WHAT'S NEW IN SUCCESSION LAW

Capacity, clarity, contradictors and civil procedure

Hyytinen v Palmer & Anor [2020] QSC 240
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For succession lawyers mental capacity issues extend far beyond the requirement for a mere will.

These days clients have any number of complex asset classes undertaking any number of decisions in giving effect to a succession plan. Accordingly, there is a broad range of mental capacity contexts that must be considered, from engagement and instructions, through to post-death implementation.

To that end, we know there is no one test for mental capacity. It sits on a continuum and is context specific.

"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 or what he is doing by his participation."[1]

Where a question of mental capacity is raised, particularly in the context of a litigation, solicitors have a fundamental duty to the court to bring it to the court's attention.[2] In doing so use of medical evidence will often be relied on, but it is not determinative.[3]

It is common for medical opinions to be sought for a wide range of legal matters. Unfortunately, even the most minor of a comment in a medical report, regarding questions of capacity, can create a mischief and a consequential burden for clients and their solicitors to address. It is further compounded when deeds of settlement contain precedent clauses that raise matters of mental capacity.

The decision of *Hyytinen v Palmer & Anor* [2020] QSC 240[4] (*Hyytinen*) is one such matter where both occurred, demonstrating the consequences that flow, when imprecision infiltrates the documentation.

In *Hyytinen*, the matter before the court was an application for sanction of a deed of settlement of a personal injuries claim. The deed included an introductory clause:

"Subject to the sanction by the Queensland Supreme Court or a declaration of capacity by QCAT, the matter is settled on the following terms…"[5]

The difficulty was that the applicant plaintiff did not consider she lacked capacity for the matter. However, the inclusion of that clause raised doubt, necessitating an application to the court. The court observed that the "inclusion of this form of words regrettably made it necessary".[6]

The genesis of the issue arose from a "throwaway line"[7] in a psychiatric report, which stated, "I believe she would require assistance in managing any financial award".[8] There was no other "evidence suggestive of any issue with capacity".[9]

In considering the matter, the court exposed the ambiguity and peril in the "throwaway line" by noting "[t]he same observation might be made of many people who do not lack any legal capacity but are not particularly good with their money".[10] The court found that "even if the comment were intended to mean that the applicant lacks capacity, such a view is convincingly contradicted by the preponderance of other evidence relevant to the point".[11] And so, the court determined the applicant did "not have impaired capacity regarding a financial matter and is not a person under a legal disability".[12]

However, the matter did not end there, because the respondent defendants did not "resist the application or take any point about the declarations being sought".[13] In taking that approach their position raised questions as to whether there was a contradictor to the application for the declaration of capacity. If not, then the law required that the declaration should not be made.[14]

Henry J identified "[t]he real issue in the application goes to the proper mechanism for relief",[15] citing section 10(2) *Civil Proceedings Act 2011*:

"The court may hear an application for a declaratory order only and may make a declaratory order without granting any relief as a result of making the order."[16]

In examining the application of that provision, Henry J noted it was in similar "terms to s10 *Equity Act 1901* (NSW)", which was considered in *Forster v Jododex Australia Pty Ltd* (1972) 127 CLR 421 at 437 where Gibb J cited *Russian Commercial and Industrial Bank v The British Bank for foreign Trade*:

"the question must be a real, not a theoretical question; the person raising must have a real interest to raise it; he must be able to secure a proper contradictor, that is to say, someone presently existing who has a true interest to oppose the declaration sought."

Henry J found that passage was addressing sufficiency of standing to oppose rather than a requirement they actively oppose. In support of his view, he affirmed this statement of law,[17] "where the Court held it had power to order a declaration when a party who has an interest to oppose the declaratory relief sought, nonetheless, decides not to oppose it. The Court observed the participation of a party with an interest to oppose the declaratory relief sought meant there was a proper contradictor."[18]

Here the court found that "a contradictor clearly does exist here, has notice of the application and, indeed, appears. That the contradictor, in the form of the respondent defendants, does not oppose the declarations, is no obstacle because the jurisdictional principle goes to the existence of a contradictor, not the position taken by the contradictor."[19] In making that finding Henry J made the declarations sought.[20]

In taking instructions from a client involved in litigation a solicitor's primary responsibility is to be reasonably satisfied that the client has the mental capacity to participate in the litigation and to provide proper instructions.[21]

If the solicitor is not satisfied, then they have limited authority to act – their authority is limited to making due inquiry into the capacity of their client and when that occurs they are assisting the court in their role as an officer of the court. The solicitor has a clear duty to raise it with the court.

In a cautionary statement, the court said: "If the party lacks mental capacity and the solicitor knew or should have known, the solicitor is at risk of having to pay indemnity costs even in the absence of impropriety…A solicitor who persists with representing a client who has lost mental capacity is liable to have costs awarded against them on an indemnity basis even if there is no impropriety."[22]

To that end, it is important to be aware that the applicable common law capacity test can be and is altered by statute and rules of court. For example, in most Australian states and territories the necessary capacity to make a power of attorney is dictated by statute.[23]

In respect of the capacity to conduct of a court matter, a person under a legal incapacity is defined by Schedule 3 *Uniform Civil Procedure Rules 1999* (Qld) (UCPR). A person under a legal incapacity includes 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. In Queensland

Rule 95 of the *Uniform Civil Procedure Rules 1999* (Qld) provides the court may appoint a litigation guardian if the interests of a party who is under a legal incapacity require it.

In the context of capacity assessments, *Hyytinen* sharply reminds us that not only are there a range of mental capacity levels, questions as to mental capacity must also address the task at hand.

Where medical evidence is sought to assist, any material provided to the medical practitioner ought to be framed in the context of the legal matter being addressed, detail the precise test that must be met, and seek the medical opinion specifically addresses those matters.

But most importantly, care must be taken as to the formulation of preconditions in settlement documentation, lest the parties might find themselves in the midst of an unanticipated application where the complexities of civil procedure are tested.

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Notes

[1] *Gibbons v Wright [1954] HCA 17; (1954) 91 LCR 423, 437 at [555].*
[2] *Pistorino v Connell & Ors [2012] VSC 438 (25 September 2012) For analysis of this case, see 'Clients, Capacity and Court Proceedings' by Katerina Peiros and Christine Smyth, Law Institute Journal, Victoria, August 2013; the casenote, Pistorino v Connell & Ors [2012] VSC 438 (25 September 2012) by Katerina Peiros and Christine Smyth, Retirement and Estate Planning Bulletin, October 2012.*
[3] *Shaw v Crichton [1995] NSWCA 423 (23 August 1995).*
[4] *My thanks to Chris Kahler of Kahler Lawyers for bringing this decision to my attention.*
[5] *Page 1 at line 5.*
[6] *Page 3 at line 5.*
[7] *Page 3 at line 14.*
[8] *Page 3 at line 15.*
[9] *Page 3 at line 15.*
[10] *Page 3 at line 15-20.*
[11] *Page 3 at line 20.*
[12] *Page 3 at line 20.*
[13] *Page 3 at line 7.*
[14] *Page 3 at lines 20-40.*
[15] *Page 3 at line 10.*
[16] *Page 4 at line 5-30.*
[17] *Page 4 at lines 10-40.*
[18] *Australian Competition and Consumer Commission v MSY Technology Pty Ltd (2012)201 FCR 378 referred to by McMurdo J as he then was, in Re Queensland Police Credit Union Ltd (2013) 279 FLR 420.*
[19] *Page 5 at lines 15-20.*
[20] *Page 5 at line 25.*
[21] *Goddard Elliot v Fritsch [2012] VSC 87.*

[22] *[550].*

[23] *For Queensland, see Schedule 3 of the Powers of Attorney Act 1998, and Schedule 4 Guardianship And Administration Act 2000.*