You are not God

When instructions are clear, you must prepare the will

Earlier this year, Queensland Law Society invited me to co-present a webinar on the issue of testamentary capacity with ethics solicitor Shane Budden (with whom I also co-wrote this column).

This year, the QLS Ethics and Practice Centre noted a marked increase in enquiries around the theme of what is the role of a solicitor in taking will instructions?

This column extracts the key elements from our webinar and is designed to assist practitioners by providing a succinct guide to our role and responsibilities.[1]

Solicitors have a duty to follow their client's lawful, proper and competent instructions,[2] and all adults are presumed to have capacity unless otherwise proven.[3] Generally speaking, a client who lacks capacity cannot provide instructions and a solicitor has a duty of care not to follow instructions when the client lacks the capacity to give them.[4]

However, will instructions occupy a more complicated space, in that they can often be given in circumstances in which capacity is in question (and not definitively established or ruled out). A solicitor's duty is to take will instructions;[5] if the instructions are not coherent, the solicitor is considered on notice that capacity may be impaired, and they must take steps to assess the client's capacity.[6]

Capacity is a legal test, not a medical one.

The courts have provided guidance for solicitors faced with will instructions from clients whose capacity is not definitively established, and that guidance consistently favours the taking of the instructions and the drafting of the will if this is possible. In the Canadian decision of *Scott v Cousins*[7] Collity J said:

"[C]areful solicitors…will not play God – or even judge – and will supervise the execution of the will while taking, and retaining, comprehensive notes of their observations on the question [of capacity]."

Similarly, in *Petrovski v Nasev; The Estate of Janakievska,*[8] the New South Wales Court of Appeal cited with approval the advice concerning the taking of instructions contained in Mason & Handler's *Wills, Probate and Administration Service NSW* (Butterworths):

"(i) The solicitor who is to draw the will should attend on the testator personally and fully question the testator to determine capacity – the questions should be directed to ascertain whether the testator understands that he is making a will and its effects, the extent of the property of which he is disposing and the claims to which he ought to give effect;

"(ii) One or more persons should be present, selected by the solicitor having regard to their calibre as witnesses if required to testify whether the issue of capacity is raised. Where possible, one of the witnesses should be a medical practitioner, preferably the doctor who has been treating the testator and is familiar with him, who should in making a thorough examination of the testator's condition, question him in detail and advise the solicitor as to the capacity and understanding of the testator. The presence of other persons at this time would require the testator's consent;

"(iii) A detailed written record should be made by the solicitor, the results of the examination recorded by the medical practitioner and notes made by those present.

"If after careful consideration of all the circumstances the solicitor is not satisfied that the testator does not have testamentary capacity he should proceed and prepare the will. It is a good general practice for the solicitor who took instructions to draw the will and be present on execution and this practice should not be departed from in these circumstances. On execution, the attesting witnesses should, where possible, come from those persons (including the solicitor) referred to above who were present at the time of instructions and, again, as at every stage, detailed notes of the events and discussions taken.

"If those questions and the answers to them, leave the solicitor in real doubt as to what should be done, other steps may be desirable. This may include obtaining a more thorough medical appraisal or, if the testator declines, considering whether the will can be properly drawn, should assurance on testamentary capacity fail to satisfy the test just quoted."

Given that wills can be taken when the end of life is near, urgency is required and the opportunity for extensive testing of capacity is limited, it is imperative that solicitors draft a will if clear instructions can be obtained. However, as taking instructions from an enfeebled testator whose capacity may be questioned comes with significant risk, steps must be taken to protect the interests of all concerned.[9] At the very least practitioners faced with this scenario would be assisted by the following:

- take such steps as are possible to assess capacity in the circumstances
- take instructions from the testator in person
- have witnesses present who are not beneficiaries and who also make notes of the attendance
- have the testator sign the notes of the attendance if possible.

back to contents

with Christine Smyth and Shane Budden

It is a strange anomaly that we are in an era in which practitioners are burdened with downward pressure on costs and upward pressure on practice and process. There is no doubt that complying with these steps is time-consuming and increases the risk a solicitor will be called upon to give evidence on a will dispute.

Conversely, many clients are price, simplicity and time sensitive. Their expectations and demands do no often align. However, there remains scope for practitioners to educate clients on the cost/benefit value of having a solicitor involved in the process, most importantly for when the testator passes and the will comes into effect.

To assist practitioners, the QLS Ethics and Practice Centre is developing an Ethics Note on the role of a solicitor in regard to the question of testamentary capacity. Any feedback from practitioners is welcome – please email ethics@qls.com.au .

Christine Smyth is Immediate Past President of Queensland Law Society, a QLS Accredited Specialist (succession law) and Partner at Robbins Watson Solicitors. She is a member of the QLS Council Executive, QLS Council, QLS Specialist Accreditation Board, the Proctor Editorial Committee, STEP, and an Associate Member of the Tax Institute. Shane Budden is a QLS ethics solicitor.

Notes

1. A more extensive analysis of a practitioner's role and duties is available through the *Queensland Handbook for Practitioners on Legal Capacity*.
2. Rule 8, Australian Solicitors Conduct Rules 2012.
3. *Murphy v Doman* (2003) 58 NSWLR 51.
4. *Goddard Elliott v Fritsch* [2012] VSC 87 at paragraph 418.
5. *Ryan v Public Trustee* [2000] 1 NZLR 700; see also WA Lee and AA Preece, *Lee's Manual of Succession Law*, fifth edition, LBC, page [307].
6. GE Dal Pont, KF Mackie, *Law of Succession* (LexisNexis Butterworths, 2013) 750.
7. (2001) 37 ETR (2d) 113 at [70].
8. [2011] NSWSC 1275 (17 November 2011) at 89.
9. *Pates v Craig and Public Trustee, Estate of Cole* [1995] NSWSC 87 [142]-[148].