

What's new in succession law

Loss of capacity – an issue for all lawyers

with Christine Smyth



“The husband in this case is not the first nor will he be the last litigant who thinks he is smarter than those advising him. Nor will the husband be the first or last litigant to make foolish decisions. That in my view does not make him a person with a disability.”¹

Many of us have irrational, demanding, clamorous clients, often when involved in complex legal matters. However, we also know that cognitive decline frequently involves this kind of conduct. So, at what point does the behavior of a client raise questions as to their capacity and invoke our duty to the court to bring it to the court's attention?

Wembley & Wooten (Wembley),² a recent decision of the Family Court, examines the capacity of a client to conduct litigation and the duty of the acting solicitor to bring their concerns before the court. It draws on the decisions of *Goddard Elliot (a Firm) v Fritsch* [2012] VSC 87 (*Goddard*) and *Pistorino v Connell* [2012] VSC 438 (*Pistorino*),³ distinguishing the facts of *Pistorino*, while affirming the applicable legal principles enunciated in both decisions.

All adults are presumed to have capacity, unless the contrary is established on the balance of probabilities.⁴ Rule 8 of the Australian Solicitors Conduct Rules 2012 requires a solicitor to follow a client's lawful, proper and competent instructions.

Here we are concerned with “competent”. Capacity is to be determined according to the context.⁵ When certain factors are present, solicitors have a duty to ensure the client has the requisite legal capacity before either taking instructions or assisting them to make a legal decision which will affect their interests.⁶

In *Wembley*, the husband's solicitor became increasingly concerned as to his client's ability to properly give instructions. In August, 2017 (five months prior to the application) he wrote to the husband's treating psychiatrist querying his client's capacity. In September, 2017 the psychiatrist reported that their mutual client did “not presently present with prominent cognitive impairment”.

Notwithstanding, the solicitor maintained his concerns, bringing an application before the court. The solicitor's evidence included

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Talk sense to a fool and he calls you foolish.”

– Euripides, *The Bacchae*

the husband being affected by alcohol consumption, his heavy chain-smoking, reluctance to attend the solicitor's office, believing his solicitor was wrong, the husband's behaviour at the conciliation conference, and inappropriate email communications.⁷

Having regard to those factors and his duties to the court under the provisions of the *Legal Profession Uniform Law Application Act 2014* (Vic.),⁸ and *Goddard*, the husband's solicitor brought an application for a case guardian to be appointed on behalf of his client.⁹ The husband did not oppose the application, counterintuitively, he “indicated to the Court that he proposes to continue instructing the applicant in this case”,¹⁰ regardless of the outcome.

In *Goddard*, Bell J articulated the solicitor's duty as follows:

“...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.”¹¹

There was supporting evidence from the wife's affidavit material exhibiting the husband's medical history,¹² which included “Chronic Post Traumatic Stress Disorder (PTSD), Major Depressive Disorder-Recurrent and Alcohol Use Disorder and a history of prominent longstanding intermittent depressive symptoms, low moods associated with despondency (not suicidal), disturbed sleep, social avoidance and symptoms of anhedonia and amotivation”,¹³

Upon the application being made, the court ordered that the husband attend further medical examination. The medical evidence was that the husband could “adequately conduct and give adequate instructions for the conduct of the case”¹⁴ with the caveat that the doctor was not privy to the privileged sealed evidence of the husband's solicitor.¹⁵

Ultimately, the court found that the husband had the requisite capacity.

The difficulty with these matters is not that the client must have completely lost capacity, to the extent of invoking an enduring power of attorney, but rather “[t]he standard of capacity which is required for a person to participate in legal proceedings is the same standard of capacity which is required for a person to enter into legal transactions.”¹⁶

One in five people between the ages of 16 and 85 suffer a mental illness in any year,¹⁷ which, while not impacting their overall capacity, may impact their capacity to engage in legal matters. Practitioners may now, more than ever before, need to be live to their duties in this context. It is an onerous duty and one that may call for the practitioner contemplating such applications within the client retainer.

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Notes

¹ *Wembley & Wooten* [2018] FamCA 334 at [31].

² [2018] FamCA 334.

³ See page 40 of the October 2013 edition of *Proctor* for a previous article by this writer on these cases.

⁴ *Hawkes v Wilkie* [2012] NSWSC 1039 – the question was whether the elderly person had the capacity to create a trust by which she gave \$300,000. Upon the death of the elderly person, the question of her capacity to make the gifts and to create the trust was litigated and very much turned on the evidence. See also: *Eg, Re Bridges* [2001] 1 Qd R 574; *Re T* [1992] 4 All ER 649, 664 (Lord Donaldson MR).

⁵ *Gibbons v Wright* (1954) 91 CLR 423.

⁶ *Legal Services Commissioner v Ford* [2008] LPT 12; *Legal Services Commissioner v Comino* [2011] QCAT 387; *Legal Services Commissioner v de Brenni* [2011] QCAT 340.

⁷ At [22] much of the evidence was sealed due to client confidentiality.

⁸ Equivalent Queensland provisions are found in the Australian Solicitor Conduct Rules.

⁹ At [1].

¹⁰ At [32].

¹¹ At [6].

¹² At [11].

¹³ At [13].

¹⁴ At [17].

¹⁵ At [17].

¹⁶ At [23] citing the passage from *Goddard* at 554-555.

¹⁷ blackdoginstitute.org.au/docs/default-source/factsheets/facts_figures.pdf?sfvrsn=8.