁰⁶ The lawyer genuinely believed that his client had testamentary capacity and proceeded to allow the client to execute an updated will.


In finding that the client did not have testamentary capacity, Mullins J emphasised that **it is the process the lawyer undertakes to assess capacity** (not the ultimate conclusion they reach) that determines whether they have fulfilled their legal and ethical duties:¹⁰⁷

104 *Powers of Attorney Act 1998* (Qld) s 41(2) (Editor's Note). See also Form 3 – Enduring Power of Attorney (Long Form), which contains the following direction to witnesses (lawyers) on page 12: 'It is strongly recommended that, if you are in any doubt, you make a written record of the proceedings and of any questions you asked to determine the principal's capacity.'

105 Public Guardian, above n 61, 6.

106 [2013] QSC 142 (3 June 2013) [25].

107 *Ibid* [64]. See also *Sharp v Adam* [2006] EWCA Civ 449 (28 April 2006) [27], where the Court of Appeal upheld a decision of the trial judge that a testator did not have testamentary capacity at the time he made his will but noted that the lawyer that prepared the will acted 'in a quite exemplary fashion' and 'did everything conceivably possible' to establish whether the testator had capacity (including involving another lawyer from her firm, involving the testator's general practitioner, extensively questioning the testator and maintaining extensive notes of all dealings).



The greater the preparation and the care exercised by a solicitor when taking instructions from a client about a will and attending on the client for the purpose of having the will signed, the more likely there will be available to the court relevant evidence to determine the issue of testamentary capacity. Whether or not the solicitor has complied with what is reasonably required to carry out the solicitor's professional duty in those circumstances of a particular case does not dictate the conclusion as to testamentary capacity.

In contrast, in *Legal Services Commissioner v Ford*, Fryberg J held that a lawyer was guilty of unsatisfactory professional conduct because, inter alia, 'he failed to make an appropriate written record of all steps taken in assessing [his client's] competence or, toward that end, including all questions and answers.'¹⁰⁸ In that case, the lawyer had attended on his client in a nursing home in order for her to execute a new will and an enduring power of attorney. Despite various factors indicating that the client may have lacked capacity, the solicitor made only a brief statement about the client's capacity in his diary.¹⁰⁹

108 [2008] LPT 12 (22 August 2008) 22.

109 Ibid 16. The statement provided: 'She was quite clear in her intentions and her recollections of her instructions to me on 3rd December and she was able to tell me her wishes without any prompting as to what she wished in her Will and in relation to the Power of Attorney. I again considered that she was alert and that her Will clearly reflected her wishes and desires without any intimation of any pressure or influence being exerted on her.'

6

What do I do if I Determine My Client has Capacity?

If the lawyer's preliminary assessment of the client reveals that the client has capacity to make the particular decision, the lawyer should make detailed file notes of the basis on which they have reached this conclusion. The lawyer is then able to take the client's instructions and act upon them. However, it is imperative that lawyers continually assess whether their client has capacity across the course of the retainer; **the client must have capacity at the time the lawyer seeks to act on their instructions.**¹¹⁰


In cases where the client's capacity is likely to diminish over time (for example, because they are elderly or in the early stages of a significant illness), the lawyer should raise the issue of the client's capacity into the future with the client and assist the client to make appropriate arrangements for any future time when the client may lack capacity.¹¹¹ Depending on the client's instructions, this may involve the preparation of an enduring power of attorney, an advance health directive or both.

If a substituted decision maker is appointed to the client for a particular decision but it is clear that the client has capacity for that decision, the lawyer should consider raising with their client the need to take steps to have the substituted decision maker's appointment varied or terminated. Ideally, this would involve encouraging and supporting the client to make an application for a review of the substituted decision maker's appointment. In some circumstances, this could also involve alerting the Tribunal or relevant court, making an application to the Tribunal or a court for a declaration that the client has capacity for that decision or seeking orders for the removal of the substituted decision maker (either completely or solely in relation to that decision).¹¹²

110 To the extent that the instructions do not require the lawyer to take steps on behalf of their client, for instance, instructions to prepare an advice for the client, the lawyer can arguably prepare the advice and furnish it to the client even if in the intervening period the client has lost capacity. The lawyer cannot act on instructions to the extent that they would be performing an act on the client's behalf.

111 Law Society of New South Wales, above n 63, item 3.

112 See, eg, *Powers of Attorney Act 1998* (Qld) ss 109A, 110, 111, 116; *Guardianship and Administration Act 2000* (Qld) ss 29, 31, 81, 146; *Uniform Civil Procedure Rules 1999* (Qld) r 95(2); *Federal Circuit Court Rules 2001* (Cth) r 11.11(1); *Family Law Rules 2004* (Cth) r 6.10(1); *High Court Rules 2004* (Cth) r 21.08.6; *Federal Court Rules 2011* (Cth) r 9.65.



Case Study: Ostensible capacity and substituted decision makers

Beth seeks representation at a Mental Health Review Tribunal hearing. Her lawyer assesses her as having capacity to instruct. He then finds out the day before the hearing that the Public Guardian has been appointed as Beth's guardian.

The lawyer asks Beth for permission to talk with the Public Guardian officer or the Tribunal to obtain a copy of the guardianship order. If Beth agrees, the lawyer should obtain the order and determine whether it relates to 'legal matters' and remains current. If it does not relate to legal matters or has expired, the lawyer can take instructions from Beth provided that he remains of the opinion that she has capacity to instruct.

If the order does relate to legal matters and is current, even though the lawyer has assessed Beth as having capacity, he can only take instructions from the guardian. However, the guardian must take into account Beth's wishes and maximise her involvement at the hearing.

If Beth forbids the lawyer from speaking with the guardian or Tribunal, then his position is difficult. If the extent of the guardianship can be determined at the hearing, the lawyer can seek an adjournment and obtain instructions from the appropriate source. If not, he may have to seek leave to attend the hearing as a support person to assist Beth to express her views, wishes and interests.

7

What do I do if I Determine My Client does not have Capacity or has Questionable Capacity?

If, having taken all reasonable steps to maximise a client's capacity, it becomes evident that the client does not have capacity to give instructions or doubts remain in the lawyer's mind about whether the client has capacity, there are a number of options to consider. There are also courses of action that are not appropriate. In determining which option(s) will be most appropriate, the lawyer must exercise careful professional judgment in balancing competing factors and considerations. In essence, this process encapsulates an evaluation of the risks to the client, and a determination of the most appropriate level of intervention (if any) in light of these risks. Even if it is clear that the client does not have capacity, the lawyer 'should still seek the client's views and take them into account.'¹¹³

7.1 Actions NOT open to lawyers

Although a lawyer must act in their client's best interests, this duty is constrained by both the duty of confidence and the duty to follow the client's lawful, proper and competent instructions.¹¹⁴ Accordingly, a lawyer should not:¹¹⁵

- (a) without express instructions, act in what they believe to be the client's best interests; or
- (b) unilaterally seek instructions from a third party. Informal decision makers have no lawful authority to give lawyers instructions on behalf of another.

Ceasing to act for the client is a significant step and should only be taken once all other available options are exhausted.

113 Bar Council (UK), above n 103, 2.

114 Queensland Law Society, *Australian Solicitors Conduct Rules* (at 1 June 2012) rr 4.1.1, 9, 8.1; *Legal Profession (Australian Solicitors Conduct Rules) Notice 2012* (Qld).

115 Law Society of South Australia, above n 60, 24-25.

7.2 Has a substituted decision maker been formally appointed by or for the client?

(a) Substituted decision makers

Lawyers should enquire whether a substituted decision maker has been formally appointed by or for the client to make decisions on the client's behalf. A substituted decision maker can be formally appointed:

- (i) by the client under an enduring power of attorney;¹¹⁶
- (ii) by an order of the Tribunal or a court appointing a guardian or administrator to an adult with impaired decision making capacity;¹¹⁷ or
- (iii) in relation to litigation, by a person consenting to act as and/or (depending on the relevant court) an order of a court appointing a person to act as the litigation guardian of a person under a legal incapacity.¹¹⁸

At first instance, the lawyer should ask the client whether a substituted decision maker has been appointed by or for the client. If the client is unsure, the lawyer may also check with the relevant support service, or with the client's family and friends (with the client's consent). If no information is available from these sources, the lawyer can lodge an enquiry about current Orders by calling or writing to the Registrar of the Tribunal, identifying the lawyer's association with the client and advising the client's name and date of birth. There is no Queensland register of enduring powers of attorney.

If an administrator is appointed for financial matters, then that suspends the right of the principal to make those decisions, irrespective of their capacity.¹¹⁹ It may be, therefore, that only the administrator will be able to contract with a lawyer to retain their services on a fee basis. If an administrator is unwilling to retain the lawyer, the lawyer may be able to proceed by obtaining an amendment to the Tribunal appointment, seeking a Tribunal direction or, if litigation is involved, by the appointment of a litigation guardian.

Under the *Uniform Civil Procedure Rules 1999* (Qld), a person under a legal incapacity may only commence or defend proceedings only by way of a litigation guardian.¹²⁰ A litigation guardian is primarily liable for the costs of the lawyer they engage. They are also personally liable if costs are awarded against a plaintiff they represent, but are not generally personally liable if costs are awarded against a defendant they represent. All costs properly incurred by a litigation guardian may be recovered from the estate of the person who they represent.¹²¹

116 *Powers of Attorney Act 1998* (Qld) s 32.

117 *Guardianship and Administration Act 2000* (Qld) s 12.

118 *Uniform Civil Procedure Rules 1999* (Qld) r 95; *Federal Circuit Court Rules 2001* (Cth) r 11.11; *Family Law Rules 2004* (Cth) r 6.10; *High Court Rules 2004* (Cth) r 21.08; *Federal Court Rules 2011* (Cth) r 9.63.

119 *Bergmann v DAW* [2010] QCA 143 (11 June 2010) [16] (McMurdo P), [18] (Holmes JA), [35], [41], [43] (Muir JA).

120 *Uniform Civil Procedure Rules 1999* (Qld) rr 93-99.

121 Queensland Law Reform Commission, *A Review of Queensland's Guardianship Laws*, Report No 67 (2010) vol 4, 371-2.

Focus: Where a substituted decision maker is not good enough

There are some decisions that cannot be made by a substituted decision maker, for instance:

- entering a plea for a criminal charge;
- consenting to marriage;
- making or revoking a will; and
- appointing an attorney.

See section 14(3) and schedule 2 (definition of 'special personal matter') in the *Guardianship and Administration Act 2000* (Qld).

In these cases, alternative legal actions will need to be taken to produce the desired outcome. For example, an application to the Supreme Court for a statutory will.

(b) Where there is an enduring power of attorney

If an enduring power of attorney exists, it should be reviewed to determine whether the appointment remains current and whether the decision to be made (and legal matters) is within the scope of the appointment. In doing so, the lawyer should ensure that the enduring power of attorney is properly executed and does not have any errors on its face. If so, the lawyer is able to act on the instructions of the attorney for the matter. However, if the document does not appear to be validly executed or contains errors on its face, the lawyer should conduct a more thorough investigation to determine whether the attorney has the authority to instruct. If still in doubt, an application may be made to the Tribunal or Supreme Court for a declaration on the validity of the enduring document.¹²²

Case Study: Existing enduring power of attorney

Liz is unable to make decisions about where she lives. Her community care provider applied for and was granted an interim (urgent) order for the appointment to her of the Public Guardian as guardian and Public Trustee as administrator, so that Liz could be moved to a nursing home. Neither the care provider nor the Tribunal were aware that Liz's husband Albert had been appointed under an enduring power of attorney. Albert seeks representation at the final hearing.

Having inspected the enduring power of attorney document and confirmed that it has been validly executed, contains no errors on its face and gives Albert authority to make decisions in relation to Liz's housing and treatment and legal matters, the lawyer decides he can act for Liz in the proceedings and take instructions from Albert. The lawyer sends a copy of the enduring power of attorney document to the guardian, administrator and Tribunal registry. Once the guardian and administrator are aware of the enduring power of attorney, their powers are suspended and the Tribunal initiates a review of their appointment. At the hearing, the Tribunal revokes the interim appointments, as Albert has authority to make the relevant decision and has been acting honestly and diligently.

For more information about the order of priority for substituted decision makers, see *Focus* on page 43.

- (c) Where there is an appointed guardian, administrator or litigation guardian

Where the lawyer becomes aware that a guardian, administrator or litigation guardian has been appointed to the client, the lawyer should review the terms of the document effecting that appointment to ensure that:

- (i) the appointment is still in force; and
- (ii) the decision to be made falls within the scope of the appointment.

This will allow the lawyer to determine whether it is the client or the guardian or administrator that has the power to make the particular decision. **If the guardian or administrator has the power to make the decision, and is also appointed for legal matters, the lawyer must take and act on the instructions of the guardian or administrator**

Focus: Scope of guardian's or administrator's authority

Under the *Guardianship and Administration Act 2000 (Qld)*, a guardian is appointed for personal matters and an administrator is appointed for financial matters.

A personal matter is defined as relating to the adult's care and can include accommodation, employment, education, health care and legal matters, but specifically excludes legal matters relating to the adult's financial or property matters.

A financial matter is defined as a matter relating to the adult's financial or property matters, which includes legal matters relating to the adult's financial or property matters.

For legal matters not involving finances or property, lawyers will obtain their instructions from the appointed guardian. For all other legal matters, instructions properly come from the administrator.

Where a guardian is appointed for a personal matter or an administrator is appointed for a financial matter but the appointment does not extend to legal matters, the guardian or administrator cannot instruct the lawyer until their appointment is extended to include legal matters. This can be done by applying to the Tribunal for an urgent interim order to extend the appointment to legal matters.

- (d) Duty to take into account the wishes of the principal

Even if it is the substituted decision maker that has power to make the decision, the substituted decision maker is required to:¹²³

- (i) give the person to whom they are appointed the necessary support, access to information and opportunity to participate in decisions affecting their life;
- (ii) take the wishes of the person to whom they are appointed into account to the maximum extent possible; and (iii) exercise their powers in the way least restrictive of the rights of the person to whom they are appointed.

¹²³ See, eg, *Guardianship and Administration Act 2000 (Qld)* s 34(1), sch 1 general principle 7; *Powers of Attorney Act 1998 (Qld)* s 76, sch 1 general principle 7.

If the lawyer suspects that the substituted decision maker is breaching their duties to the client, the lawyer may refuse to act on their instructions. But the lawyer may also need to take action to protect the client's best interests. For example, by making an application to the Tribunal or a relevant court or making a complaint to the Office of the Public Guardian and requesting that it investigates. Ideally, such action will only be taken with the permission and on behalf of the principal. Intervention through application to the Tribunal or the courts can only be initiated by the lawyer on their own behalf where the lawyer has standing under the relevant legislation. (See Chapters 7.4 and 7.5 below for further discussion.)

Focus: Order of priority for substituted decision makers

The order of priority where there is both an appointed guardian or administrator and an enduring power of attorney is set out in sections 22 to 25 of the *Guardianship and Administration Act 2000* (Qld).

Where the Tribunal knows of the attorney and appoints a guardian or administrator, the attorney may only exercise power to the extent authorised by the Tribunal.

Where the Tribunal is unaware of the attorney and appoints a guardian or administrator, once the guardian or administrator becomes aware of the attorney, the guardian or administrator must advise the Tribunal in writing of the existence of the enduring power of attorney as soon as possible and the guardian's or administrator's powers are suspended pending review by the Tribunal of their appointment.

An attorney who is unaware of the appointment of a guardian or administrator does not become liable for decisions made in the proper exercise of the attorney's power because of the appointment of the guardian or administrator.

7.3 Will the client consent to a formal assessment of capacity by a medical professional?

Lawyers are not qualified to conduct a medical determination of an individual's cognitive capacity.¹²⁴ In situations of doubt, it may be appropriate for a lawyer to request a formal capacity assessment from a medical professional with experience in assessment of cognitive capacity.¹²⁵

(a) When should a medical assessment be obtained?

While a person's capacity is presumed, if a lawyer has doubts as to a particular client's ability to give lawful, proper and competent instructions, the QLS recommends obtaining a medical assessment.¹²⁶

124 Wells, above n 22, 38.

125 Law Society of New South Wales, above n 63, 7.

126 Queensland Law Society, 'I have doubts about my client's capacity – what should I do?' (2013) Queensland Law Society Ethics Centre, [2] <<http://ethics.qls.com.au/content/faq/doubts-client-capacity>>. See below for more detailed information on obtaining a medical assessment and the circumstances in which a lawyer can compel a client to undergo such an assessment.

A medical assessment should only be sought after fully informed consent is obtained from the client.¹²⁷ This is a sensitive issue and should be carefully considered before tactfully suggesting it to the client.¹²⁸ A suggestion that the client has lost capacity to make his or her own decisions may offend or anger the client, who may subsequently be less cooperative with the lawyer. The specific legal need should be distinguished from any offensive personal inferences that may be drawn from the suggestion.

While obtaining a client's consent for such an assessment may be difficult, it is important to highlight to the client that the assessment is largely for his or her benefit: 'it is in their interests to have that confirmation of capacity as evidence to meet any later challenge to the validity of the transaction or the act the subject of the instructions.'¹²⁹ Lawyers do not have the authority to compel a client to undergo a medical assessment.¹³⁰

(b) What if the client refuses to consent to the assessment?

Where a client refuses an assessment of capacity and doubt still remains as to their capacity, the lawyer is placed in a difficult position.

It is recommended that the lawyer revisit the opportunity to obtain a medical assessment with the client where:

- (i) after a time or on a change of circumstances, initial concerns as to lack of capacity in the context of the contemplated instructions remain;
- (ii) other options listed in this Chapter have been fully explored and rejected, or are not available;
- (iii) the possible consequences of being unable to act further on the client's behalf has been fully explored with them.¹³¹

If consent is still not forthcoming, the lawyer will need to consider whether they can continue to act.

(c) Who should you obtain the medical assessment from, and what do you need to tell the medical professional?

It is important to ensure that a formal assessment is obtained from a professional specifically qualified to assess cognitive capacity.

There are various medical professionals whose role is to undertake capacity assessment and they use various methods and tools to complete this task. The lawyer needs to consider the client's particular circumstances and their disability or impairment before making a referral to an appropriate professional.¹³² For instance, persons with mental illness should generally be assessed by psychiatrists, whereas elderly persons should generally be assessed by geriatricians.

127 Law Society of South Australia, above n 60, 23.


128 Bar Council (UK), above n 103, 2.

129 Queensland Law Society, above n 126, [2].

130 Bar Council (UK), above n 103, 3.

131 Law Society of South Australia, above n 63, 24.

132 Law Society of New South Wales, above n 64, 13 (which includes a useful list of types of professionals that may be able to carry out a capacity assessment).



Often a client may be more willing to submit to a medical assessment by their general practitioner. Moreover, the client's general practitioner, particularly if they have a long-term relationship with the client, may be in a better position to properly assess the client's capacity.¹³³ On the other hand, general practitioners often have an interest in maintaining a therapeutic relationship with the client, meaning they are less likely to find that the client has impaired capacity. If the general practitioner does not have a long-term relationship with the client, they may not be suitably qualified to assess the client's capacity, but may be able to recommend an appropriate professional to obtain an assessment from.

Given the fact that capacity is decision-specific, the medical professional should be informed in detail of the particular purpose of the assessment, the nature of the decisions the client has to make and the relevant legal test that must be satisfied.¹³⁴ An example referral letter from a lawyer to a medical professional is contained in Schedule 4.

Alternatively, if it is anticipated that an application to the Tribunal will eventually be made for the appointment of a guardian or administrator, the medical professional may be asked to complete the Tribunal form entitled 'Report by Medical & Related Health Professional'. It is still important to inform the medical professional of the specific decision the client seeks to make and any other relevant information.

(d) What do you do after a medical assessment is obtained?

It is important to acknowledge that while a completed capacity assessment by a medical professional can be persuasive in forming an opinion regarding the client's capacity, it is still only a clinical opinion and must be distinguished from a legal determination of capacity.¹³⁵

The lawyer must use their professional judgment in considering the evidence and deciding whether the client has capacity. Alternatively the capacity assessment could be used as a basis for starting discussions involving intervention and treatment with the client and their family.¹³⁶

The lawyer may form the opinion that the client requires non-legal support and that with such support the client may have the capacity to make the relevant decision and provide the lawyer with lawful, proper and competent instructions. In such cases, the lawyer should consider referring the client to an agency that will provide assistance. Examples of non-legal support include local health area services, advocacy services and government organisations. Lawyers should contact their local community legal centre for an up-to-date list of non-legal support agencies.¹³⁷

133 Bar Council (UK), above n 103, 3.

134 Law Society of New South Wales, above n 63, item 6.

135 Law Society of New South Wales, above n 63, 8.

136 Ibid 9.

137 A list of community legal centres is available on the Queensland Association of Independent Legal Services Inc website <<http://www.qails.org.au/>>.

Case Study: Opinions of medical professionals in practice

Alexandra is 75 years old and lives in a locked dementia ward of a hospital. She calls a community legal centre and says that she has been diagnosed with Alzheimer's disease but doesn't believe she is ill. Lawyers from the community legal centre attend upon Alexandra at the hospital. She is alert, aware of her surroundings, understands why and how she is in hospital and provides the lawyers with logical and coherent instructions that she wishes to leave the ward and return home.

On reviewing Alexandra's medical records, the lawyers discover that she was diagnosed with Alzheimer's disease six years ago and that the diagnosis has been confirmed recently by senior doctors on multiple occasions. The lawyers meet with Alexandra on two further occasions, at which times she continues to display high levels of cognitive function.

Despite the medical opinions in Alexandra's records, the lawyers reach the conclusion that Alexandra has the capacity to apply to the Tribunal for a declaration of capacity and to make decisions in relation to her health care and accommodation. As such, the lawyer's are able to act on Alexandra's instructions. At the Tribunal hearing, the Tribunal orders an independent medical review of Alexandra. The review concludes that Alexandra has capacity and the Tribunal grants the declaration.

7.4 Can a substituted decision maker be appointed?

If a client is incapable of providing instructions, and no other person has formal authority to provide instructions on the client's behalf, it may be appropriate for a guardian, administrator or litigation guardian to be appointed who can stand in the client's place and ensure their best interest are protected.¹³⁸ An application for such an appointment requires an investigation of the client's capacity and, even if an appointment is not made, can result in a binding decision on the client's capacity for a particular matter.

It is preferable if the client themselves, or a family member, friend, social worker or health care professional makes the application. However, lawyers must be careful not to breach their duty of client confidentiality or waive legal professional privilege in discussing or providing information to another person about a client's diminished capacity. Theoretically, a lawyer is able to make an application to the Tribunal or a court for a substituted decision maker to be appointed to their client. However, this should be a **last resort**, as there are complex ethical issues involved when a lawyer makes such an application (which are addressed in further detail in Chapter 7.5).

Further, a lawyer must satisfy the relevant standing test before they can apply to a court to have a litigation guardian appointed to their client,¹³⁹ or apply to the Tribunal for a guardian or administrator to be appointed to their client.¹⁴⁰ In the latter case, the lawyer must show that they are an 'interested person', meaning that they are a person who has 'a sufficient and continuing interest in the [client]'.¹⁴¹ The Tribunal and its predecessor have held that an interested person 'must have an ongoing concern for the welfare of the adult' in relation to whom the application is made;¹⁴² they must have 'an interest necessarily connected with the adults [sic] proper care and protection'.¹⁴³

On this basis, it has been held that the solicitor for one party to court proceedings cannot bring an application for a guardian or administrator to be appointed to the opposing party, because the solicitor is concerned not for the welfare of the opposing party but to further the interests of their own client by expediting the resolution of the litigation.¹⁴⁴ Likewise, the director of a company involved in proceedings against an individual cannot bring an application against the individual because the director's interest is not continuing (in that it is limited to resolution of the proceedings) and 'is tainted as he is in a position of conflict'.¹⁴⁵

Conversely, the Tribunal has held that step-children could bring an application against their step-father in relation to their step-father's capacity to continue to conduct proceedings against them, because they had continuing familial relations, common corporate business interests and genuine concern for the step-father and his family.¹⁴⁶

139 In Queensland courts and the High Court, the rules do not specify who may apply for a litigation guardian to be appointed for a party: *Uniform Civil Procedure Rules 1999* (Qld) r 95; *High Court Rules 2004* (Cth) r 21.08. In the Federal Circuit Court, the rules state that only a party can request the appointment of a litigation guardian: *Federal Circuit Court Rules 2001* (Cth) r 11.11(1). In the Family Court, the rules merely state that 'a person' may apply for a case guardian to be appointed for a party: *Family Law Rules 2004* (Cth) r 6.10(1). However, a note to that rule provides: 'An application in relation to a case guardian may be made by a party or a person seeking to be made the case guardian or by a person authorised to be a case guardian.' In the Federal Court, the rules state that only a party or an 'interested person' may apply for an order appointing a litigation representative for a party: *Federal Court Rules 2011* (Cth) r 9.63(1). An 'interested person' of a 'mentally disabled person' is the person's 'guardian', which is defined to mean a person entrusted under a Commonwealth, State or Territory law with the care and management of the person or their estate: see sch 1 (Dictionary).

140 *Guardianship and Administration Act 2000* (Qld) s 12(3).

141 *Ibid* sch 4.

142 *Re MAD* [2007] QGAAT 56 (28 August 2007) [24].

143 *Re EEP* [2005] QGAAT 45 (24 August 2005) [15].

144 *Re MAD* [2007] QGAAT 56 (28 August 2007) [25].

145 *Re EEP* [2005] QGAAT 45 (24 August 2005) [15].

146 *Re BRT* [2012] QCAT 128 (20 March 2012) [26]-[28].

Case Study: Appointing a substituted decision maker

Charlie has an acquired brain injury and severe epilepsy. An administrator is appointed to manage Charlie's financial affairs. He clearly lacks capacity and the administrator refuses to be involved in the matter.

As Charlie's capacity is impaired, the lawyer must inform him that she cannot accept his instructions unless he has a litigation guardian. As the administrator refuses to act as litigation guardian, the lawyer informs Charlie someone must agree to be his litigation guardian. Margaret states that she would be willing to act as litigation guardian and Charlie agrees. Once Margaret files her consent to act as litigation guardian with the Court, the lawyer can act on her instructions, taking into account Charlie's wishes to the maximum extent possible. In some cases, the Court has been known to waive the requirement for Margaret to act by a solicitor.

7.5 Ethical complexities for lawyers seeking to have a substituted decision maker appointed to their client

Even if a lawyer has standing to apply to a court to have a litigation guardian appointed to their client or to apply to the Tribunal for a guardian or administrator to be appointed to their client, they still have legal and ethical duties to follow their client's lawful, competent and proper instructions, act in the best interests of their client and not disclose confidential information of the client without consent (subject to limited exceptions). These duties fetter the ability of a lawyer to make such applications. Applying for a substituted decision maker to be appointed to a person 'is a very serious thing because it deprives the person of their fundamental civil rights under the common law'.¹⁴⁷

Where a client is not averse to their lawyer making such an application, then there is no real legal or ethical issue for the lawyer. An issue only arises where the client is hostile to the lawyer making such an application and instructs the lawyer not to do so.¹⁴⁸

Prima facie, taking such steps without or contrary to a client's instructions 'should be unpalatable to the lawyer'.¹⁴⁹ However, the courts in New South Wales have recognised that there are limited circumstances in which a lawyer may be able to make such a request or application and still comply with their ethical duties. These circumstances are an 'important qualification' to the lawyer's duties.¹⁵⁰

147 *Goddard Elliott (a firm) v Fritsch* [2012] VSC 87 (16 March 2012) [553] (Bell J).

148 Justice Paul Brereton, 'Acting for the incapable – a delicate balance' (2012) 35 *Australian Bar Review* 244, 247. For a detailed discussion of the ethical considerations involved, refer to Wells, above n 22, 39-40.

149 Law Society of South Australia, above n 60, 26.

150 Law Society of New South Wales, above n 63, item 9; cf Wells, above n 22, 39.

Focus: Applying for the appointment of a guardian or administrator

An application for the appointment of a guardian or administrator is made to the Tribunal by way of a Form 10 'Application for Administration/Guardianship Appointment or Review'. Proposed guardians or administrators (except for the Public Guardian or Public Trustee) will need to sign relevant pages of the form witnessed by a justice of the peace, commissioner for declarations or solicitor.

The Form 10 should be accompanied by a 'Report by Medical & Related Health Professional', a standard form to be filled in by a medical professional giving their assessment of the client's capacity for the matter. If there is difficulty in obtaining this report, then a written explanation of the reasons for this should accompany the Form 10 (otherwise the Tribunal will be very reluctant to set the matter down for hearing). Other expert reports may be relevant or sufficient but should first be discussed with the Tribunal registry.

Once the application is lodged, a hearing date will be set. The applicant is expected to attend the hearing. The person the subject of the application and any proposed guardians or administrators should also attend the hearing. At the end of the hearing, an appointment may be made for all or specific matters, and for a set period of time.

If an appointment needs to be made as a matter of urgency, the relevant forms can be lodged and an interim order appointing a guardian or administrator can be made on the papers.

McD v McD was an application by a lawyer for the equivalent of a guardian and administrator to be appointed to their client. Powell J granted the lawyer leave to substitute the client's brother as the applicant in the application. His Honour noted that while the lawyer was clearly acting in what the lawyer considered to be in the best interests of his client by commencing the proceedings, it was inappropriate for the lawyer to continue as the applicant.¹⁵¹ His Honour stated that the preferable course was for the lawyer to encourage the client's family, friends or a trustee company to commence such proceedings.¹⁵²

[I]t was, in my view, *undesirable* that [the lawyer] should thus put himself in an adversary position in relation to [his client] who, if her condition could be cured or controlled, might wish to oppose the relief sought in the proceedings. While it may be that, on occasion, situations may arise in which there is no person, other than the intended defendant's own solicitor, who is either able, or willing, to commence proceedings for the appointment of a committee or a manager of the intended defendant's property and affairs, I believe that, as there is no limitation upon the persons who may bring such proceedings, *such cases ought to be very rare, indeed*. Rather, so it seems to me, where a person's own solicitor believes that an application should be made for the appointment of a committee or manager of his client's property and affairs, and no member of the client's family is available or willing to make such an application, the preferred course for the solicitor to adopt is, as was done in *Re An Alleged Incapable Person* (1959) 77 WN (NSW) 156, to invoke the good offices of a friend of the client, or even of one of the trustee companies.¹⁵³

151 [1983] 3 NSWLR 81, 84.

152 *Ibid* (emphasis added).

153 In *Re an Alleged Incapable Person* (1959) 77 WN (NSW) 156, Myers J held that a trustee company with no interest in a particular person could make an application under section 39 of the *Mental Health Act 1958* (NSW) for an order (equivalent to the appointment of a guardian and administrator). His Honour noted that the application was made by the trustee company because no next-of-kin thought fit to make the application and that the application was 'entirely due to the good offices of the gentleman who was her solicitor until she became incapable of continuing his retainer.'

An appeal against the granting of a similar application was dismissed in *R v P*.¹⁵⁴ In that case, the Court of Appeal noted that such applications involved the possibility of the lawyer having a conflict of interest and duty as well as the possible unauthorised disclosure of confidential information.¹⁵⁵ The Court noted that *McD* was authority for the proposition that such applications should not be brought by lawyers against their clients 'at least if there is *any reasonable alternative*.'¹⁵⁶ However, Hodgson JA emphasised that this was not an absolute rule and that there may be circumstances in which a lawyer may make such an application against their client:¹⁵⁷

McD did not purport to impose any absolute rule against solicitors bringing such an action, and I do not think this Court should suggest that there is an absolute rule against such actions being brought. The bringing of such actions is *extremely undesirable* because it involves the solicitor in a conflict between the duty to do what the solicitor considers best for the client and the duty to act in accordance with the client's instructions; and also because of a possible conflict between the solicitor's duty to the client and the solicitor's interest in continuing to act in the proceedings in question and to receive fees for this.

In relation to disclosure of confidential information, Hodgson JA stated:¹⁵⁸

There remains the question whether the respondent has misused confidential information in bringing the proceedings, upon the basis of general law principles about the obligations of persons having confidential information, quite apart from restrictions on disclosing or giving in evidence of matters the subject of legal professional privilege. In relation to these principles, in my opinion there is room for the adoption of the approach taken in cases such as *Church v Price*, to the effect that the solicitor's concern for the interest of the client, so long as it is reasonably based and so long as it results in no greater disclosure of confidential information than absolutely necessary, can justify the bringing of proceedings and such disclosure of confidential information as is absolutely necessary for the purpose of such proceedings.

In the later case of *P v R*, Barrett J granted a lawyer's application for the equivalent of a guardian and administrator to be appointed to their client on the basis that the client clearly had impaired capacity but had no family members willing to make the application, no social worker and no friends from church sufficiently close to make the application.¹⁵⁹ Barrett J held that before a lawyer can make such an application, they must take 'adequate steps to find some alternative person to bring the proceedings' or such steps must be able to be shown to 'have been fruitless.'¹⁶⁰ His Honour concluded that because 'there being no reasonable and apparently available alternative' person to make the application:¹⁶¹

That amounts to a special circumstance warranting the making of orders on the application of a solicitor, he being a person who has gained a close appreciation of the defendant's circumstances and difficulties generally in the course of dealing with her personal injuries claim.

154 (2001) 53 NSWLR 664 (Court of Appeal).

155 Writing extra-curially, Justice Paul Brereton has also suggested that the lawyer's duty to the court may justify the lawyer in making such a request or application: Brereton, above n 148, 250.

156 (2001) 53 NSWLR 664, 666 (Mason P), 683 (Hodgson JA), 684 (Ipp AJA).

157 Ibid 683 (emphasis added).

158 Ibid 683-4. An alternative ground for disclosure may also be provided by rule 9.2.5 of the *Australian Solicitors Conduct Rules*, which provides that a solicitor may disclose confidential client information for the purpose of preventing imminent serious physical harm to the client or to another person: Queensland Law Society, *Australian Solicitors Conduct Rules* (at 1 June 2012) r 9.2.5; *Legal Profession (Australian Solicitor's Conduct Rules) Notice 2012* (Qld).

159 [2003] NSWSC 819 (9 September 2003) [77]-[80].

160 Ibid [69], [81].

161 Ibid [81].

While a lawyer may not be able to apply for a litigation guardian, guardian or administrator to be appointed to their client without breaching their duties to the client, this does not mean that lawyers are restricted from bringing the issue of their client's capacity to the attention of a court or Tribunal in proceedings already on foot. The courts have shown an increased willingness to entertain applications by lawyers in relation to the capacity of their clients (particularly when the client has already commenced litigation) on the basis of the lawyer's paramount duty to the court and the administration of justice. For instance, in *Till v Nominal Defendant* the Supreme Court of Queensland stayed compensation proceedings on the application of the plaintiff's barrister and subsequently heard an oral application by the plaintiff's solicitors to have the plaintiff's capacity assessed by the Tribunal for the purposes of determining whether a guardian should be appointed to the plaintiff for the litigation.¹⁶² McMeekin J granted the application, ordered that the question of the plaintiff's capacity be referred to the Tribunal and stayed the court proceedings until that issue was finalised.¹⁶³ The reasons of McMeekin J did not address the ethical issues associated with the fact that the application was brought by the plaintiff's lawyers.

More recently, Bell J emphasised in *Goddard Elliott (a firm) v Fritsch* that:

the primary responsibility of a lawyer is to be satisfied the client has the mental capacity to instruct. Doubts about this issue in the mind of the lawyer can also have important consequences for the conduct of legal proceedings. If the issue cannot be resolved to the reasonable satisfaction of the lawyer, as occurred in the present case, the lawyer must raise the issue with the court. It is the court which has the final responsibility to determine the issue.¹⁶⁴

His Honour also held:

Where the client does not have [the mental capacity to participate in the proceeding and to instruct], the lawyer does not have the authority to represent them in the proceeding, except for certain limited purposes, most particularly perhaps for the purpose of an inquiry into that question. I say perhaps because they are not really representing the client in that process, but rather assisting the court as an officer of the court.¹⁶⁵

This reasoning was followed in *Pistorino v Connell*, where Dixon J granted an *ex parte* application made by the solicitor of a plaintiff for a litigation guardian to be appointed to the plaintiff, despite the fact the application was opposed by the plaintiff and involved the disclosure of confidential communications between the solicitor and plaintiff that were subject to legal professional privilege.¹⁶⁶ His Honour emphasised that lawyers, as officers of the court with a fundamental duty to the court, had a duty to raise the issue of their client's capacity with the court.¹⁶⁷ While Dixon J did not expressly address the issue of the solicitor's duties to the client, his Honour implied that the client's interests could be protected by:

- (a) the solicitor making the application *ex parte* (provided there are no other persons interested or affected by the application);
- (b) the court hearing the matter *in camera*; and

162 [2010] QSC 121 (22 April 2010) [1], [6].

163 *Ibid* [27]-[29].

164 *Goddard Elliott (a firm) v Fritsch* [2012] VSC 87 (16 March 2012) [568].

165 *Ibid* [549].

166 [2012] VSC 438 (25 September 2012) [2]-[4].

167 *Ibid* [4]-[6].

- (c) the court making orders that the confidential material placed before it for the purposes of the application along with the transcript of proceedings be sealed up, kept confidential and not disclosed to anyone without the leave of the court.¹⁶⁸

However, given the conflict of duties and interests referred to by the courts, it may be difficult for a lawyer to continue to act for the client following the lawyer's application for a substituted decision maker to be appointed to their client.

In summary, the authorities on this issue are unsettled. On the basis of the conservative approach adopted by the New South Wales courts, a lawyer should not breach their legal and ethical duties if:

- (a) they apply to the Tribunal for a guardian or administrator to be appointed to their client, with their client's consent;
- (b) in the absence of such consent, they encourage the client's family, friends, advocate or a trustee company to apply to the Tribunal for a guardian or administrator to be appointed to their client (that such actions would not breach the lawyer's duty of confidence would appear to be a necessary implication of the reasoning in the authorities on this issue); or
- (c) if no one is willing to apply and the lawyer has standing, they apply to the Tribunal for a guardian or administrator to be appointed to their client provided that:
 - (i) the lawyer has taken adequate steps to ensure there is no other reasonable alternative person to make the request or application;
 - (ii) the lawyer has gained a close appreciation of the client's circumstances and difficulties;
 - (iii) the lawyer's concern for the client has a reasonable basis; and
 - (iv) only confidential information that is absolutely necessary for the making of the request or application is disclosed.

A similar approach should apply to the appointment of litigation guardians. However, where the client has already commenced proceedings, on the basis of the more lenient approach adopted by the Queensland and Victorian courts, a lawyer should not breach their legal and ethical duties if they apply to the court for an order that their client's capacity be assessed by the Tribunal or for a litigation guardian to be appointed to their client provided that the application is made in a way that ensures that confidentiality and privilege are maintained.

In either case, however, the lawyer may need to withdraw as legal representative for the client in the substantive matter due to the arising conflict of interest.

168 Ibid [10], [13], [15]. Dixon J made such orders in the application before him.

7.6 Should I cease to act?

As already mentioned, determining the most appropriate option is akin to a risk assessment process. The decision as to whether to terminate the client retainer is a difficult one, and each case will need to be considered in light of the particular context and circumstances. Where there is a very high risk that a client will suffer serious detriment if the lawyer ceases to act, it is possible that intervention (such as seeking appointment of a substituted decision maker) may be warranted. However, if the risk to the client is very low, then ceasing to act may be more appropriate than seeking an intrusive intervention against the wishes of the client.

A lawyer may terminate a retainer for just cause and on reasonable notice.¹⁶⁹ What constitutes just cause is not defined,¹⁷⁰ but the inability of a client to give lawful, competent and proper instructions would arguably constitute 'just cause'.¹⁷¹ The *Australian Solicitors Conduct Rules* do not specify what 'reasonable notice' is; however, where the lawyer decides this option is the most appropriate in the circumstances it is recommended that a letter be sent to the client outlining:¹⁷²

- (a) the reason(s) for ceasing to act;
- (b) the direct and indirect consequences for the client of this; and
- (c) any options open to the client (including the availability of any relevant non-legal support).

A sufficient period of time should be allowed for the client to consider the letter prior to terminating the retainer.

Alternatively, the lawyer may consider that although the client is not currently able to give instructions, there is potential in the future for the client to either have capacity to do so (for example, through improvement in mental state by the client accepting medication or support), or to agree to accept intervention such as the appointment of a substituted decision maker. Staying with the client in these circumstances preserves the lawyer-client relationship, which may be invaluable to a client where the lawyer has acted as a trusted advisor over a long period of time. Considering the ethical duties imposed on lawyers, this may be the only appropriate course of action as 'the just lawyer does not abandon her client, but stands with him unless or until the client says otherwise.'¹⁷³

169 Queensland Law Society, *Australian Solicitors Conduct Rules* (at 1 June 2012) r 13.1.3; *Legal Profession (Australian Solicitors Conduct Rules) Notice 2012* (Qld).

170 Law Council of Australia, *Australian Solicitors' Conduct Rules 2011 and Consultation Draft Commentary* (19 October 2012) <<http://www.lawcouncil.asn.au/lawcouncil/images/LCA-PDF/docs-2000-2099/2012October19-ConsultationDraftCommentary.pdf>> 22.

171 Law Society of New South Wales, above n 63, item 8. In England and Wales, the common law and professional conduct rules allow termination for 'good reason', which has been held to be 'a fact-sensitive question': *Richard Buxton (a firm) v Mills-Owen* [2010] 4 All ER 405, 417. In that case, the Court of Appeal also endorsed the guidance notes to the professional conduct rules which state that 'good reason' will include 'a solicitor being unable to obtain clear instructions from the client': 418.

172 Law Society of South Australia, above n 60, 26.

173 Wells, above n 22, 40.

8

Who Pays the Costs of Maximising and Assessing Capacity?

Capacity is inexorably linked to issues of cost. If performed properly and thoroughly, the process of maximising a client's capacity and then conducting a preliminary assessment of capacity may take lawyers a significant amount of time. It may result in the lawyer incurring higher than normal expenses and charging a higher than normal fee (particularly if the client has agreed to time costing). If a formal assessment of capacity by a medical professional is necessary, this will obviously involve additional direct costs (in the form of the medical professional's fee) and indirect costs (in the form of the additional consideration the lawyer must give to the medical professional's report).

Who should pay such costs? This issue remains largely unresolved. In the absence of any specific government financial support for persons with doubtful or impaired capacity, the costs are currently borne by the client by default. As Bell J noted in *Goddard Elliott (a firm) v Fritsch*, '[t]here is no duty psychiatrist stationed at every court just in case they are needed.'¹⁷⁴ In rare cases, the courts or Tribunal might order an opposing party to pay the costs of a formal assessment of capacity by a medical professional, particularly where the opposing party commenced the application and stands to gain from a declaration of impaired capacity. For instance, in *BRT*, the Tribunal held:¹⁷⁵

As these proceedings are not being brought by BRT it is unreasonable to expect that he would meet the costs of the psychiatric examination. As a result the Tribunal will order that the applicants pay the psychiatrist's fees.


Where costs are awarded as a result of successful litigation, a client may recover the costs that are 'necessary or proper for the attainment of justice' if costs are to be assessed on a standard basis,¹⁷⁶ or costs 'reasonably incurred and of a reasonable amount' if costs are to be assessed on an indemnity basis.¹⁷⁷ In both cases, professional fees properly charged by the client's lawyer in taking the client's instructions will be partially although not completely recoverable. These costs may include costs relating to any additional time spent in the taking of instructions because of the client's impaired capacity.

174 [2012] VSC 87 (16 March 2012) [565].

175 *BRT* [2012] QCAT 128 (20 March 2012) [33].

176 *Uniform Civil Procedure Rules* 1999 (Qld) r 702.

177 *Ibid* r 703.



Even where the client must bear the costs, there are some limits to the client's liability. For instance, Medicare benefits or Legal Aid payments may cover some (but very rarely all) of the costs of a formal assessment of capacity by a medical professional.¹⁷⁸ Further, there are restrictions on the quantum of fees that lawyers can charge their clients for maximising and assessing capacity. Charging clients excessive legal costs can amount to professional misconduct or unsatisfactory professional conduct.¹⁷⁹ It may also be a breach of the fiduciary obligations owed by lawyers to their clients.¹⁸⁰

For example, in *Legal Services Commissioner v Towers*, de Jersey CJ held that a solicitor who acted under a power of attorney for a client with impaired capacity had engaged in professional misconduct by grossly excessive charging.¹⁸¹ The Chief Justice emphasised that once a client is incapacitated, lawyers should ensure that their charges will 'withstand rigorously independent scrutiny.'¹⁸² His Honour drew particular attention to the fact that the solicitor's:

approach included charging \$300 per hour for attendances not involving the delivery of professional services: for example, shopping for Mr White and conversing with him. It is the [solicitor's] taking advantage of the incapacity of Mr White for his own benefit together with the extent of the over-charging which warrants this being characterised as professional misconduct.¹⁸³

This case would suggest that to the extent steps taken in maximising and assessing capacity do not involve the delivery of professional services, lawyers should carefully consider how they charge for such activities.

178 Legal Aid Queensland, *Grants Handbook* (10 April 2013) <<http://www.legalaid.qld.gov.au/about/Policies-and-procedures/Grants-handbook/What-do-we-fund/Nature-and-extent-of-funding/Civil-law/Expert-reports-in-civil-law-matters/Pages/default.aspx>> see section entitled 'Expert reports in civil law matters'.

179 *Legal Profession Act 2007* (Qld) s 420(1)(b).

180 See, eg, *Law Society of NSW v Foreman* (No 2) (1994) 34 NSWLR 408, 435-6 (Mahoney JA).

181 [2006] LPT 3 (22 May 2006) 2-3.

182 *Ibid* 3.

183 *Ibid*.

9

Where Can I Obtain Further Guidance?

Given the potential ethical complexities of deciding which option may be most appropriate where a client's capacity is in doubt, it may be useful for the lawyer to utilise the ethics guidance service offered by the QLS Ethics Centre. The Centre provides a confidential face-to-face or telephone service, which is free for all QLS members.

A solicitor who discusses the client's circumstances with a QLS ethics solicitor will not breach their duty of confidence, as the *Australian Solicitors Conduct Rules* provide that a solicitor may disclose confidential client information in a confidential setting for the sole purpose of obtaining advice in connection with the solicitor's legal or ethical obligations.¹⁸⁴

Contact details for the QLS Ethics Centre are as follows:

Telephone: 07 3842 5843

Email: ethics@qls.com.au

¹⁸⁴ Queensland Law Society, *Australian Solicitors Conduct Rules* (at 1 June 2012) r 9.2.3; *Legal Profession (Australian Solicitors Conduct Rules) Notice 2012* (Qld).


Schedule 1

Indicia of Impaired Capacity

The following circumstances **could (but do not necessarily)** indicate that a client lacks capacity:¹⁸⁵

- (a) the client is elderly or has a disability or impairment such as:
 - (i) dementia;
 - (ii) cognitive impairment (such as acquired brain injuries and neurodegenerative diseases);
 - (iii) intellectual disabilities; or
 - (iv) mental illness (such as schizophrenia, depression and bipolar disorder);
- (b) the client is in hospital or a nursing home when instructions are taken;
- (c) the client has difficulty recalling things, has a bad memory or is forgetful;
- (d) the client cannot perform simple calculations;
- (e) the client lacks mental flexibility and has difficulty grasping new ideas;
- (f) the client is disoriented (including losing things or getting lost) or repeats themselves;
- (g) the client is anxious about decision making or is upset by being unable to manage tasks;
- (h) the client has continuing difficulties communicating or a limited ability to interact with the lawyer (including being unable to repeat advice or ask questions of the lawyer);
- (i) the client has changed lawyers recently or frequently or has radically changed their instructions recently;

¹⁸⁵ Endicott, above n 18, 1-2; O'Neill and Peisah, above n 8, 4-5; Hamilton Cockburn, above n 95, 17; Law Society of New South Wales, above n 63, 4; Legal Aid Queensland, above n 58, 206-7; *Legal Services Commissioner v Ford* [2008] LPT 12, 21-22 (Fryberg J).

- 
- (j) third parties accompany the client and do not give the client an opportunity to speak for themselves;
 - (k) the person facilitating contact between the client and the lawyer stands to benefit from any decision made by the client;
 - (l) the lawyer has a sense that ‘something is different’ because there has been a change in the client’s presentation, mood or sociability; and
 - (m) the lawyer is on notice of issues regarding the client’s mental health or cognitive function (particularly where information is volunteered by a third party).

Schedule 2

Capacity Tests Applicable to Different Practice Areas

1 Entry into a contract

Capacity to contract depends on the nature and complexity of the particular contract in question. The High Court emphasised in *Gibbons v Wright*:¹⁸⁶

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 is doing by his participation.

Later, their Honours referred to various English authorities and stated that it:

appears to us to be that the 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. As Hodson LJ remarked in *[Estate of Park]*, 'one cannot consider soundness of mind in the air, so to speak, but only in relation to the facts and the subject-matter of the particular case' [(1954) P 112, 136]. Ordinarily the nature of the transaction means in this connection the broad operation, the 'general purport' of the instrument; but in some cases it may mean the effect of a wider transaction which the instrument is a means of carrying out: *Manches v Trimborn* [(1946) 174 LT 344, 345].

2 Making a gift

Capacity to make a gift to another is governed by the same test as the capacity to contract. In accordance with the High Court's reasons in *Gibbons v Wright* (discussed in relation to contracts above), the test for capacity will depend on the nature and timing of the particular gift. As Endicott explains, this means that in some cases the test for making a gift may be the same as that required to make a will or other testamentary disposition:¹⁸⁷

186 (1954) 91 CLR 423, 437.

187 Endicott, above n 18, 10.

Where the subject matter and value of the gift are trivial in relation to the donor's other assets, a low degree of understanding will suffice. Where the effect of the gift is to dispose of the donor's only asset of value and for all practical purposes to pre-empt the terms of the donor's will, then the degree of understanding required should be the same as required to make a will. In addition when an elderly person makes a substantial gift, there must be an understanding of both the immediate effect that the disposing of the asset could have on the donor (Centrelink) and the longer term effect that reduction of assets could have on the person for the rest of his or her life (accommodation options).

3 Making a will or other testamentary disposition

In order to have testamentary capacity, a testator must satisfy the test established in the seminal case *Banks v Goodfellow*.¹⁸⁸

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 natural faculties – that no insane delusion shall influence his will in disposing of his property and being about a disposal of which, if the mind had been sound, would not have been made.

The test established by *Banks v Goodfellow* must be brought to bear on 'existing circumstances in modern life.'¹⁸⁹ The adaption of the test to modern life requires that:¹⁹⁰

1. The testatrix must be aware, and appreciate the significance, of the act in the law upon which she is about to embark;
2. The testatrix must be aware, at least in general terms, of the nature, extent and value of the estate over which she has a disposing power;
3. The testatrix must be aware of those who may reasonably be thought to have a claim upon her testamentary bounty, and the basis for, and nature of, the claims of such persons;
4. The testatrix must have the ability to evaluate, and discriminate between, the respective strengths of the claims of such persons.

The modern adaption of the *Banks v Goodfellow* test has been accepted in Queensland.¹⁹¹

4 Making decisions about financial affairs

There is no universally employed test for capacity in relation to making decisions about financial matters. To the extent that making decisions about financial affairs involves entering into a contract, making a gift or making a will or other testamentary disposition, the relevant tests for capacity have already been discussed. In the context of the *Guardianship and Administration Act 2000* (Qld), if a person lacks capacity for a 'financial matter' (the types of which are listed in Part 1 of Schedule 2 to the Act) then an administrator may be appointed to the person in relation to that matter.¹⁹² This test is discussed in more detail at Item 9.1 below in relation to the appointment of guardians and administrators.

188 (1870) LR 5 QB 549, 565.

189 *Kerr v Badran* [2004] NSWSC 735 (17 August 2004) [49].

190 *Read v Carmody* [1998] NSWSC 182 (23 July 1998) (Powell JA).

191 See, eg, *Frizzo v Frizzo* [2011] QSC 107 (12 May 2011) [23]-[24]; affd [2011] QCA 308 (1 November 2011) [24]; *Ruskey-Fleming v Cook* [2013] QSC 142 (3 June 2013) [57]-[60].

192 *Guardianship and Administration Act 2000* (Qld) s12(1).

5 Making decisions about medical treatment

5.1 Generally

Whether an adult has capacity to make decisions about medical treatment will depend upon the nature of the medical treatment and the adult's cognitive capabilities. McDougall J in *Hunter and New England Area Health Service v A* stated that '[i]n 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.'¹⁹³ His Honour then referred with approval to the test established by Butler-Sloss LJ in *Re MB (Caesarean section)*:¹⁹⁴

As Butler-Sloss LJ said in *Re MB* ... in deciding whether a person has capacity to make a particular decision, the ultimate question is whether that person suffers from some impairment or disturbance of mental functioning so as to render him or her incapable of making the decision. That will occur if the person:

- (1) is unable to comprehend and retain the information which is material to the decision, in particular as to the consequences of the decision; or
- (2) is unable to use and weigh the information as part of the process of making the decision.¹⁹⁵

In *Re Bridges*,¹⁹⁶ Ambrose J referred with approval to the decision of the English Court of Appeal in *Re T (Adult: Refusal of Treatment)*¹⁹⁷ and the decision of Thorpe J in *Re C (Adult: Refusal of Medical Treatment)*.¹⁹⁸ In *Re T*, Lord Donaldson MR emphasised the decision-specific nature of capacity: 'The more serious the decision, the greater the capacity required.'¹⁹⁹ Each member of the Court of Appeal also listed conditions or circumstances that could have an adverse impact on a person's capacity.²⁰⁰ In *Re C*, Thorpe J held that an adult will have capacity to accept or reject medical treatment unless they do not sufficiently understand the nature, purpose and effects of the proposed treatment.²⁰¹ His Lordship then stated that capacity requires the adult to:²⁰²

- (a) comprehend and retain relevant treatment information;
- (b) believe that treatment information (this may include believing it 'in their own way'); and
- (c) weigh the information to arrive at a decision.

193 (2009) 74 NSWLR 88, 97-8.

194 [1997] 2 FLR 426, 436-7.

195 (2009) 74 NSWLR 88, 93.

196 [2001] 1 Qd R 574, 575-7.

197 [1993] Fam 95.

198 [1994] 1 WLR 290.

199 [1993] Fam 95, 113.

200 *Ibid* 112-13 (Lord Donaldson MR), 118 (Butler-Sloss LJ), 122 (Slaughton LJ).

201 [1994] 1 WLR 290, 295.

202 *Ibid*.

5.2 Involuntary treatment (under the *Guardianship and Administration Act 2000* (Qld))

Chapter 5 of the *Guardianship and Administration Act 2000* (Qld) contains provisions that authorise the involuntary treatment of adults who do not have capacity for ‘health matters’ and ‘special health matters’ (each of which are defined in items 4 and 7 of Part 2 to Schedule 2 to the Act). Capacity in this context is defined to mean:²⁰³

capacity, for a person for a matter, means the person is capable of—

- (a) understanding the nature and effect of decisions about the matter; and
- (b) freely and voluntarily making decisions about the matter; and
- (c) communicating the decisions in some way.

The requirements of this definition are discussed in more detail at Item 9.1 below in relation to the appointment of guardians and administrators.

5.3 Involuntary treatment (under the *Mental Health Act 2000* (Qld))

A person may be involuntarily treated for mental illness under the *Mental Health Act 2000* (Qld) provided that they, among other things, ‘lack the capacity to consent to be treated for the illness.’²⁰⁴ Capacity in this context is defined to mean:²⁰⁵

capacity, for a person, means the person is capable of—

- (a) understanding the nature and effect of decisions about the person’s assessment, treatment, care or choosing of an allied person; and
- (b) freely and voluntarily making decisions about the person’s assessment, treatment, care or choosing of an allied person; and
- (c) communicating the decisions in some way.

Informed consent for electroconvulsive therapy and psychosurgery carry additional requirements set out in sections 133 to 137 of the *Mental Health Act 2000* (Qld).

5.4 Challenging involuntary treatment under the *Mental Health Act 2000* (Qld)

The jurisdiction of the Mental Health Review Tribunal (**MHRT**) includes periodic review of involuntary treatment orders and approving the administration of electroconvulsive therapy. The MHRT’s decision may be appealed to the Mental Health Court.

Section 8(b) of the *Mental Health Act 2000* (Qld) creates a presumption of capacity to make decisions about a person’s mental health treatment. It provides, in particular, that ‘a person is presumed to have capacity to make decisions about the person’s assessment, treatment and choosing of an allied person’.

203 *Guardianship and Administration Act 2000* (Qld) sch 4 (definitions of ‘capacity’ and ‘impaired capacity’).

204 *Mental Health Act 2000* (Qld) s 14(1)(f).

205 *Ibid* sch (definition of ‘capacity’).

Provided the lawyer can obtain coherent instructions from the client in relation to the conduct of proceedings before the MHRT or Mental Health Court, evidence of the person's impaired capacity to consent to mental health treatment should be no barrier to legal representation. If it were, then the presumption of capacity would be undermined, the doctor's assessment of capacity would take precedent over that of the MHRT's and very few people would be able to retain legal representation despite a legal right to do so under the Act.²⁰⁶

For further discussion, see Item 9.2 below in relation to making and contesting guardianship and administration applications below.

5.5 Executing an advance health directive

Section 42 of the *Powers of Attorney Act 1998* (Qld) provides:

- (1) A principal may make an advance health directive, to the extent it does not give power to an attorney, only if the principal understands the following matters—
 - (a) the nature and the likely effects of each direction in the advance health directive;
 - (b) a direction operates only while the principal has impaired capacity for the matter covered by the direction;
 - (c) the principal may revoke a direction at any time the principal has capacity for the matter covered by the direction;
 - (d) at any time the principal is not capable of revoking a direction, the principal is unable to effectively oversee the implementation of the direction.

Editor's note — If there is a reasonable likelihood of doubt, it is advisable for the witness to make a written record of the evidence as a result of which the witness considered that the principal understood these matters.

- (2) A principal may make an advance health directive, to the extent it gives power to an attorney, only if the principal also understands the matters necessary to make an enduring power of attorney giving the same power.

Editor's note — See section 41 (Principal's capacity to make an enduring power of attorney).

Further, schedule 3 to the *Powers of Attorney Act 1998* (Qld) provides that:

capacity, for a person for a matter, means the person is capable of—

- (a) understanding the nature and effect of decisions about the matter; and
- (b) freely and voluntarily making decisions about the matter; and
- (c) communicating the decisions in some way.

Guidelines produced by the Office of the Public Guardian provide detailed guidance to lawyers who act as witnesses to advance health directives.²⁰⁷ Failure to follow the guidelines may amount to unsatisfactory professional conduct.²⁰⁸

206 See, eg, *Mental Health Act 2000* (Qld) ss 328, 450.

207 Public Guardian, above n 61.

208 *Legal Services Commissioner v Ford* [2008] LPT 12 (22 August 2008) 22 (Fryberg J).

6 Making decisions about privacy

6.1 Commonwealth privacy legislation

The *Privacy Act 1988* (Cth) and the Australian Privacy Principles impose requirements that individuals must consent to the collection, use and disclosure of certain types of information in relation to them. Consent is defined to include express or implied consent,²⁰⁹ but these terms are not further defined. The Office of the Australian Information Commissioner has issued draft guidelines that state that consent must be:

- (a) voluntary;
- (b) adequately informed;
- (c) current and specific; and
- (d) given by a person with capacity to understand and communicate their consent.²¹⁰

The guidelines contain the following information about capacity to consent to the collection, use and disclosure of information:²¹¹

An individual must have the capacity to consent. This means that the individual is capable of understanding the nature of a consent decision, including the effect of giving or withholding consent, forming a view based on reasoned judgement and how to communicate a consent decision. An APP entity can ordinarily presume that an individual has the capacity to consent, unless there is something to alert it otherwise.... If an entity is uncertain as to whether an individual has capacity to consent at a particular time, it should not rely on any statement of consent given by the individual at that time.

A similar approach has been adopted in other binding and non-binding guidelines previously issued by the Office of the Privacy Commissioner.²¹²

6.2 Queensland privacy legislation

Similarly, the *Hospital and Health Boards Act 2011* (Qld) states that confidential information cannot generally be disclosed unless the person to whom the information relates consents to the disclosure.²¹³ The Act does not define consent. Guidelines issued by Queensland Health in relation to the (now repealed) *Health Services Act 1991* (Qld) stated that consent must be voluntary, informed and given by a person with capacity to do so.²¹⁴ In relation to

209 *Privacy Act 1988* (Cth) s 6.

210 Office of the Australian Information Commissioner, *Australian Privacy Principles (APP) Guidelines* (August 2013), [B.29] <<http://www.oaic.gov.au/images/documents/privacy/applying-privacy-law/app-guidelines/chapter-b-app-guidelines-v1.1.pdf>>.

211 *Ibid* [B.46].

212 Australian Government, National Health and Medical Research Council, Office of the Privacy Commissioner, *Use and disclosure of genetic information to a patient's genetic relatives under section 95AA of the Privacy Act 1988* (Cth): *Guidelines for health practitioners in the private sector* (15 December 2009) Office of the Australian Information Commissioner, 24-27 <[http://www.oaic.gov.au/images/documents/migrated/2009-12-16045841/E96%20Privacy%20Act%20\(95AA\).pdf](http://www.oaic.gov.au/images/documents/migrated/2009-12-16045841/E96%20Privacy%20Act%20(95AA).pdf)>; Office of the Federal Privacy Commissioner, *Guidelines on Privacy in the Private Health Sector* (8 November 2001) Office of the Australian Information Commissioner, xi-xiii <http://www.oaic.gov.au/images/documents/migrated/migrated/hg_01.pdf>.

213 *Hospital and Health Boards Act 2011* (Qld) ss 142, 144. See also ss 63(3)(b), 132(3)(b), 197(3)(b).

214 Queensland Government, Queensland Health, *Health Services Act 1991: Part 7 – Confidentiality Guidelines* (February 2012), 6 <http://www.health.qld.gov.au/foi/docs/conf_guidelines.pdf>. Note that the Guidelines are currently under review by the Queensland Government, which warns that they should not be relied upon as they are currently out of date.

capacity, the guidelines merely state that '[t]he individual must be capable of understanding the issues relating to the decision, forming a view based on reasoned judgement, and communicating their decision.'²¹⁵

7 Entry into marriage

A marriage is void where one person is 'mentally incapable of understanding the nature and effect of the marriage ceremony'.²¹⁶ The *Marriage Act 1961* (Cth) places the relevant duty on the marriage celebrant not to solemnise a marriage if he or she 'has reason to believe the marriage would be void'.²¹⁷ This would include where a party to the marriage does not have capacity to marry because they are incapable of understanding the nature and effect of the ceremony.

There is no one Australian case that exhaustively explains the requirements of this definition. Chisholm J in *AK v NC* held that this does not require the person to have a detailed and specific understanding of all of the legal consequences of marriage.²¹⁸ However, Young CJ in *Privet v Vovk* held that this means that 'the person contracting the marriage must be mentally capable of appreciating that it involves the responsibilities normally attached to a marriage'.²¹⁹

Mullane J in *Babich v Sokur* emphasised that the Australian test requires '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'.²²⁰ His Honour favoured the view that it is insufficient for a person to have 'a general understanding of marriage and its consequences'; rather, the person must understand the 'specific consequences of the marriage that the person is about to enter into'.²²¹

But it is in my view significant that the legislation not only requires a capacity to understand "the effect" but also refers to "the marriage" rather than "a marriage". In my view taken together those matters require more than a general understanding of what marriage involves. That is consistent with consent in contract being consent to the specific contract with specific parties, consent in criminal law to sexual intercourse being consent to intercourse with the specific person, and consent to marriage being consent to marriage to the specific person.²²²

The Australian *Marriage Act* test is ostensibly different to the English common law test, which merely requires that a person understand the nature (but not effect) of the marriage ceremony.²²³ Having said that, the Australian authorities do refer with approval to English authorities,²²⁴ in particular the decision of Singleton LJ in *Re Estate of Park; Park v Park*, where his Lordship held that the relevant question to be posed in determining whether a person has capacity to marry is whether the individual is:

215 Ibid.

216 *Marriage Act 1961* (Cth) ss 23(1)(d)(iii), 23B(1)(d)(iii).

217 Ibid s 100.

218 (2004) FLC 93-178, 79,020-21. His Honour's comments were referred to with approval by Mullane J in *Babich v Sokur* [2007] FamCA 236 (9 March 2007) [249], [251].

219 (2005) 195 FLR 191, 196.

220 *Babich v Sokur* [2007] FamCA 236 (9 March 2007) [244].

221 Ibid [252].

222 Ibid [255] (original emphasis).

223 Ibid [244].

224 See, eg, *Re Marriage of Brown; Dunne v Brown* (1982) 60 FLR 212; *Ranclaud v Cabban* (1988) NSW ConvR 55-385; *Beverley v Watson* [1995] ANZ ConvR 369; *Barrand v Coxall* [1999] QSC 352 (30 November 1999); *Dalle-Molle v Manos* (2004) 88 SASR 193; *Privet v Vovk* (2005) 195 FLR 191; *Ghosn v Principle Focus Pty Ltd (No 2)* [2008] VSC 574 (19 December 2008).

capable of understanding the nature of the contract into which he [is] entering, or [is] his mental condition such that he [is] incapable of understanding it? To ascertain the nature of the contract of marriage a man must be mentally capable of appreciating that it involves the responsibilities normally attached to marriage. Without that degree of mentality, it cannot be said that he understands the nature of the contract.²²⁵

Therefore, the issue under examination in the context of marriage includes an analysis of whether the individual in question understands the responsibilities associated with and the consequences that will flow from their particular marriage, bearing in mind that the nature of the contract and the responsibilities associated with it will necessarily vary between different couples and from marriage to marriage.²²⁶ Thus the ability of a client to assess the potential impact of their married state in the future is an essential element in determining whether or not the client has capacity to marry and therefore whether the marriage itself will be or is valid:

A person who has lost their long-term planning ability as a result of a brain injury and has little capacity to foresee the consequences of their actions may be able to speak quite eloquently about marriage but be unable to understand the ramifications of entering into a marriage contract which will have fundamental, long-term ongoing impact on his or her life and finances.²²⁷

8 Executing an enduring power of attorney

Section 41 of the *Powers of Attorney Act 1998* (Qld) provides:

- (1) A principal may make an enduring power of attorney only if the principal understands the nature and effect of the enduring power of attorney.

Editor's note — However, under the general principles, a person is presumed to have capacity—schedule 1, section 1.

- (2) Understanding the nature and effect of the enduring power of attorney includes understanding the following matters—
 - (a) the principal may, in the power of attorney, specify or limit the power to be given to an attorney and instruct an attorney about the exercise of the power;
 - (b) when the power begins;
 - (c) once the power for a matter begins, the attorney has power to make, and will have full control over, the matter subject to terms or information about exercising the power included in the enduring power of attorney;
 - (d) the principal may revoke the enduring power of attorney at any time the principal is capable of making an enduring power of attorney giving the same power;
 - (e) the power the principal has given continues even if the principal becomes a person who has impaired capacity;
 - (f) at any time the principal is not capable of revoking the enduring power of attorney, the principal is unable to effectively oversee the use of the power.

Editor's note — If there is a reasonable likelihood of doubt, it is advisable for the witness to make a written record of the evidence as a result of which the witness considered that the principal understood these matters.

225 [1954] P 112, 127.

226 *Re Marriage of Brown; Dunne v Brown* (1982) 60 FLR 212, 222 (McCall J).

227 Office of the Public Advocate (Victoria), 'Marriage' (Practice Guideline No 13, Office of the Public Advocate, July 2007) 3 <http://www.publicadvocate.vic.gov.au/file/file/PracticeGuidelines/PG13_Marriage_09.pdf>.

Further, schedule 3 to the *Powers of Attorney Act 1998* (Qld) provides that:

capacity, for a person for a matter, means the person is capable of—

- (a) understanding the nature and effect of decisions about the matter; and
- (b) freely and voluntarily making decisions about the matter; and
- (c) communicating the decisions in some way.

The Supreme Court of Queensland has held that an enduring power of attorney is more complex and more unfamiliar to most members of the community than a will and thus requires a higher standard of capacity.²²⁸

Guidelines produced by the Office of the Public Guardian provide detailed guidance to lawyers who act as witnesses to the execution of enduring powers of attorney.²²⁹ Failure to follow the guidelines may amount to unsatisfactory professional conduct.²³⁰

9 Legal capacity in the context of guardianship and administration matters

9.1 Appointment of a guardian or administrator

Section 12 of the *Guardianship and Administration Act 2000* (Qld) provides for the appointment of a guardian or administrator for an adult with respect to a matter or matters for which that adult does not have the requisite capacity.²³¹ In each of these cases, it is important to remember that the test is both domain-specific and decision-specific. For instance, a client may have ‘capacity for simple and complex personal matters and simple financial matters but [have] impaired capacity for complex financial matters.’²³²

For the purposes of that *Guardianship and Administration Act 2000* (Qld), ‘capacity’ is defined such that a person will have capacity in relation to a matter if they are capable of:

- (a) understanding the nature and effect of decisions about the matter;
- (b) freely and voluntarily making decisions about the matter; and
- (c) communicating the decisions in some way.²³³

Speaking of this definition in *Re MC*, the Tribunal made the following general observations:²³⁴

228 *Adult Guardian (Re Enduring Power of Attorney of Vera Hagger) v Hagger* (Unreported, Supreme Court of Queensland, Chesterman J, 16 April 2002, 1083 of 2001); *Re CAC* [2008] QGAAT 45 (5 June 2008) [63].

229 Public Guardian, above n 61.

230 *Legal Services Commissioner v Ford* [2008] LPT 12 (22 August 2008) 22 (Fryberg J).

231 Importantly, impaired capacity is only one limb of a three-limbed test that must be satisfied before a substituted decision maker can be appointed. This means that an administrator or guardian may not be appointed even if the Tribunal finds that the adult does lack capacity. See further *Guardianship and Administration Act 2000* (Qld) s 12(1).

232 *Re FHW* [2005] QGAAT 50 (2 September 2005) [46].

233 *Guardianship and Administration Act 2000* (Qld) sch 4.

234 [2010] QCAT 677 (2 December 2010) [10].

Capacity is a functional concept, related to a person's ability to identify, understand, evaluate, retain and process relevant information in making a choice between options for action and the ability to cause that decision to be put into effect. The existence or absence of a diagnosis of a medical condition is not determinative of impaired capacity: it is merely one factor taken into account when the tribunal considers how a person's functioning is impaired in the decision making process about a particular matter.

The first limb is process-based, meaning it is concerned with the process of bringing relevant and necessary information to bear in order to make the decision. In particular, the decision making process must be rational, so that while '[t]he use of information in a decision making process may not necessarily always be conventional but should be at least rational.'²³⁵ The fact that a client needs certain information about the matter explained to them in language and concepts that they understand does not mean that he or she has failed the first limb of the test.²³⁶

By contrast, the second limb 'looks at volition and the susceptibility of an adult to undue influence'.²³⁷ In particular, examines 'volition and whether a person's free will has been so overborne that there is an inability of that person to make up his or her own mind and to make his or her own decisions.'²³⁸

Finally, the third limb requires the person to be able to communicate in some way. Age, limited education, limited fluency in English and cognitive impairment may prevent a person from understanding complex and jargonistic language, but this does not mean that the person cannot communicate their decisions; rather, it means that their limitations should be taken into account when communicating with them.²³⁹

While cultural conventions and considerations may be relevant background information that informs any assessment of capacity, the fact that a person makes (or refuses to make) decisions in conformity with cultural norms should arguably not be interpreted as meaning the person does not satisfy any of the three limbs of the test.²⁴⁰ For instance, in some cultures there may be strenuous obligations to assist every member of an extended family, while in other cultures women may not traditionally engage in significant decision making.

235 *Re HE* [2013] QCAT 488 (20 August 2013) [26].

236 *Re FHW* [2005] QGAAT 50 (2 September 2005) [43]. Similarly, in *PY v RJS* [1982] 2 NSWLR 700, Powell J held that a person will be incapable of managing their affairs (for the purposes of the now repealed *Mental Health Act 1958* (NSW)) where they are incapable of dealing in a reasonably competent fashion with ordinary routine affairs and the lack of such competence creates a real risk that they will be disadvantaged in the conduct of their affairs or their money or property may be dissipated or lost; 'it is not sufficient ... merely to demonstrate that the person lacks the high 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': 702.

237 *Re FHW* [2005] QGAAT 50 (2 September 2005) [44].

238 *Re HE* [2013] QCAT 488 (20 August 2013) [52].

239 *Re FHW* [2005] QGAAT 50 (2 September 2005) [45]-[46].

240 For a case where the Tribunal took into consideration the obligations of Aboriginal people to their extended family into account, see *Re BSA* [2014] QCAT 206 (24 April 2014) [14], [18], [21], [22], [30], [49].

9.2 Making and contesting guardianship and administration applications

General principle 1 in schedule 1 to the *Guardianship and Administration Act 2000* (Qld) provides that an adult is presumed to have capacity for all matters. In *Bucknall v Guardianship and Administration Tribunal (No 1)*, Byrne SJA held that the Tribunal *must* apply the presumption that an adult has capacity for a matter in hearing applications for a guardian or administrator to be appointed to a person, hearing applications for a declaration that a person does or does not have capacity for a matter, and hearing a review of the appointment of a guardian or administrator.²⁴¹

Consequently, adults who are the subject of such applications must be deemed to have capacity in order to instruct lawyers to either:

- (a) resist an application for a guardian or administrator to be appointed to them;
- (b) to make an application for a declaration that the adult has capacity for a matter; or
- (c) to make an application for review of the appointment of a guardian or administrator (with the purpose of having the appointment revoked),

provided that the lawyer can obtain coherent instructions from the client in relation to the conduct of the matter.

To adopt any other interpretation would produce an illogical and absurd result that would undermine the presumption of capacity contained in the *Guardianship and Administration Act 2000* (Qld) and the decision of Byrne SJA in *Bucknall*. If lawyers were required to refuse to act for a person the subject of applications before the Tribunal on the basis of impaired capacity, the person would be denied representation despite being presumed to have capacity for the purposes of the proceeding.

Such a denial of representation would also appear inconsistent with section 43(2)(b)(i) of the *Queensland Civil and Administrative Tribunal Act 2009* (Qld), which provides that a party to a proceeding before the Tribunal who is a person with impaired capacity 'may be represented by someone else'.²⁴² Persons with impaired capacity have been referred to as one of 'the categories of parties for whom an as of right entitlement to representation was given'.²⁴³ Writing extra-curially, Member Bridget Mandikos of the Tribunal has stated that where 'a party is ... a person of impaired capacity ... that party is not required to apply to QCAT for permission to be represented as representation is a right under the QCAT Act'.²⁴⁴

241 [2009] 2 Qd R 204, 406-7.

242 See also *Guardianship and Administration Act 2000* (Qld) s 124.

243 *McKinnon v Queensland* [2012] QCAT 169 (5 April 2012) [6] (Senior Member Endicott). But note in that case the Tribunal emphasised that there must be evidence to rebut the presumption of capacity so that the right to representation arises: [21]-[23].

244 Bridget Mandikos, 'Leave for Representation: Section 43 of the Queensland Civil and Administrative Tribunal Act' (2010) 43 Hearsay <http://www.hearsay.org.au/index.php?option=com_content&task=view&id=855&Itemid=48> see section entitled 'How does a party apply for legal representation?'

10 Conducting Civil Proceedings

10.1 Queensland courts

Part 4 of Chapter 3 of the *Uniform Civil Procedure Rules 1999* (Qld) contains provisions concerning the involvement of ‘persons under a legal incapacity’ in civil litigation. The critical test for determining whether the provisions of Part 4 of Chapter 3 apply to require a litigation guardian to be appointed to a person is whether the person is ‘under a legal incapacity.’²⁴⁵ The definition of ‘person under a legal incapacity’ is contained in Schedule 5 to the *Supreme Court of Queensland Act 1991* (Qld). According to that definition, a person is under a legal incapacity if they are under 18 or, more relevantly, they are a ‘person with impaired capacity’.

The term ‘person with impaired capacity’ is further defined in Schedule 5 of the *Supreme Court of Queensland Act 1991* (Qld) to mean ‘a person who is not capable of making the decisions required of a litigant for conducting proceedings or who is deemed by an Act to be incapable of conducting proceedings.’ The mere fact that a person has a psychological incapacity or disability will not of itself mean that they have ‘impaired capacity’ for the purposes of the rules.²⁴⁶ Muir J noted in *Thomson v Smith*:²⁴⁷

The concept of ‘impaired capacity’ concerns a person’s ability to make decisions which must be made in the course of litigation. The existence of a condition or character trait which affects the quality or timeliness of such decisions would not establish ‘impaired capacity’ unless its extent was so gross as to compel the conclusion that the person was relevantly incapacitated. Imprudence or defective judgment, even if resulting from an obsession about the litigation or some aspect of it, normally would not constitute ‘impaired capacity’.

In the context of the Victorian rules of court, it has been held that for a person to have the capacity to conduct civil proceedings ‘the person must be able to understand the nature of the litigation, its purpose and its possible outcomes, including the risks in costs.’²⁴⁸ The decision-specific nature of proceedings was emphasised by Kyrou J in *Slaveski v Victoria*:²⁴⁹

The question of incapacity in relation to litigation must be examined against the facts and subject matter of the particular litigation, the number and complexity of the issues involved and the identity, number and interests of the other parties, particularly opposing parties. A person can have the requisite capacity for one proceeding and lack it for another. Where a person is a party to a proceeding and is legally represented, he or she will be incapable of managing his or her affairs in relation to the proceeding if he or she does not have the mental capacity to understand the nature of the acts or transactions in respect of which he or she needs to give instructions to the lawyer.

In the context of the South Australian rules of court, DeBelle J held in *Dalle-Molle v Manos* that:²⁵⁰

245 *Uniform Civil Procedure Rules 1999* (Qld) r 93(1).

246 See, eg, *Steindl Nominees Pty Ltd v Laghaifar* [2003] QCA 49 (18 February 2003) 4 (Davies JA). In that case, the Court of Appeal held that evidence that a party had a depressive illness following from a physical accident did not ‘prove or even suggest that he was legally incapable’. Cf *Fowkes v Lyons* [2005] QSC 7 (20 January 2005) 3 (Wilson J), where her Honour held that a plaintiff who suffered from paranoid schizophrenia and cannabis abuse had impaired capacity.

247 [2005] QCA 446 (2 December 2005) [132].

248 *Pistorino v Connell* [2012] VSC 438 (25 September 2012) [21]. See also *Goddard Elliott (a firm) v Fritsch* [2012] VSC 87 (16 March 2012) [557].

249 (2009) 25 VR 160, 183. Kyrou J then listed a series of issues that are relevant to determining whether a person has capacity to conduct civil proceedings: 184-5.

250 (2004) 88 SASR 193, 199.

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.

On the issue of whether a person can provide sufficient instructions to a lawyer, *Debelle J* held:²⁵¹

In ordinary usage ‘sufficient’ means ‘of a quantity, extent or scope adequate to a certain purpose or object’: *Oxford English Dictionary*. When qualifying the noun ‘instructions’, it is signifying that the person is able, once an appropriate explanation is given, to understand the essential elements of the action and is able then to decide whether to proceed with the litigation or, if it is a question of agreeing a compromise of the proceedings, to decide whether or not to compromise.

In relation to the lawyer’s role in representing a litigant on an application for a litigation guardian to be appointed to them, Bell J in *Goddard Elliott (a firm) v Fritsch* emphasised that:²⁵²

Where the client does not have [the mental capacity to participate in the proceeding and to instruct], the lawyer does not have the authority to represent them in the proceeding, except for certain limited purposes, most particularly perhaps for the purpose of an inquiry into that question. I say perhaps because they are not really representing the client in that process, but rather assisting the court as an officer of the court.

10.2 Federal Court

Similar to proceedings in Queensland courts, Division 9.6 of the *Federal Court Rules 2011* (Cth) provides for the involvement of ‘persons under a legal incapacity’ in civil proceedings. A person under a legal incapacity may only start or defend a proceeding in the Federal Court by the person’s litigation representative.²⁵³ For the purposes of the *Federal Court Rules 2011* (Cth), a person is under a legal incapacity if they are a minor or a ‘mentally disabled person’.²⁵⁴

A mentally disabled person is defined to mean ‘a person who, because of a mental disability or illness, is not capable of managing the person’s own affairs in a proceeding’.²⁵⁵

In *Owners of Strata Plan No 23007 v Cross*, Edmonds J emphasised that the reference to *proceedings* means the test for capacity is decision-specific and held that for a person to have capacity for the purposes of conducting litigation, the person must have the ability to:²⁵⁶

- (a) understand that they require advice in relation to their legal issue;
- (b) communicate this requirement to someone who could arrange an appointment with a lawyer or arrange such an appointment themselves;

251 *Ibid* 198-9.

252 [2012] VSC 87 (16 March 2012) [549].

253 *Federal Court Rules 2011* (Cth) r 9.61.

254 *Ibid* sch 1 (definition of ‘person under a legal incapacity’).

255 *Ibid* sch 1 (definition of ‘mentally disabled person’).

256 (2006) 153 FCR 398, 413.

- (c) instruct the lawyer with sufficient clarity to enable the lawyer to understand the situation and advise the person appropriately; and
- (d) make decisions and give instructions based on the advice the person may receive from the lawyer and give effect to such advice.

Edmonds J cited with approval the reasoning of Boreham J in *White v Fell* in relation to the capacity to conduct civil proceedings:²⁵⁷

To have that capacity she requires first the insight and understanding of the fact that she has a problem in respect of which she needs advice ... Secondly, having identified the problem, it will be necessary for her to seek an appropriate adviser and to instruct him with sufficient clarity to enable him to understand the problem and to advise her appropriately ... Finally, she needs sufficient mental capacity to understand and to make decisions based upon, or otherwise give effect to, such advice as she may receive.

Edmonds J also cited with approval the reasoning of Chadwick LJ in *Masterman-Lister v Brutton*, where his Lordship held that the issue 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.²⁵⁸

10.3 Family Court and Federal Circuit Court

Under the *Family Law Rules 2004* (Cth), a person with a disability may only start, continue, respond to or seek to intervene in a case before the Family Court by a case guardian.²⁵⁹ A person with a disability is a person who, because of a physical or mental disability, either does not understand the nature or possible consequences of the case or is not capable of adequately conducting, or giving adequate instructions for the conduct of, the case.²⁶⁰ Under the *Federal Circuit Court Rules 2001* (Cth), a person needs a litigation guardian in relation to a proceeding before the Federal Circuit Court if 'the person does not understand the nature and possible consequences of the proceeding or is not capable of adequately conducting, or giving adequate instruction for the conduct of, the proceeding.'²⁶¹

11 Defending Criminal Proceedings

In order to have the capacity to give instructions in relation to the defence of criminal proceedings an accused person must be fit to stand trial. In *R v Presser*, Smith J outlined the matters an accused person must understand in order to be fit to stand trial (called the 'Presser criteria'):²⁶²

257 Unreported, Court of Appeal (England and Wales), Boreham J, 12 November 1987; *Owners of Strata Plan No 23007 v Cross* (2006) 153 FCR 398, 412-3. This passage was also cited with approval by Bell J in *Goddard Elliott (a firm) v Fritsch* [2012] VSC 87 (16 March 2012) [557].


258 *Masterman-Lister v Brutton* (Nos 1 and 2) (CA) [2003] 1 WLR 1511, 1539; *Owners of Strata Plan No 23007 v Cross* (2006) 153 FCR 398, 412.

259 *Family Law Rules 2004* (Cth) r 6.08.

260 *Ibid* Dictionary (definition of 'person with a disability').

261 *Federal Circuit Court Rules 2001* (Cth) r 11.08.

262 [1958] VR 45, 48. His Honour's judgement has subsequently been adopted by the High Court and Queensland Court of Appeal: *Kesavarajah v The Queen* (1994) 181 CLR 230, 243 (Mason CJ, Toohey and Gaudron JJ); *R v M* [2002] QCA 464 (5 November 2002) [4].



He [the accused] needs, I think, to be able to understand what it is that he is charged with. He needs to be able to plead to the charge and to exercise his right of challenge. He needs to understand generally the nature of the proceeding, namely, that it is an inquiry as to whether he did what he is charged with. He needs to be able to follow the course of the proceedings so as to understand what is going on in court in a general sense, though he need not, of course, understand the purpose of all the various court formalities. He needs to be able to understand, I think, the substantial effect of any evidence that may be given against him; and he needs to be able to make his defence or answer to the charge. Where he has counsel he needs to be able to do this through his counsel by giving any necessary instructions and by letting his counsel know what his version of the facts is and, if necessary, telling the court what it is. He need not, of course, be conversant with court procedure and he need not have the mental capacity to make an able defence; but he must, I think, have sufficient capacity to be able to decide what defence he will rely upon and to make his defence and his version of the facts known to the court and to his counsel, if any.

Importantly, if an accused does not satisfy the last criterion, they will not be fit to stand trial but will be fit to plead guilty.²⁶³ In *R v M*, de Jersey CJ (with whom McPherson JA and Mullins J agreed) expanded on the *Presser* criteria and the meaning of fitness for trial:²⁶⁴

Fitness for trial, in relation to the capacity to instruct counsel, posits a reasonable grasp of the evidence given, capacity to indicate a response, ability to apprise counsel of the accused's own position in relation to the facts, and capacity to understand counsel's advice and make decision in relation to the course of the proceedings. It does not extend to close comprehension of the forensic dynamics of the courtroom, whether as to the factual or legal contest. For a person represented by counsel, fitness for trial of course assumes that counsel will represent the client on the basis of the client's instructions. That the giving such instructions may take longer because of intellectual deficit is a feature with which courts should and do bear.

A person whose fitness for trial is in question may be referred to the Mental Health Court for determination of that question. Fitness for trial is defined in the Schedule to the *Mental Health Act 2000* (Qld) in the following manner:

fit for trial, for a person, means fit to plead at the person's trial and to instruct counsel and endure the person's trial, with serious adverse consequences to the person's mental condition unlikely.

263 Legal Aid Queensland, above n 58, 208.

264 [2002] QCA 464 (5 November 2002) [13].

12 Giving Evidence

12.1 Queensland courts

Capacity to give evidence in Queensland courts depends upon whether the evidence will be given under oath. Section 9A(2) of the *Evidence Act 1977* (Qld) provides that 'a person is competent to give evidence in the proceeding if, in the court's opinion, the person is able to give an intelligible account of events which he or she has observed or experienced.' In contrast, section 9B(2) establishes a higher capacity threshold for giving evidence under oath:

a person is competent to give evidence in the proceeding on oath if, in the court's opinion, the person understands that—

- (a) the giving of evidence is a serious matter; and
- (b) in giving evidence, he or she has an obligation to tell the truth that is over and above the ordinary duty to tell the truth.

12.2 Federal courts

Capacity to give evidence in federal courts is determined by section 13(1) of the *Evidence Act 1995* (Cth), which relevantly provides that:

A person is not competent to give evidence about a fact if, for any reason (including a mental, intellectual or physical disability):

- (a) the person does not have the capacity to understand a question about the fact; or
- (b) the person does not have the capacity to give an answer that can be understood to a question about the fact;

and that incapacity cannot be overcome.

13 Voting

The test for capacity to vote is the same for elections to the Commonwealth and Queensland Parliaments. Section 93(8) of the *Commonwealth Electoral Act 1918* (Cth) provides that a person is not entitled to have their name placed on the electoral roll or to vote at an election for the Senate or House of Representatives if 'by reason of being of unsound mind, [the person] is incapable of understanding the nature and significance of enrolment and voting'. Section 64(1)(a)(i) of the *Electoral Act 1992* (Qld) provides that a person is entitled to have their name placed on the electoral roll if they are entitled to be enrolled under the *Commonwealth Electoral Act 1918* (Cth).

14 Jury Service

In order to be eligible to serve on a jury, a person must not have ‘a physical or mental disability that makes the person incapable of effectively performing the functions of a juror’.²⁶⁵ The only two cases to have considered the meaning of this requirement in Queensland have concerned deaf persons who can communicate through an Auslan interpreter. Both indicate that the focus of the test is whether the person’s disability will render them incapable of engaging in jury deliberations. In *Re the Jury Act 1995 and an application by the Sheriff of Queensland*, Douglas J held that a deaf person who could lip read well and who could communicate through an Australian Sign Language (Auslan) interpreter was ineligible for jury service.²⁶⁶ His Honour stated that:²⁶⁷

There seem to me to be considerable risks for the fairness of any trial if one relies simply on the individual’s ability to lip read to qualify her as a juror, given her concession that she may miss parts of some conversations and the likelihood that she may not be aware that conversations are occurring which she cannot observe. There is a very real risk, absent the use of an interpreter, that she will not be able to participate properly in communication among jurors. In those circumstances, and in the absence of legislative provision to facilitate the use of an interpreter to assist her to engage in the jury room discussions, my ruling is that the individual is incapable of effectively performing the functions of a juror and therefore ineligible for jury service.

In an earlier decision of the Tribunal, Member Roney QC held that a deputy District Court registrar did not discriminate against a deaf person, who could lip read proficiently and communicate through an Auslan interpreter, by refusing to include her in the jury selection process.²⁶⁸ The learned Tribunal member noted in reaching his conclusions that:²⁶⁹

Potential jurors who are deaf and require an Auslan interpreter would indeed be persons not ‘incapable of effectively performing the functions of a juror’ at least to the extent that they could participate in the trial process and before they retire to consider their verdict. But of course if all of the other jurors selected on the jury were able to communicate in Auslan, for example, a deaf juror who also used that language would be perfectly able to communicate and participate in the deliberations without the necessity for any other person to be in the jury room. In those circumstances there could be no impediment to the juror effectively performing all the functions of a juror, and that is enabled because of the individual characteristics of his or her fellow jurors...

There is certainly room for doubt as to what the language of section 4(3)(l) is concerned with. It does not seem to me to be open to conclude that its reference to persons with a physical or mental disability means that every person with a disability who may require assistance to perform their duty and cannot do so otherwise, is ipso facto incapable of effectively performing the functions of a juror. It is highly questionable whether incapacity can involve secondary considerations which are not caused by the physical or mental disability itself, but caused by the necessity for example for something else to occur which may or may not be permissible by statute, e.g. to allow for the presence of a non-juror during jury deliberations. I have already rejected, for reasons set out elsewhere, the proposition that jurors to perform their functions it is necessary that they be capable of listening to the evidence given orally in open court.

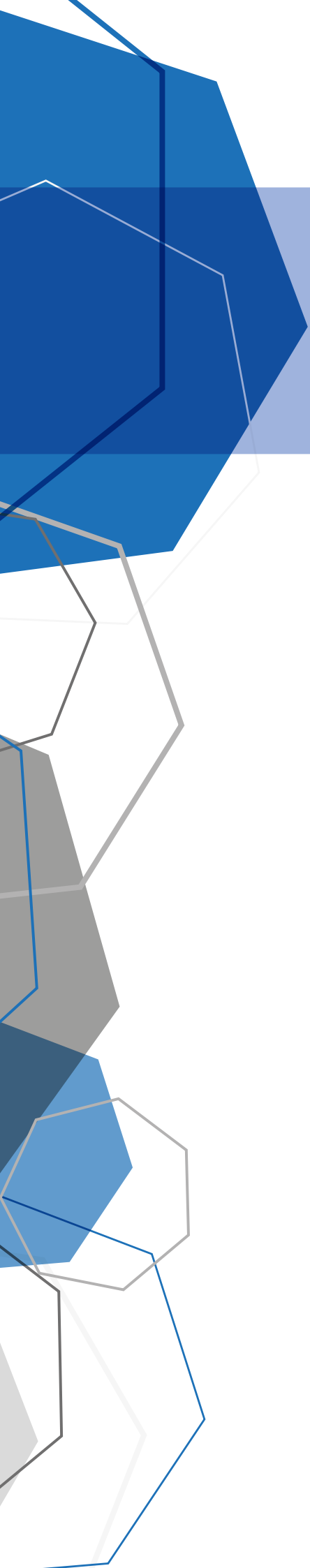
265 *Jury Act 1995* (Qld) s 4(3)(l).

266 [2014] QSC 113 (14 May 2014).

267 *Ibid* [8]-[9].

268 *Lyons v State of Queensland (No 2)* [2013] QCAT 731 (11 December 2013).

269 *Ibid* [148], [187].



Schedule 3

Office of the Public Guardian Guidelines

This Schedule contains the *Guidelines for Witnessing Enduring Documents* published by the Office of the Public Guardian dated 2014. This Schedule **will not** be updated if the Office of the Public Guardian releases updated guidelines. Lawyers are encouraged to access the website of the Office of the Public Guardian for the most up-to-date guidelines.

Guidelines for Witnessing Enduring Documents

This supersedes the 2005 “Capacity guidelines for witnesses of Enduring Powers of Attorney”

Key Points

Witnesses must satisfy themselves that the principal understands the nature and effect of:

- the document they are signing
- the delegation of their decision making powers and
- directions given about future health care.

When taking instructions, witnesses should:

- ask open-ended questions
- take notes, detailing their interview with the principal
- refer the principal to a health care professional if you have doubts about their capacity to understand the document.

Do not witness an enduring document if you have concerns that:

- the principal lacks capacity to understand what they are signing or
- the principal is being unduly influenced by another person to sign the document.

Purpose of these guidelines

In an Enduring Power of Attorney, a person (‘the principal’) delegates to another person the power to make personal and/or financial decisions on his/her behalf. By an Advanced Health Directive, the principal may give directions about health matters and special health matters, for his or her future health care. Assessing the principal’s capacity to understand the nature and likely effects of delegating powers and giving future directions is one of the most important things that a lawyer, Justice of the Peace or Commissioner for Declarations, as a witness to the document, can do.

However an assessment of capacity, by a witness, can be difficult. At times it may give rise to significant personal and professional pressure because the choices made in these circumstances may have to be defended in the future. A witness to the execution of an enduring document has a statutory duty to certify that the principal appeared to have the capacity necessary to make the document (Section 44(4) *Powers of Attorney Act 1998*).

Failing to perform this duty competently could have serious ramifications, not only for you, as the witness, but for the principal. These guidelines will help you to carry out this important statutory duty by:

- highlighting the indicators that may suggest you need to carefully consider a person's capacity
- providing a framework within which to consider the person's capacity, and
- assisting you to determine if you need to refer the person to more specialised assessment.

These guidelines are not meant to be a substitute for a proper or more rigorous assessment of a person's capacity (where that is justified).

Statutory definition

The *Powers of Attorney Act 1998* [Schedule 3] defines 'capacity' for an adult for a matter, as meaning the person is capable of -

- (a) understanding the nature and effect of decisions about the matter; and
- (b) freely and voluntarily making decisions about the matter; and
- (c) communicating the decisions in some way

Section 41 of the *Powers of Attorney Act 1998* addresses a principal's capacity to make an Enduring Power of Attorney. Section 41 states:

(1) A principal may make an enduring power of attorney only if the principal understands the nature and effect of the Enduring Power of Attorney.

(2) Understanding the nature and effect of the Enduring Power of Attorney includes understanding the following matters:

- (a) the principal may, in the Power of Attorney, specify or limit the power to be given to an attorney and instruct an attorney about the exercise of the power;
- (b) when the power begins;
- (c) once the power for a matter begins, the attorney has power to make, and will have full control over, the matter subject to terms or information about exercising the power included in the Enduring Power of Attorney;
- (d) the principal may revoke the Enduring Power of Attorney at any time the principal is capable of making an enduring power of attorney giving the same power;
- (e) the power the principal has given continues even if the principal becomes a person who has impaired capacity;
- (f) at any time the principal is not capable of revoking the Enduring Power of Attorney, the principal is unable to effectively oversee the use of the power.

It should be noted by witnesses that section 47(1) requires the same requisite capacity to revoke an Enduring Power of Attorney as is required to make an Enduring Power of Attorney.

Section 42 of the *Powers of Attorney Act 1998* addresses a principal's capacity to make an Advanced Health Directive. Section 42 states:

(1) A principal may make an advance health directive, to the extent it does not give power to an attorney, only if the principal understands the following matters -

- (a) the nature and the likely effects of each direction in the advance health directive;
- (b) a direction operates only while the principal has impaired capacity for the matter covered by the direction;
- (c) the principal may revoke a direction at any time the principal has capacity for the matter covered by the direction;
- (d) at any time the principal is not capable of revoking a direction, the principal is unable to effectively oversee the implementation of the direction.

Suggested process to satisfy yourself of the principal's capacity to understand the document

Initial contact

As a witness of an enduring document, be aware that, from the first contact with the principal, you will be able to gather information that is relevant to the principal's capacity to understand the document.

Where you know or reasonably consider that the person has a diagnosed condition that may affect his/her decision-making capacity (such as an intellectual or psychiatric disability, acquired brain injury or dementia), take extra care in witnessing the document, or seek a medical opinion verifying the person's capacity.

It is recommended that you meet with the principal alone. This is an opportunity to develop rapport with the principal and to establish the context within which the principal has decided to make the enduring document (for instance, the death of a partner or a serious illness). It is also an opportunity to determine if the person is being influenced into making the enduring document.

During this initial contact, it is reasonable to discuss background, family, health problems or related issues (such as medication that may affect cognitive function, and, in the case of an EPA, the principal's broad financial circumstances including assets, source of income, payment of household and other accounts).

If you are concerned about the principal's cognitive ability, refer the principal to a health care professional to obtain an assessment of their capacity to understand the nature and effect of the enduring document they wish to make. A witness should not rely solely on such a medical report, and must ask additional questions to satisfy themselves of the principal's capacity. You should never witness an enduring document if you doubt the principal's capacity to understand the document.

Indicators of impaired capacity

When you meet the principal, you may see a range of behaviours that indicate impaired capacity. Some early symptoms, particularly in the area of dementia, may mean the person is:

- more forgetful of recent events
- more likely to repeat themselves
- less able to grasp new ideas
- more anxious about having to make decisions
- more irritable or upset if they cannot manage a task
- easily influenced by others about their decisions
- less concerned with activities of other people

- less able to adapt to change
- often losing things or getting lost
- undergoing change in behaviour, and/or
- experiencing change in personality.

People with an intellectual or psychiatric disability may respond differently, and require further questioning to assess their ability to understand an enduring document.

Interview process

Your role as witness in the making of an enduring document is an essential safeguard for people with impaired capacity. An interview is your primary tool in assessing if the principal has the capacity to understand the document.

Always seek an opportunity to meet with the principal alone. Record the questions you ask and the principal's responses.

Preferably, ask the principal to read the enduring document before you attempt to explain it. The document contains a detailed introductory explanation. For vision-impaired people, consider reading the explanatory part of the document first.

When interviewing a principal intending to make an Enduring Power of Attorney, keep your questions 'open ended', not closed. For example, this question requires a yes/no response, which may be inadequate in determining capacity:

You understand what an Enduring Power of Attorney is, don't you?

These questions allow more expansive responses:

- What is an Enduring Power of Attorney?
- Why do you want an Enduring Power of Attorney?
- What sort of decisions will your attorney be making for you?
- Can you limit the attorney's powers if you want to?
- Are you able to give specific instructions to your attorney about decisions to be made?
- What is the extent of the assets over which the attorney will have control?
- How many attorneys can you have?
- Why have you selected this person to be your attorney?
- If you have more than one attorney, who will make decisions concerning you or your finances?
- When will the attorney's power for financial matters begin?
- When will the attorney's power for personal matters begin?
- How long does the attorney's power last?
- Can you change or revoke the Enduring Power of Attorney?
- Is there anything else that will end the attorney's power?
- What would you do if you didn't agree with the attorney's decision?

If the principal cannot answer questions such as these, explain the correct responses, then ask the questions again later in the conversation. For example:

Do you recall that I explained what an Enduring Power of Attorney is? Could you tell me what that explanation was?

When you explain a **financial** Enduring Power of Attorney, cover the following:

- that the principal is appointing someone to his/her behalf

- that the attorney will be able to assume authority to the extent indicated over the principal's financial affairs (such as selling his/her house)
- that the authority for the attorney begins once the document is completed (unless otherwise specified)
- that the attorney will be able to do anything with the principal's personal property (money etc.) and real property (real estate) that the principal could do
- that the authority will continue should the principal have impaired capacity, and
- that if the principal should lose capacity, the power will be irrevocable.

When you explain a **personal** Enduring Power of Attorney, cover the following matters:

- that the attorney's power starts only after the principal has lost capacity for decision making
- that the attorney will be able to assume authority to the extent indicated over the principal's personal affairs (such as health care, where the adult lives and with whom, and day-to-day issues)
- that the attorney will be able to do anything that the principal can do, and
- that if the principal loses decision-making ability, the power to the attorney will be irrevocable.

When interviewing a principal intending to make an Advanced Health Directive, you should ask questions such as:

- has your doctor explained any medical terms or other words that you are unclear about? (identify a medical term in the document and ask the principal what it means)
- have you discussed your decisions with family members or close friends?, if yes, ask what did they say?
- what you would want your medical treatment to achieve if you become ill?
- If treatment could prolong your life, what level of quality of life would be acceptable to you?
- how important is it to you to be able to communicate with family and friends?

When you explain an advanced health directive, cover the following matters:

- that the principal may make an advance health directive, to the extent it does not give power to an attorney
- that a direction operates only while the principal has impaired capacity for the matter covered by the direction
- that the principal may revoke a direction at any time the principal has capacity for the matter covered by the direction
- that at any time the principal is not capable of revoking a direction, the principal is unable to effectively oversee the implementation of the direction.

Where a principal is making an Advanced Health Directive, it is strongly recommended that they discuss it with their general practitioner or a specialist medical practitioner who knows their medical history and views.

If the principal has problems answering the questions after you have explained, it is advisable that you suggest that a professional opinion be sought about the principal's capacity to make an enduring document. This could be obtained from an appropriately qualified medical practitioner or another professional with expertise in cognitive assessment, e.g. neuropsychologist.

A medical assessment gives you additional information about the principal's capacity to understand the document. However, the decision about whether the principal has capacity to execute the enduring document remains with you, as the witness.

Be cautious if you observe behaviour or have interactions with the principal that are inconsistent with the information contained in the medical assessment.

Note taking

When assessing capacity to understand an enduring document, be prepared for any challenges to your assessment of the principal. It is good practice to make a written record of all the steps you have taken in assessing capacity (including all questions and answers).

Also record other witnesses' opinions about the principal's capacity or lack of capacity to understand an enduring document. It is important to record basic information such as the date, time of the interview, who was present, the length of the interview and the location.

Concerns

Making an enduring document is a significant matter. The principal should consider seeking professional advice from his/her solicitor, the Public Trustee or a trustee company before signing this document.

If you suspect that a person is abusing or exploiting someone who is about to become the principal, or is currently the principal, to an Enduring Power of Attorney, you can contact the Investigations Team at the Office of the Public Guardian to discuss your concerns.

Contact Details

Office of the Public Guardian Head Office
Phone: 3234 0870 or 1300 653 187 Health Care Consent line: 1300 753 624
e-mail: Adult@publicguardian.qld.gov.au
web: www.publicguardian.qld.gov.au

The Public Trustee
PO Box 1449
BRISBANE QLD 4001
Phone: 1300 651 591 or (07) 3213 9288
Website: www.pt.qld.gov.au

Endnote:

See Darzins, Dr P, Molloy, Dr W & Strang, Dr D (Eds) (2000) Who Can Decide: The six step capacity assessment process. Memory Australia Press: Adelaide.

Obtainable from alzasa@alzheimerssa.asn.au.

Schedule 4

Referral Letter to Medical Professional

Dear Doctor Black

Mr John Smith – DOB 28/07/1952 – Capacity to Execute Power of Attorney

We act for Mr John Smith.

We understand that you are Mr Smith's psychiatrist.


Mr Smith has authorised us to request that you provide us with a report on whether, in your opinion, Mr Smith has the legal capacity to execute the **enclosed** enduring power of attorney. We also **enclose** our authority from Mr Smith for you to disclose all necessary information to us.

Pursuant to the terms of the power of attorney, Mr Smith seeks to appoint his de facto partner Ms Brown to be his attorney for all financial matters and all personal matters (which includes a broad range of matters such as where and with whom Mr Smith lives, day-to-day matters such as diet and dress, and health care). Ms Brown's powers as attorney will only begin when Mr Smith becomes incapacitated.

In order for Mr Smith to have legal capacity to execute this power of attorney in the first place, he must understand the nature and effect of the power of attorney. This means that Mr Smith must understand the following matters:

- 1 he may specify or limit the power to be given to Ms Brown and instruct Ms Brown about the exercise of the power;
- 2 when the power begins (in this case, when he becomes incapacitated);
- 3 once the power begins, Ms Brown has power to make, and will have full control over, the all financial and personal matters subject to terms or information about exercising the power included in the enduring power of attorney;
- 4 he may revoke the enduring power of attorney at any time he is capable of making an enduring power of attorney giving the same power (that is, while Mr Smith has or regains capacity);
- 5 the power Mr Smith has given continues even if he becomes a person who has impaired capacity; and
- 6 at any time Mr Smith is not capable of revoking the enduring power of attorney, he is unable to effectively oversee the use of the power.

We consider the following information may also be relevant to your examination of Mr Smith:

- 
- 7 Mr Smith has two children from a previous marriage: Mrs Sally Place and Mr Brian Smith.
 - 8 Mr Smith is estranged from his son but still maintains close contact with his daughter.
 - 9 Mrs Place and Ms Brown do not enjoy an amicable relationship.
 - 10 Mr Smith is adamant that Mrs Sally Place should not be appointed as a co-attorney under the power of attorney.

If you have any questions or require any further clarification of the relevant legal test for capacity or any information in relation to Mr Smith, please do not hesitate to contact us.

Yours faithfully

Schedule 5

Bibliography

1 Articles, Books and Reports

American Bar Association, *Model Rules of Professional Conduct* (at 2013)

Australian Government, National Health and Medical Research Council, Office of the Privacy Commissioner, *Use and disclosure of genetic information to a patient's genetic relatives under section 95AA of the Privacy Act 1988 (Cth): Guidelines for health practitioners in the private sector* (15 December 2009) Office of the Australian Information Commissioner <[http://www.oaic.gov.au/images/documents/migrated/2009-12-16045841/E96%20Privacy%20Act%20\(95AA\).pdf](http://www.oaic.gov.au/images/documents/migrated/2009-12-16045841/E96%20Privacy%20Act%20(95AA).pdf)>

Australian Law Report Commission, *Equality, Capacity and Disability in Commonwealth Laws*, Issues Paper No 44 (November 2013) <http://www.alrc.gov.au/sites/default/files/pdfs/publications/whole_ip_44.pdf>.

Brereton, Justice Paul, 'Acting for the incapable – a delicate balance' (2012) 35 *Australian Bar Review* 244

Endicott, Clare, 'Client Capacity and Professional Standards' (Paper presented at Queensland Law Society Elder Law Conference, 17 July 2009) <<http://ethics.qls.com.au/sites/all/files/Client%20Capacity%20&%20Professional%20Standards%20-%20Clare%20Endicott%20QLS%20Elder%20Law%20Conference%202009.pdf>>

Gallagher, James and Cara Kearney, 'Representing a Client with Diminished Capacity: Where the Law Stands and Where It Needs to Go' (2003) 16 *Georgetown Journal of Legal Ethics* 597

Hamilton, Barbara and Tina Cockburn, 'Capacity to make a Will and Enduring Power of Attorney: Issues new and old' (2008) 38 *QLS Journal* 14

Hayes, Susan, *Hayes Ability Screening Index Record Booklet* (University of Sydney, 2000)

Laster, Kathy and Veronica Taylor, *Interpreters and the Legal System* (Federation Press, 1994)

- Law Council of Australia, *Australian Solicitors' Conduct Rules 2011 and Consultation Draft Commentary* (19 October 2012) <<http://www.lawcouncil.asn.au/lawcouncil/images/LCA-PDF/docs-2000-2099/2012October19-ConsultationDraftCommentary.pdf>>
- Legal Aid Queensland, *Criminal Law Duty Lawyer Handbook* (5th ed, 2012) <<http://www.legalaid.qld.gov.au/publications/Practitioners-service-providers/Documents/duty-lawyer-handbook/criminal-law-duty-lawyer-handbook.pdf>>
- Legal Aid Queensland, *Grants Handbook* (10 April 2013) <<http://www.legalaid.qld.gov.au/about/Policies-and-procedures/Grants-handbook/What-do-we-fund/Nature-and-extent-of-funding/Civil-law/Expert-reports-in-civil-law-matters/Pages/default.aspx>>
- Mandikos, Bridget, 'Leave for Representation: Section 43 of the Queensland Civil and Administrative Tribunal Act' (2010) 43 *Hearsay* <http://www.hearsay.org.au/index.php?option=com_content&task=view&id=855&Itemid=48>
- Molloy, William and Doug Drummond, *Standardized Mini-Mental State Examination (SMMSE), Ministry of Health, Province of British Columbia* <<http://www.health.gov.bc.ca/pharmacare/adi/clinician/pdf/ADTI%20SMMSE-GDS%20Reference%20Card.pdf>>
- Office of the Australian Information Commissioner, *Australian Privacy Principles (APP) Guidelines* (August 2013) <<http://www.oaic.gov.au/images/documents/privacy/applying-privacy-law/app-guidelines/chapter-b-app-guidelines-v1.1.pdf>>
- Office of the Federal Privacy Commissioner, *Guidelines on Privacy in the Private Health Sector* (8 November 2001) Office of the Australian Information Commissioner <http://www.oaic.gov.au/images/documents/migrated/migrated/hg_01.pdf>
- Office of the Public Advocate (Victoria), 'Marriage' (Practice Guideline No 13, Office of the Public Advocate, July 2007) <http://www.publicadvocate.vic.gov.au/file/file/PracticeGuidelines/PG13_Marriage_09.pdf>
- O'Neill, Nick and Carmelle Peisah, *Capacity and the Law* (Sydney University Press and the Australian Legal Information Institute, 2011)
- Queensland Government, Queensland Health, *Health Services Act 1991: Part 7 – Confidentiality Guidelines* (February 2012) <http://www.health.qld.gov.au/foi/docs/conf_guidelines.pdf>
- Queensland Law Society, *Australian Solicitors Conduct Rules* (at 1 June 2012)
- Queensland Law Society, *Barristers' Conduct Rules* (at 23 December 2011)
- Sabatino, Charles, 'Representing a Client with Diminished Capacity: How Do You Know It And What Do You Do About It?' (2000) 16 *Journal of the American Academy of Matrimonial Lawyers* 481
- Taylor, Andrew, 'Representing Clients with Diminished Capacity' (2010) 48 (February) *Law Society Journal* 56
- Wells, Jonathan, 'Lawyers' doubts about client capacity: an ethical framework' (2014) 36(5) *Law Society Bulletin (South Australia)* 38
- Willmott, Lindy and Benjamin White, 'Solicitors and enduring documents: current practice and best practice' (2008) 16(3) *Journal of Law and Medicine* 466

2 Capacity Guidelines

The Bar Council (UK), *Client Incapacity* (February 2014) 5 <<http://www.barcouncil.org.uk/for-the-bar/professional-practice-and-ethics/client-incapacity/>>

Client Capacity Committee of the Law Society of South Australia, *Statement of Principles with Guidelines* (2012) <<http://www.lawsocietysa.asn.au/PDF/ClientCapacityGuidelines.pdf>>

Client Capacity Sub-Committee, *Client Capacity Guidelines: Civil and Family Law Matters* (2009) Law Society of New South Wales <<http://www.lawsociety.com.au/ForSolicitors/professionalstandards/Ethics/Protocolsguidelines/Clientcapacityguidelines/index.htm>>

Law Society of New South Wales, *When a client's capacity is in doubt: A Practical Guide for Solicitors* (2009) <<http://www.lawsociety.com.au/cs/groups/public/documents/internetcontent/023880.pdf>>

Office of the Public Guardian, *Guidelines for Witnessing Enduring Documents* (2014) Department of Justice and Attorney General <http://www.publicguardian.qld.gov.au/__data/assets/pdf_file/0009/269307/OPG-Fact-Sheet_Guidelines-for-Witnessing-Enduring-Documents.pdf>

Queensland Law Society, 'I have doubts about my client's capacity – what should I do?' (2013) Queensland Law Society Ethics Centre <<http://ethics.qls.com.au/content/faq/doubts-client-capacity>>

3 Cases

AK v NC (2004) FLC 93-178

Adult Guardian (Re Enduring Power of Attorney of Vera Hagger) v Hagger (Unreported, Supreme Court of Queensland, Chesterman J, 16 April 2002, 1083 of 2001)

Anderson v Anderson [2013] QSC 8 (22 February 2013)

Babich v Sokur [2007] FamCA 236 (9 March 2007)

Banks v Goodfellow (1870) LR 5 QB 549

Barrand v Coxall [1999] QSC 352 (30 November 1999)

Bergmann v DAW [2010] QCA 143 (11 June 2010)

Bergmann v Dengiz [2010] QDC 18 (10 February 2010)

Beverley v Watson [1995] ANZ ConvR 369

Borchert v Terry [2009] WASC 322 (6 November 2009)

Borthwick v Carruthers (1787) 1 TR 648

Boughton v Knight (1873) LR 3 P & D 64

Boyse v Rossborough (1857) 10 ER 1192

Bucknall v Guardianship and Administration Tribunal (No 1) [2009] 2 Qd R 204

Cosham v Cosham (1899) 25 VLR 418

Dalle-Molle v Manos (2005) 88 SASR 193

Fowkes v Lyons [2005] QSC 7 (20 January 2005)

Frizzo v Frizzo [2011] QCA 308 (1 November 2011)
Frizzo v Frizzo [2011] QSC 107 (12 May 2011)
Ghosn v Principle Focus Pty Ltd (No 2) [2008] VSC 574 (19 December 2008)
Gibbons v Wright (1954) 91 CLR 423
Goddard Elliott (a firm) v Fritsch [2012] VSC 87 (16 March 2012)
Hunter and New England Area Health Service v A (2009) 74 NSWLR 88
J (by her next friend) v J [1953] P 186
Jones v Jones [2012] QSC 113 (27 April 2012)
Kerr v Badran [2004] NSWSC 735 (17 August 2004)
Kesavarajah v The Queen (1994) 181 CLR 230
L v Human Rights and Equal Opportunity Commission [2006] FCAFC 114
Law Society of NSW v Foreman (No 2) (1994) 34 NSWLR 408
Lawrence v Federal Magistrate Driver [2005] FCA 394 (15 April 2005)
Legal Services Commissioner v Ford [2008] LPT 12 (22 August 2008)
Legal Services Commissioner v Towers [2006] LPT 3 (22 May 2005)
Lyons v State of Queensland (No 2) [2013] QCAT 731 (11 December 2013)
Manches v Trimborn (1946) 174 LT 344
Masterman-Lister v Brutton (Nos 1 and 2) (CA) [2003] 1 WLR 1511
McD v McD [1983] 3 NSWLR 81
McKinnon v Queensland [2012] QCAT 169 (5 April 2012)
Owners of Strata Plan No 23007 v Cross (2006) 153 FCR 398
P v R [2003] NSWSC 819 (9 September 2003)
Pates v Craig [1995] NSWSC 87 (19 October 1995)
Pistorino v Connell [2012] VSC 438 (25 September 2012)
Privet v Vovk (2005) 195 FLR 191
R v M [2002] QCA 464 (5 November 2002)
R v McNaughten (1843) 10 Cl & Fin 200
R v P (2001) 53 NSWLR 664
R v Presser [1958] VR 45
Ranclaud v Cabban (1988) NSW ConvR 55-385
Re An Alleged Incapable Person (1959) 77 WN (NSW) 156
Re Bridges [2001] 1 Qd R 574
Re BRT [2012] QCAT 128 (20 March 2012)
Re BSA [2014] QCAT 206 (24 April 2014)
Re C (Adult: Refusal of Medical Treatment) [1994] 1 WLR 290
Re C (TH) and the Protected Estates Act [1999] NSWSC 456 (3 May 1999)
Re CAC [2008] QGAAT 45 (5 June 2008)

Re Cumming (1852) 42 ER 660
Re EEP [2005] QGAAT 45 (24 August 2005)
Re Estate of Park; Park v Park [1954] P 112
Re FHW [2005] QGAAT 50 (2 September 2005)
Re Griffith; Easter v Griffith (1995) 217 ALR 284
Re HE [2013] QCAT 488 (20 August 2013)
Re Hodges; Shorter v Hodges (1988) 14 NSWLR 698
Re MAD [2007] QGAAT 56 (28 August 2007)
Re Marriage of Brown; Dunne v Brown (1982) 60 FLR 212
Re MB (Caesarean section) [1997] 2 FLR 426
Re MC [2010] QCAT 677 (2 December 2010)
Re T (Adult: Refusal of Treatment) [1993] Fam 95
Re the Jury Act 1995 and an application by the Sheriff of Queensland [2014] QSC 113 (14 May 2014)
Read v Carmody [1998] NSWSC 182 (23 July 1998)
Richard Buxton (a firm) v Mills-Owen [2010] 4 All ER 405
Richmond v Branson [1914] 1 Ch 968
Ruskey-Fleming v Cook [2013] QSC 142 (3 June 2013)
SA v Manonai [2008] WASCA 168 (15 February 2008)
Sharp v Adam [2006] EWCA Civ 449 (28 April 2006)
Slaveski v Victoria (2009) 25 VR 160
Steindl Nominees Pty Ltd v Laghaiifar [2003] QCA 49 (18 February 2003)
Thomson v Smith [2005] QCA 446 (2 December 2005)
Till v Nominal Defendant [2010] QSC 121 (22 April 2010)
Tobin v Ezekiel [2011] NSWSC 81 (1 March 2011)
Total Trading SRL v Nastri [2007] VSC 313 (31 August 2007)
White v Fell (Unreported, Court of Appeal (England and Wales), Boreham J, 12 November 1987)
XYZ (Guardianship) [2007] VCAT 1196 (29 June 2007)
Yonge v Toynbee [1910] 1 KB 215

4 Legislation

Commonwealth Electoral Act 1918 (Cth)
Criminal Code 1899 (Qld)
Electoral Act 1992 (Qld)
Evidence Act 1977 (Qld)
Family Law Rules 2004 (Cth)
Federal Circuit Court Rules 2001 (Cth)



Federal Court Rules 2011 (Cth)
Forensic Disability Act 2011 (Qld)
Guardianship and Administration Act 2000 (Qld)
Health Services Act 1991 (Qld)
High Court Rules 2004 (Cth)
Hospital and Health Boards Act 2011 (Qld)
Jury Act 1995 (Qld)
Legal Profession (Australian Solicitors Conduct Rules) Notice 2012 (Qld)
Legal Profession (Barristers Rules) Notice 2011 (Qld)
Legal Profession Act 2007 (Qld)
Marriage Act 1961 (Cth)
Mental Health Act 2000 (Qld)
National Disability Insurance Scheme Act 2013 (Cth)
Powers of Attorney Act 1998 (Qld)
Public Guardian Act 2014 (Qld)
Supreme Court of Queensland Act 1991 (Qld)
Uniform Civil Procedure Rules 1999 (Qld)

5 Treaties

Convention on the Rights of Persons with Disabilities, opened for signature
30 March 2007, 999 UNTS 3 (entered into force 3 May 2008)

6 Other

A list of community legal centres is available on the Queensland Association of Independent Legal Services Inc website <<http://www.qails.org.au/>>.

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