In my earlier articles *Safeguards to reduce Elder Abuse (Setting up the meeting)*[1], *More safeguards to reduce Elder Abuse (Conducting a meeting)*[2] and *Still more safeguards to reduce Elder Abuse (Asking open questions)*[3] I expanded on the recommendation of the Australian Law Reform Commission that safeguards could reduce the risk of elder abuse facilitated through the misuse of powers of attorneys[4]. After all, proper safeguards can reduce elder abuse generally, and not just with powers of attorney, and with all advisers, and not just with lawyers.

In this fourth and last article in this series, I suggest sound procedures that will assist with proof of the aged person's understanding. Whilst the suggestions are based on remarks made in court decisions directed at solicitors, the following are offered as general safeguards:

1 Take detailed notes

An adviser should take detailed notes of questions asked, answers given and general observations[5]. The following comment appears in *When a client's mental capacity is in doubt: A Practical Guide for Solicitors*[6] concerning the need for solicitors to carefully record conversations and observations in doubtful situations, but it has more general application:

> It is fundamental that solicitors take thorough, comprehensive and contemporaneous file notes of any consultation with clients where mental capacity is in issue or where the solicitor is exploring this issue through questioning and by observing the client. These notes will be invaluable if the issue of mental capacity is subsequently raised in legal proceedings where the question of the client's mental capacity is challenged. These challenges may not be made for some years after a solicitor has taken instructions, as is often the case when wills are disputed many years after they have been made. A solicitor's notes may also be of assistance to any professional clinician who is engaged to undertake a professional assessment of the client's mental capacity.

This approach is particularly important where there are circumstances which may cast doubt on the aged person's mental capacity, such as a long standing diagnosis of dementia[7], hospitalisation[8] or medical condition[9].

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[1] This can be accessed at http://brownelinkenbaghlegalservices.com.au/safeguards-to-reduce-elder-abuse-setting-up-the-meeting/

[2] This can be accessed at http://brownelinkenbaghlegalservices.com.au/more-safeguards-to-reduce-elder-abuse-conducting-a-meeting/

[3] This can be accessed at http://brownelinkenbaghlegalservices.com.au/still-more-safeguards-to-reduce-elder-abuse-asking-open-questions-2/

[4] The report, *Elder Abuse – A National Response*, is available at https://www.alrc.gov.au/publications/elder-abuse-report, accessed 15 July 2017.

[5] This is the case for solicitors because the "evidence of an experienced and impartial solicitor, who knew the deceased, would normally carry great weight": *Petrovski v Nasev; The Estate of Janakievska* [2011] NSWSC 1275, [207]. The same ois likely to be true of all advisers.

[6] This project started in 2014 and produced the revised publication in August 2016.This can be found at https://www.lawsociety.com.au/resources/areasoflaw/ElderLaw/index.htm, accessed 16 August 2016.

[7] *dÄpice –v- Gutkovitch; Estate of Abraham (No2)* [2010] NSWSC 1333, [4]; *Hobhouse v Macarthur-Onslow* [2016] NSWSC 1831.

[8] *McNamara –v- Nagel* [2017] NSWSC 91, [277].

2 Obtain appropriate expert opinion

If time, circumstance – such as where the adviser has a doubt about the aged person's mental capacity or volition - and the aged person's instructions[10] allow, an adviser should obtain a medical opinion about the aged person's mental capacity, capacity to withstand pressure or other appropriate issue. However, it will be important to chose the doctor carefully, tell the doctor the relevant legal tests, give the doctor the relevant information and understand the doctor's limited role.

Choose the doctor carefully

The 'tests' for mental capacity used by lawyers and courts are, unsurprisingly, legal tests. They are not medical tests[11]. It is said that solicitors cannot delegate or abrogate the responsibility of assessing the aged person's mental capacity[12], and it likely that the same approach will be applied to other advisers. This doesn't mean that a medical opinion is not useful in assessing a person's mental capacity to undertake a legal transaction; it often will be, especially one obtained contemporaneously[13] from a longstanding treating doctor[14].

Tell the doctor the legal tests

The medical practitioner will often need to be directed to the relevant legal 'test' for mental capacity[15]. Thinking that a medical practitioner can assess mental capacity is be like a doctor expecting a solicitor to assess frontotemporal dementia Apart from the futility involved, there may be costs consequences for an adviser who fails to properly engage the medical expert[16].

It is not surprising that a medical practitioner needs to be directed to the relevant legal 'test' for mental capacity as medical practitioners are trained to diagnose and treat medical conditions, not make an assessment of mental capacity according to legal tests[17]. This means that tests about medical capacity which are routinely performed by medical practitioners for the purpose of diagnosis, such as orientation to time and place, or the Mini-Mental test[18], are not particularly helpful in assessing mental capacity in the legal context.

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[9] *Phillips v Phillips; Phillips by his Tutor NSW Trustee & Guardian v Phillips* [2017] NSWSC 280.

[10] There is circularity in obtaining instructions to obtain an opinion on mental capacity which may disclose that the aged person did not have the mental capacity to give the instructions. However, there is no obvious and easily available approach which avoids this potential circularity. In most circumstances the adviser can rely on the presumption of sanity.

[11] *Craig-Bridges v NSW Trustee and Guardian* [2017] NSWCA 197, [133] citing *Zorbas v Sidiropoulous (No 2)* [2009] NSWCA 197, [65]; *Guthrie v Spence* (2009) 78 NSWLR 225; [2009] NSWCA 369, [196].

[12] *Romascu v Manolache* [2011] NSWSC 1362, [200].

[13] Cf *Manning v Hughes - Estate of Ludewig* [2010] NSWSC 226, [60], [67].

[14] *Robinson –v- Spratt* [2002] NSWSC 426, [41]; *Dickman v Holley; Estate of Simpson* [2013] NSWSC 18, [152]; *McNamara –v- Nagel* [2017] NSWSC 91, [303], [319].

[15] An example where a medical report was not useful where this did not occur is *Estate El Chami; Habib v El Chami* [2016] NSWSC 1208, [31] – [32]. See also *Barakett –v- Barakett* [2016] NSWSC 1257, [20] and *Re Kensall* [2016] VSC 724, [92].

[16] In *Re Oliver (dec'd)* [2016] QSC 264, [9].

[17] *Rogers v Whitaker* [1992] HCA 58; (1992) 175 CLR 479 at 483; *Breen v Williams* ("Medical Records Access case") [1996] HCA 57; (1996) 186 CLR 71, [9].

[18] In *Dementia and the cognitive requirements of Banks v Goodfellow: a review of the literature*, Lonie and Purser state that "MMSE provides an indication of a whether or not a testator's overall level of functioning is less good than it should be, on average, for his/her age. It does not allow for the reliable determination of a testator's capabilities in different areas of cognitive function (as set out within the neurocognitive disorders section of the DSM-V)". In *Legal Incapacity and expert opinion evidence*, Coyne and Miller state that: "Just because an

When directing a doctor's attention to the relevant 'tests' it is highly recommended that reference be made to the legal tests explained by the High Court and the Court of Appeal[19]. There is also merit in drawing the medical practitioner's attention to my recommended procedures[20], as these hold true for a doctor as much as any other adviser.

Give the doctor the relevant information
As with all medical reports, as well as informing the doctor of the legal standards against which the assessment is to be made, there needs to be comprehensive background material provided. This may include:

- the medical history known to the solicitor
- the personal history, including, if relevant, a family tree
- evidence of previous intentions, such as earlier wills and other documents
- circumstances of dependency
- relevant information about relationships with relatives or acquaintances[21]
- the adviser's observations about the aged person, and
- the reason the transaction is being undertaken.

Understand the doctor's role
Doctors should not explain a legal transaction, and therefore probably can't directly comment on whether the client understood the legal transaction. If the relevant issue is mental capacity, the doctor should report on the client's ability to have the requisite understanding after explanation. The solicitor, or other relevant adviser, must provide the explanation. However, the following summary gives an example of the comments which a medical practitioner has the qualifications to make which will then assist the adviser to form the necessary opinion about the client's mental capacity:

> the main thrust of [the doctor's] opinion [was] that the evidence of [the aged person's] forgetfulness, lack of insight, inability to hold a complex conversation, and a certain degree of paranoia, indicate that she suffered both from a loss of memory and frontal lobe disease that impaired her cognitive functions… [The doctor] said that the frontal lobe is a critical aspect of being able to think and understand the recollection of things. He said that it was the seat of executive function and to be able to do the job it is meant to do, it has to be able to take in information, interpret it and hold that information in the brain whilst taking in other bits of information and comparing them. He said that one of the earliest features in frontal lobe dysfunction is the inability to hold different disparate bits of information and hold them there in a useful manner to be able to compare them.[22]

The court then drew the conclusion that it could not be satisfied that the testator had testamentary capacity. Similarly in *Ryan –v- Dalton; Estate of Ryan* [2017] NSWSC 1007 the court identified the testator's executive function as important and noted that this was "a person's ability to think abstractly, to weigh pros and cons of particular arguments, and to

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individual performs poorly on, say, neuropsychological tests for Executive Functioning does not mean that they cannot make a reasoned decision about a specific issue, such as making a Will. Equally, just because they performed well on such tests it does not follow that they have the capacity to make a reasoned decision about a specific legal issue".

[19] For a will this is the test explained in *Banks v Goodfellow* (1870) LR 5 QB 549; *Timbury v Coffee* [1941] HCA 22; (1941) 66 CLR 277 and, in more modern language, *Read v Carmody* [1998] NSWCA 182. For every other legal action, it is the test contained in *Gibbons v Wright* [1954] HCA 17; (1954) 91 CLR 423, [7] – [8].

[20] These are contained in my articles *Safeguards to reduce Elder Abuse (Setting up the meeting)*, *More safeguards to reduce Elder Abuse (Conducting a meeting)* and *Still more safeguards to reduce Elder Abuse (Asking open questions)*.

[21] The British Columbia Law Institute publishes a guide which notes these types of suggestions. It can be found at http://www.bcli.org/sites/default/files/undue%20influence_guide_final_cip.pdf, accessed 7 January 2017, at 41.

[22] *Manning v Hughes - Estate of Ludewig* [2010] NSWSC 226, [66].

come to a judgement"[23]. The relevant issue may be volition, rather than mental capacity. But a medical report may also be useful in assessing a client's vulnerability to undue influence[24].

3 Keep the records

An adviser should retain the file notes and expert opinion indefinitely. This is because the necessity for proof can arise many years after the legal work is performed. An example is *Hookway v Hookway* [2017] TASFC 4 where nine years after the deceased's will, death and the grant of probate, a beneficiary successfully brought proceedings for the revocation of the grant on the basis of a lack of testamentary capacity. Another example is *Commonwealth v Cornwell* [2007] HCA 16; (2007) 234 ALR 148; 81 ALJR 933. In 1999 Cornwell commenced proceedings asserting that the Commonwealth was vicariously liable for the advice given to him by an employee in 1965. The loss didn't crystallise until Cornwell's retirement in 1994. Accordingly, the High Court determined that the claim was not statute barred. A similar issue could have arisen if Cornwell had made a will in 1965 and died in 1994.

In *Estate of Beryl Lee Hordern (Deceased); Homersham v Carr* [2017] NSWSC 753, even though most of the file was destroyed 'in the ordinary course after seven years', a part of the file was retained 'because of their importance to the question of the deceased's testamentary capacity'. There is much to be commended about this approach.

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[23] [2017] NSWSC 1007, [71].
[24] *Tobin v Ezekiel; Estate of Lily Ezekiel* [2011] NSWSC 81, [34].
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